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**SELECTED, REPORTED, AND ANNOTATED**

**By A. C. FREEMAN.**

**VOLUME 138.**

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## VOLUME 138.

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**AMERICAN STATE REPORTS.**  
**VOLUME 138.**





A. C. Freeman





# In Memoriam.

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This volume had hardly taken on its final form, the work of the printer and binder was yet unfinished, when the hitherto tireless energy of the editor suddenly waned, and he peacefully passed away from the scenes of human activity in which for two score years he had played so commanding a part. To his associate editors, who feel his loss as a trusted friend and counselor as well as a profound lawyer and expounder of jurisprudence, remains the privilege of paying this last tribute to his memory.

Abraham Clark Freeman was the first representative of legal letters that the West sent to the East, and not to the East alone, but to the world at large, for when his treatise on the "Law of Judgments" came from the press in San Francisco, it won instant and universal recognition from Bench and Bar wherever the jurisprudence of Britain and America is administered, and established for the author a reputation as a law-writer which, strengthened by his subsequent productions, will endure for generations to come. Kent, Story and Cooley, writing from the East and Middle-west, had already made an imperishable contribution to legal literature. Now, with the expansion of civilization westward, it devolved upon Freeman and Pomeroy to make a like contribution from the Pacific Coast. That they have discharged their exalted trust faithfully and with consummate ability is attested by the universal esteem in which their works are held by the profession. None are relied upon more frequently nor with more confidence. They rank among the foremost legal productions of their century, and are an unfailing source of enlightenment and inspiration to their readers.

California, although it was Mr. Freeman's home for the last fifty years of his life, was not his native state. He was born in Hancock county, Illinois, in 1843. Of educational advantages he enjoyed few beyond those afforded by the district schools. At the age of eighteen, lured by the call of the Golden West which at that time thrilled humanity, he

set out with his father overland for California. Arriving here he taught in the schools of San Joaquin county for a year or two, after which he directed his attention to the law, studying in the office of Judge Morris M. Estee at Sacramento. His contemporaries bear witness to his indefatigable industry and marvelous aptitude for grasping legal principles—qualities which soon earned their reward, for in 1864 he was admitted to the Bar, and at once entered upon the successful practice of his profession in Sacramento. Subsequently, as business interests broadened, and editorial ventures necessitated closer relations with his publishers, he removed to San Francisco, where he continued in active practice until the infirmities of advancing years admonished him to retire. But his literary labors, begun early in his career, he pursued, with unflagging zeal, almost to the last day of his life.

His book on “Judgments,” generally regarded, except by himself, as his most finished production, appeared in 1873. Then in rapid succession followed his works on “Executions,” “Cotenancy and Partition,” and “Void Judicial Sales”—all written before the end of 1877, and all justly regarded as authority upon the subjects which they treat. At this stage of his career he was called to the position of editor of the “American Decisions,” a position made vacant at the close of the eleventh volume by the untimely passing away of Mr. John Proffatt, who with singular ability had laid the foundations of that renowned series. Completing the one hundred volumes of the “American Decisions” in 1888, Mr. Freeman became editor of the “American State Reports,” a new publication launched at that time as a continuation of the “American Reports” and “American Decisions,” and he continued as editor in chief of the “American State Reports” down to the present volume.

The first characteristic of Mr. Freeman that compelled attention was his prodigious capacity for work. To many a lawyer, even though he were above mediocre ability, either the editing of these voluminous works or the carrying on of the varied and extensive practice, might well have seemed a formidable undertaking. But Mr. Freeman never appeared to recognize anything remarkable in the discharge of both these functions and the performance of the enormous amount of labor they involved. Calm, self-possessed, and unpre-

tending. he stood at his post, never confused, never overwhelmed by his work. Through all the years of intense activity, no adversary ever found him unprepared, no client found him so occupied that he could not give counsel, while volume after volume, over two hundred in all, passed through his hands to the printer with clock-like regularity.

His dominant intellectual quality was the ability to grasp legal principles and state them in terse, lucid, and unmistakable terms. However intricate and involved the principle, however obscured by the multitudinous facts or decisions through which it ran, he quickly identified it, brought it forth, and clothed it in language that carried conviction. This faculty he possessed to a degree that has never been surpassed. He was endowed with a peculiar incisiveness of thought which enabled him to recognize essentials, and essentials only; the nonessential, the accidental, he unhesitatingly swept aside. It was this rare genius, coupled with a legal instinct to detect those decisions which were of practical utility and permanent value, that made him pre-eminently successful in selecting cases for publication in the "American Decisions" and "American State Reports." It is here that he has rendered his highest service to the profession. Time alone will demonstrate how well he has builded, and how deep a debt of gratitude society owes him. Living and laboring in this field at a period when the very number of decisions was bewildering the profession and threatening to sink the law into chaos, steadfast and resolute he held his course

"Constant as the northern star,  
Of whose true-fix'd and resting quality  
There is no fellow in the firmament."

To the casual observer, Mr. Freeman may have appeared somewhat cold and self-centered. But close acquaintances found him a man of pleasing personality and genuine sympathy, intensely interested in humanity and the solution of its problems. Although his services of a strictly public character were not so extensive as they might have been had his temperament been less modest and retiring, still he was thoroughly conversant with the affairs of state and deeply concerned as to their proper administration, while his influence, invariably thrown upon the side of right as he discerned it, was constant and far-reaching. For his friends he

possessed a devotion and a loyalty that will not be forgotten. And to us whose privilege it has been to be associated with him in his editorial labors, he revealed a genial friendliness and a wealth of wisdom that will never be effaced from memory. In his departure we have sustained an irreparable loss, but we find consolation in the reflection that the works he wrought live on, an ever-present and uplifting influence in the affairs of mankind.

PETER V. ROSS.  
WILLIAM S. CHURCH.  
HENRY G. TARDY.

San Francisco, July, 1911.

## **In Memoriam.**

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**Abraham Clark Freeman.**

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**Adopted by the Bar Association of San Francisco, Friday, May 19, 1911.**

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To the President, Officers and Members of the San Francisco Bar Association.

**GENTLEMEN:—**Your Committee heretofore appointed and charged with the duty of preparing a suitable memorial upon the death of Hon. Abraham Clark Freeman, a member and former President of this Association, beg leave to submit the following:

The members of this Committee enjoyed the privilege of an intimate acquaintance with Mr. Freeman during the greater part of his professional life, not only that portion passed in the city of Sacramento, but during the later years of his practice at the San Francisco Bar as well, and came to know him both as a man and a lawyer.

While as a man Mr. Freeman was in outward semblance of a somewhat cold and impassive demeanor, yet underneath the surface was to be found a warm and sympathetic heart, and a large capacity for loyal friendship.

As a lawyer Mr. Freeman early took rank as one of the ablest members of the profession, not only within his native city, but eventually throughout the state and beyond its confines, and during the years of his active work at the Bar he enjoyed a large and lucrative practice. He was a man of the highest integrity and unswervingly devoted to his clients' interests. His methods were of the most exact, and his cases were prepared with the utmost care and nicety; and, when called, he was always "ready." No one ever knew him to ask a continuance for other than some unforeseen contingency, not arising through his own fault. He was himself always prepared, and came to be dubbed affectionately among his fellows at the Bar who knew his habits of

practice as "Ready Old Freeman." While he was courteous in extending reasonable indulgence to his adversaries if the application had merit, he had no use for the man who asked for time simply to postpone the evil day. It was against his principles to waste time. He was an inveterate worker himself, and he believed that others should work likewise.

While Mr. Freeman was in no respect an orator, he was a clear and forceful reasoner, with great power of analysis; and with his strong and ready grasp of legal principles he was ever a formidable antagonist. As an advocate participating successfully in many important cases, to be found in our reports; as a distinguished member of the Convention which framed the present Constitution of the state; and later as a member of the Commission for the Revision and Codification of the laws of the state, Mr. Freeman has left the impress of his great ability stamped deeply upon our jurisprudence and our system of laws.

But it is not in these more localized fields of his professional work that Mr. Freeman has left the most imperishable "footprints in the sands of time." It was as a law-writer that he builded the greatest monument to his industry and ability—a monument which makes any poor tribute we may pay him here pale into insignificance. This was the work he loved, and in this he shone. To mention no other of his legal productions, perhaps no text-book is more highly regarded as authority, or more generally quoted upon any subject embraced within its pages, by Bench and Bar alike, than "Freeman on the Law of Judgments." This work is an invaluable handbook upon the entire subject upon which it treats, and has made Mr. Freeman's name familiar in every state and country where the modern system of English jurisprudence prevails.

While the Committee appreciate that these meager suggestions are but inadequate to justly portray the character and attainments of our dead brother, we trust that they may suffice to indicate that the name Mr. Freeman has left for himself in his profession is one which cannot readily be added to by mere words.

As it is deemed meet and appropriate to his memory that some evidence of our honor and esteem be placed of record

with the Association, we respectfully recommend the adoption of the following resolutions:

*Resolved*, That in the death of Abraham Clark Freeman this Association has lost an honored member, the legal profession one of its most learned, profound, and earnest thinkers, and the community a good and loyal citizen;

*Resolved*, That this memorial be spread upon the minutes of the Association; that suitable presentation thereof be made to the courts; and that an engrossed copy be sent to the family of the deceased, as an evidence of our sympathy and condolence.

Respectfully submitted,

WM. C. VAN FLEET,  
Chairman.

GEORGE E. BATES,  
D. E. ALEXANDER,  
Committee.





## **In Memoriam.**

---

ABRAHAM CLARK FREEMAN was born in Illinois in 1843. He came from vigorous, but undistinguished, pioneer stock. In 1861 he moved, with his parents, to California. He was then a tall, angular, awkward boy of retiring disposition. His opportunities for education had been meager and confined to elementary studies, yet almost solely by his own efforts he prepared himself to teach in the country schools, which was his first occupation in this state. While teaching he continued his self-education, and after accumulating a small sum of money came to Sacramento City to study law.

He began his legal studies in the office of Hon. Morris M. Estee, then district attorney of Sacramento county.

With that remarkable aptitude and industry which distinguished him in after years, young Freeman made rapid progress and was licensed to practice law in 1864. He at once entered upon the practice of the profession, and from the beginning exhibited the mental qualities and characteristics which later gave him such wide renown. The first years of his practice were, however, accompanied with that struggle which is so frequently the lot of young men without wealth or influence, but these trials he bore with cheerful confidence and fortitude. In the interim, after his admission to the Bar and before he had obtained an established practice, he wrote his first book, the great work known as "Freeman on Judgments," which was published in 1873. It at once took high rank, and already has reached its fourth edition, and in all English-speaking countries is the recognized and standard authority on the important subject of which it treats. The publication of this book immediately gave its young author a world-wide renown. The older members of the Bar, who can recall the adverse and discouraging conditions under which this book was written, can testify that its production was the work of no ordinary man. The "Law of Judgments" was followed shortly by his work on "Cotenancy and Partition," which was issued in 1874, and soon after

by his learned and exhaustive treatise on the law of "Executions," which came from the press in 1876. The great work of his life began, however, in 1879, when he became editor of the "American Decisions," after the first twelve volumes had been issued. Mr. Freeman was editor of eighty-eight volumes of "American Decisions" and one hundred and thirty-eight volumes of "American State Reports." and was actively engaged in this important editorial work for thirty-two years. The "notes" written by him, and contained in these publications, would, if gathered together, constitute a voluminous and exhaustive, and at the same time an accurate and concise, encyclopedia of the law as recognized and administered wherever judicial proceedings are conducted in the English language. While engaged in this editorial labor he, from time to time, revised for new editions his great publications on "Judgments," "Executions" and "Coteny and Partition," and also found time to write the exhaustive monograph on "Partition" which appears in Volume 30 of the "Cyclopedia of Law and Procedure." He was likewise a frequent contributor to various law journals of well-written, incisive and authoritative articles on important legal subjects. He was not, however, like many authors—a mere theorist. During all this time he was actively engaged in the practice of the law, and had an extended and responsible business, which he conducted in a successful manner and to the satisfaction of his numerous clients.

He had little taste for public life and never sought political honors, but in 1878 he was a member of the Convention which framed the present Constitution of California, and subsequently, under appointment of the Governor, prepared the bills necessary to be enacted to bring the laws into harmony with the Constitution. He served for about ten years as a trustee of the State Library, and for four years was one of the Code Commissioners of the state. He never shirked nor neglected any work intrusted to him. His entire life was one of ceaseless industry. The amount of work done by him was prodigious, and the ease and accuracy with which he accomplished it were some of his distinguishing traits. But his life of steady toil in no way narrowed or hardened him. He at all times remained generous, cheerful and hopeful, and took at all times an active interest in the affairs of his time. His views were progressive; he accepted the developments of

progress with confident faith that they could be and should be made to work out only human betterment. He was free from egotism, and possessed of a natural diffidence which, sometimes misunderstood, made him appear to strangers to be distant, cold and proud. Yet he possessed social talents of a high order, and to the fortunate few to whom he revealed himself he disclosed a variety of interest, a depth of wisdom, a richness of humor, and a sympathetic disposition both marvelous and charming. With his friends he was a most agreeable, entertaining and lovable companion. He was unspoiled by success, and had that gentleness and simplicity which mark true greatness. His estimates of men and affairs were invariably liberal, just and fair. He was not contentious, and his breadth of view and charity of judgment kept him from heated partisanship and factional strife.

In matters political he held positive views. He believed strongly in political freedom, and scorned party government through intrigue, or the improper or undue domination of individuals or factions. Adherence to such views led him early to prefer personal freedom to official distinction, and to abandon all aspirations for political distinction. Ever mindful of his duties to society, he preferred to discharge those obligations in the less conspicuous but no less useful and honorable field in which he labored.

Abraham Clark Freeman was a man of great but quiet courage. The well-matured convictions which he possessed, he was ready on all proper occasions strongly, but modestly, to assert and defend.

All his writings disclose that he was master of clear, elegant, and forceful expression. Few writers have equaled him in terseness and accuracy. His pleadings, of which there are volumes on file with the clerk of this court, are models of legal form and of lucid statement. His power of analysis was extraordinary. With remarkable ease and readiness he would grasp and solve the most confused and apparently intricate questions, quickly stripping the controversy of non-essentials, and disclosing the simple principles involved.

As a writer of law-books and an author of legal literature Mr. Freeman stood in the front rank. High authorities have spoken of him as the most able law-writer of his time, and the volume and quality of his work would seem to justify such

estimate. For condensation, variety, lucidity and accuracy he probably had no equal.

The value of the life work of this man cannot be estimated. He was a strong factor in the reformation of the literature of the law and a powerful influence for uniformity of law and procedure throughout the nation. His legal writings have been so voluminous, varied and accurate as to cover the entire field of Anglo-Saxon jurisprudence. His work has left a permanent impression upon social order, and helped to elucidate and simplify the principles by which men are held together in civilized society.

His friends—those who best knew his power—would have liked to have seen him become a great judge, or placed in some conspicuous official position where his abilities would have been more noted and applauded. But it was probably better that his great work should be done as it was, quietly and inconspicuously, and in steadily helping to build strong and sure the foundations of society. He worked faithfully almost to the end, and died quietly in his home in San Francisco on April 11, 1911. His death was strangely unheralded, but this is understood when we remember that he lived for higher things than temporary applause.

He rests to-day in the peace of a true victory.

The Bar of Sacramento, of which for so many years he was a brilliant ornament, and to many of whose members he was a loving and helpful friend, offers this tribute to the life and labors of Abraham Clark Freeman. We offer his work as a lawyer as a model and inspiration to the profession. We offer his life as an example of great talents nobly used.

In announcing his death, we grieve for the loss of a friend, and feel deep regret for the loss to our profession. But our sorrow is mingled with a feeling of triumph and tempered by the pride we take in his progressive, successful and noble life, and by the gratitude we feel that he should have been so long spared to do the useful work in which his life and energies were employed. He has builded for himself a lasting monument.

The splendid usefulness and simple dignity of this great man's life forbid further words of eulogy.

A. C. HINKSON,  
Chairman.

S. SOLON HOLL,  
CLINTON L. WHITE,  
PETER J. SHIELDS,  
C. T. JONES,  
Committee.

Adopted by the Bar Association of Sacramento county,  
May 17, 1911.

S. LUKE HOWE,  
Secretary.

Presented to the superior court of the county of Sacramento, state of California, and spread at length upon the minutes of said court, May 17, 1911.

[Seal]

E. F. PFUND,  
Clerk.

By H. P. SARGENT,  
Deputy.

Presented to and filed as a record of the supreme court of the state of California June 5, 1911.

B. GRANT TAYLOR,  
Clerk.



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**ALABAMA.**

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**HUTCHERSON v. STATE.**

[165 Ala. 16, 50 South. 1027.]

**CRIMINAL TRIAL—Argument of Counsel.**—Where the defendant in a homicide case has testified that she was sick at the time of the killing, and that a certain physician attended her, it is reversible error for the state in argument to ask, "Why didn't the judge bring Doctor Mason and show you by him that he was doctoring her?" when the physician resided in the state and was not less accessible to the prosecution than to the defense. (p. 18.)

**HOMICIDE—Self-defense—Evidence of Prior Beating.**—Where a woman interposes the plea of self-defense in a prosecution for killing her husband, evidence that he had on former occasions beaten her is properly excluded. (p. 18.)

**HOMICIDE—Self-defense—Duty of Wife to Retreat.**—Where a wife interposes the plea of self-defense in a prosecution for killing her husband, she is entitled to an instruction that when living with him in his house, his home is her home, and the law imposes no duty upon her to retreat to avoid a difficulty, even with him, if she is free from fault in bringing on the difficulty. (p. 18.)

Cora Hutcherson was convicted of murder in the second degree, and appealed. The oral charge of the court referred to in the opinion is as follows: "The defendant sets up self-defense in this case, and before she can avail herself of it she must reasonably satisfy you that her life was in danger, either real or apparent, and that she had no safe mode of escape."

Charge 1, referred to in the opinion, follows: "I charge that, when the wife is living with the husband in his house, his home is her home, and the law imposed no duty upon her to retreat to avoid a difficulty, even with her husband, if she was free from fault in bringing on the difficulty."

Hybart & Burns, for the appellant.

Alexander M. Garber, attorney general, for the state.

<sup>17</sup> McCLELLAN, J. The defendant was adjudged guilty of murder (second degree) of her husband, the tragedy taking place within their common abode. The justification set up was self-defense. There was evidence tending to support this defense.

In argument to the jury, the representative of the state said: "Gentlemen of the jury, why didn't the defendant bring Dr. Mason here, and show you by him that he was doctoring her?" Seasonable objection and motion to exclude this statement were overruled. It appears that the defendant testified to Dr. Mason's professional attendance upon her, and that she was sick at the time of the killing. From the bill it appears that Dr. Mason's place of residence was Excel, Alabama. It does not appear that this physician was not as accessible to the prosecution as to the defense. Under such circumstances as this record shows, the solicitor's quoted statement was improper, and should have been disallowed: *Crawford v. State*, 112 Ala. 1, 23, 21 South. 214; *Bates v. Morris*, 101 Ala. 282, 13 South. 138; *Brock v. State*, 123 Ala. 24, 26 South. 329. •

<sup>18</sup> The fact, if so, that deceased had, on former occasions, beat her, was properly excluded.

The part of the oral charge excepted to was erroneous.

Charge 1, given for the defendant, announced the law applicable to the nonduty of the defendant to retreat under the circumstances hypothesized.

For the error first indicated, the judgment is reversed and the cause remanded.

Dowdell, C. J., and Simpson and Mayfield, JJ., concur.

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*The Law of Self-defense* is discussed in the notes to *State v. Sumner*, 74 Am. St. Rep. 717; *State v. Gordon*, 109 Am. St. Rep. 804. A person attacked in his own house or domicile is not bound to retreat in order to avoid killing his adversary: *Palmer v. State*, 9 Wyo. 40, 87 Am. St. Rep. 910; *Elder v. State*, 69 Ark. 648, 86 Am. St. Rep. 220. And one within the curtilage of his dwelling is in fact and in law within his dwelling, and is not bound to retreat before the violent assault of a trespasser: *State v. Brooks*, 79 S. C. 144, 128 Am. St. Rep. 836.



## SINGER v. SINGER.

[165 Ala. 144, 51 South. 755.]

**EQUITY—Multifariousness.—Even When There is but One Defendant,** a bill is multifarious which seeks relief as to two distinct subjects having no connection with or dependence upon each other. (p. 19.)

**EQUITY.—Multifariousness is Described as the Joinder of distinct and independent matters, thereby confounding them; or the uniting, in one bill, of several matters perfectly distinct and connected against one defendant.** (p. 19.)

**DIVORCE—Enforcement of Property Rights—Multifariousness.** A bill by a wife praying a divorce, and that the defendant be required to convey to her land which stands in his name but which has been paid for with her funds, is not demurrable because multifarious. (pp. 19, 22.)

Strother, Hines & Fuller, for the appellant.

E. M. Oliver and Charles S. Moon, for the appellee.

<sup>145</sup> **SIMPSON, J.** The bill in this case was filed by the appellee against the appellant, praying a divorce a vinculo, and also that the defendant be required to convey to her certain lands which had been paid for with funds belonging to the complainant, or that the court will divest the legal title to said lands out of the respondent and vest the same in complainant. This appeal is from a decree overruling a demurrer to the bill.

The question of multifariousness in bills in equity has been perplexing to courts and text-writers; so much so that it has sometimes been said that no general rules can be made applicable to every case, but the circumstances of each case must largely govern the discretion of the court. We have recently considered the subject at some length, and referred to the general rules suggested by eminent text-writers: *Bently v. Barnes*, 155 Ala. 659, 47 South. 159. The question comes up more frequently where there are several parties, variously interested in the matters of litigation, although it is a rule that, even where there is but one defendant, a bill is multifarious which seeks relief as to two distinct subjects having no connection with or dependence on each other. In our own case of *Heinz v. White*, 105 Ala. 670, 17 South. 185, the bill was held to be multifarious, because the facts averred were inconsistent, and the rights of the complainant under the two phases of the bill were inconsistent with each other, and the relief prayed was wholly different. In the case of *Truss* <sup>146</sup> *v. Miller*, 116 Ala. 494, 22 South. 86, we said that, while multifariousness is not capable of accurate definition, "it is described generally as the joinder of distinct and independent matters, thereby confounding them; or the uniting, in one bill, of several matters perfectly distinct and unconnected

against one defendant." In that case this court held that a bill which sought contribution from one joint maker of a note secured by a mortgage, and also that a portion of the land be declared subject to a vendor's lien, etc., was not multifarious.

The only cases referred to in the brief of the appellant is that of *Prickett v. Prickett*, 147 Ala. 494, 42 South. 408, and it is probably nearer to this case, in facts, than any case we have. The bill in that case "sought to enforce a resulting trust in lands, and, at the same time, on independent averments, sought to have alimony decreed to complainant out of the estate of the respondent." This court said: "These were distinct and separate subjects, and in no way connected the one with the other. The relief prayed for is likewise separate and distinct. The bill, therefore, was demurrable for multifariousness." That was not a bill for divorce, but sought to have a resulting trust declared in the land, and also to compel the husband to provide for the maintenance and support of his wife.

In the case of *People v. Morrill*, 26 Cal. 336, the bill prayed that a patent (from the state) be canceled, that one of the defendants be enjoined from prosecuting certain suits for taking asphaltum from the land, and from removing asphaltum. The court said that the objection of multifariousness "is in many cases a matter of discretion, and no general rule can be laid down on the subject. . . . The parties are all interested in the principal question raised by the complaint; the issues tendered <sup>147</sup> are simple, and foreshadow no embarrassment to a convenient and orderly trial; and by the joinder objected to a multiplicity of suits has been avoided." The bill was consequently held not multifarious.

In a case in the New Jersey chancery court, where it was sought to prosecute in the same action a claim against the executor and against the estate, the court said: "No general rule defining what causes of action may properly be joined and what cannot can be laid down. The question is always one of convenience in conducting a suit, and not of principle. and is addressed to the sound discretion of the court (citing cases). If it appears that the causes of action or claims are so dissimilar or distinct in their nature that they cannot be heard and determined together, but must be heard piecemeal—first one and then the other—a clear case of misjoinder is presented; but where a complainant has two good causes of action, each furnishing the foundation of a separate suit, one the natural outgrowth of the other or growing out of the same subject matter, . . . and the suit has a single object, they may be properly joined, and the objection of multifariousness or misjoinder will not be sustained"; citing authorities: *Ferry v. Laible*, 27 N. J. Eq. 145.

In another case, in the same court, in which the widow set up an equitable estate in the lands of her husband's estate, and prayer also, in the alternative, that dower be assigned for her in the same, the court said: "But the court not only may, but must of necessity, inquire of what estate the husband died seised, and this involves an inquiry into the nature and character of the husband's right to the estate. . . . An objection to a bill on the ground of multifariousness frequently resolves itself into a question of expediency. On the one <sup>148</sup> hand, the bill should be sufficiently extensive to answer the purposes of complete justice; on the other hand, distinct and independent matters are not to be united in the same bill. These matters in this bill are not so distinct and independent as technically to constitute the vice of multifariousness": *Rockwell v. Morgan*, 13 N. J. Eq. 384.

It is stated that "the rule in equity has always been that property shall be restored to the wife, upon a dissolution of the marriage, because of the husband's misconduct, which belonged to her at the time of the marriage, and which the husband had secured by unfair means to be vested in him (14 Cyc. 790); also, that "Ordinarily an application for a restoration or division of property may be made separately or be included in the petition for divorce": 14 Cyc. 792, 793.

Some of the cases referred to in the text cited seems to rest upon a statute (*Meehan v. Meehan*, 2 Barb. 377; *Holmes v. Holmes*, 4 Barb. 295); but in the case last cited the point was made that the statute provided only for the case of a divorce a vinculo, and was not applicable to a cause of divorce a mensa, and the court says: "I understand that courts of equity, in cases of divorce or separation, independent of the statute referred to, have the power of restoring to the wife the whole or a portion of her property, and of restraining the husband from receiving gifts or legacies to her after such divorce of separation."

The supreme court of Mississippi held that on a divorce a vinculo "the property which he obtained by marriage will be decreed to the wife" (*Tewksbury v. Tewksbury*, 4 How. (Miss.) 109); but the case upon which this case is based seems to be incomplete in the book, and does not decide the point.

<sup>149</sup> The supreme court of Texas holds that in granting a divorce the court may make a division of the community property; but that seems to be based on a statute, and probably results from the law in regard to community property in that state: *Trimble v. Trimble*, 15 Tex. 18.

The supreme court of Wisconsin seems to take it as a matter of course that, in granting a decree for divorce, the court will render a judgment for the return to the wife of her separate money and property: *Pauly v. Pauly*, 69 Wis. 420, 34 N. W. 512.

The supreme court of Tennessee decreed a divorce and that the wife's property (which the husband had promised to settle on her, but had not) be restored to her: *Sharp v. Sharp*, 2 Sneed, 496.

One of the grounds of equitable jurisdiction is to avoid a multiplicity of suits, and where the only two parties interested are before the court, and there is no repugnancy, and no mixing of incongruous subjects, there seems to be no reason why it should be necessary to have two suits. In fact, in the present case, there is no question about the right to provide alimony, and, in order to act intelligently on that question, it is necessary that the court ascertain what property the husband has and what property the wife has, and if the point is raised that certain property, standing in his name, really belongs to her, it seems that this is the most convenient and appropriate time and way to settle that matter, in order that complete justice may be accomplished.

The decree of the chancellor is affirmed.

Dowdell, C. J., and McClellan and Mayfield, JJ., concur.

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*Equity has Jurisdiction to Grant Divorces and Enforce Trusts*, and if the parties join in the trial of both questions in one suit they are bound by the decree when neither appeals therefrom. *Carnahan v. Carnahan*, 143 Mich. 390, 114 Am. St. Rep. 660. In *Van Vleet v. De Witt*, 200 Ill. 153, 65 N. E. 677, it is said that in divorce proceedings the rights of the wife in the real estate of her husband may be determined, and that if the rights of third parties are involved in such determination, they may be brought before the court and their interests settled. In *Prouty v. Prouty*, 4 Wash. 174, 29 Pac. 1049, it is affirmed that in an action for divorce and alimony there is no misjoinder in making defendants persons to whom the plaintiff alleges that her husband has fraudulently conveyed his property, and asking that the conveyance be set aside and she awarded alimony out of the property. But according to *Reed v. Reed*, 70 Neb. 779, 98 N. W. 73, property rights not growing out of the marriage relation cannot be joined in an action for divorce, nor equitable relief be prayed for in divorce proceedings. For decisions on the power of the court in divorce proceedings to make a division of property between the parties, see *Brenger v. Brenger*, 142 Wis. 26, 135 Am. St. Rep. 1050; *Grow v. Grow*, 134 Ky. 816, 135 Am. St. Rep. 440; *Fall v. Fall*, 75 Neb. 120, 121 Am. St. Rep. 767; *Huffman v. Huffman*, 47 Or. 610, 114 Am. St. Rep. 943; *Carnahan v. Carnahan*, 143 Mich. 390, 114 Am. St. Rep. 660; *Cole v. Cole*, 142 Ill. 19, 34 Am. St. Rep. 56.

**HAMBY v. HAMBY.**

[165 Ala. 171, 51 South. 732.]

**COTENANCY.**—A Widow is not a Cotenant With the Heirs of her husband. (p. 24.)

**PARTITION.**—Heirs cannot Maintain a bill for partition against the widow of their ancestor. (p. 24.)

**PARTITION—Purpose of Compulsory Division.**—Statutes for compulsory partition among tenants in common are for the purpose of avoiding the mischief which may grow out of vicious assertions by cotenants of their right to possession of every part of the land to the embarrassment of others having the same right. (p. 24.)

**PARTITION.**—Heirs cannot have Partition pending the paramount right of the widow to acquire dower or homestead. (p. 24.)

**DOWER—Proceedings for Assignment.**—It is not the Duty of a widow to proceed for the assignment of dower. She may await the action of the heirs or personal representatives. (p. 24.)

**DOWER.**—Creditors of the Deceased Owner of Land, entitled to the present payment of their debts, may have the land sold subject to the widow's dower right, and she may consent that her dower be sold with the residue of the land, so as to vest a complete title in the purchaser. (p. 24.)

**EQUITY—Jurisdiction of Estate of Decedent.**—If, on a bill filed for that purpose, a chancery court assumes jurisdiction of the administration of an estate of a decedent, all incidental questions may and must be there settled, and nothing can thereafter be done in the probate court. (p. 24.)

**PARTITION—Administration of Estate of Deceased.**—A bill for partition among heirs does not necessarily involve the administration of the estate of the deceased owner, nor necessarily draw to the chancery court jurisdiction of such administration. (p. 25.)

**PARTITION—Jurisdiction of Chancery and Probate Courts.**—If a bill by heirs for partition does not seek to have the estate of the deceased owner administered in the chancery court, but proceeds on the theory that no administration is necessary, a plea alleging that after the filing of the bill the probate court assumed jurisdiction, appointed an administrator, and allotted a homestead to the widow, and alleging that the remainder of the estate is subject to dower and that there are debts for the payment of which there is no personal property, will be sustained and the administration allowed to proceed in the probate court, unless the bill is amended by setting up the proceedings in the probate court, and praying a removal of the administration into the chancery court where all questions may be settled. (p. 25.)

S. L. & E. E. Cox, for the appellant.

Curry & Robinson and I. R. Hinton, for the appellee.

<sup>172</sup> SAYRE, J. This is a bill for the partition of lands—two hundred acres—with a prayer in the alternative for a sale <sup>173</sup> for division in the event a partition cannot be had, and was filed November 21, 1907. The land had been owned and occupied by A. P. Hamby, now deceased, and the parties are his heirs at law and his widow, the last named being made a party defendant to the bill, with the allegation that

the interests of both complainants and defendant are subject to her right of dower. The bill has nothing to say in respect to the possession of the lands subsequent to the death of Hamby, nor anything in respect to the widow's claim or possession of homestead. It is alleged that decedent died March 20, 1907, owing no debts, and that there had been no administration of his estate. On November 2, 1908, a pleading was filed by all the defendants, which the parties and the chancellor seem to have concurred in treating as a single plea. In three paragraphs this plea set up in bar of the bill (1) that certain one hundred and sixty acres of the land had been set apart by the probate court as a homestead exemption to the widow; (2) that the remainder of the tract was subject to the quarantine and dower rights of the widow; and (3) that the estate of Hamby, deceased, owed debts, for the payment of which there was no personal estate, and that an administrator had been appointed. We take this plea to mean that the probate court had undertaken to assume jurisdiction, and had appointed an administrator, and had allotted homestead exemption, subsequent to the filing of the bill in chancery for partition. The chancellor held the plea to be sufficient, and from this decree the complainants have appealed.

It is proper to notice some aspects of the bill. The widow is not a cotenant with the heirs, and they cannot maintain a bill for partition against her. Statutes for compulsory partition among tenants in common are for the purpose of avoiding the mischiefs which may grow out of vicious assertions by cotenants of their <sup>174</sup> undoubted right to be in possession of every part of the lands held in cotenancy to the harassment of others having the same right: Freeman on Cotenancy and Partition, sec. 440. To have partition the cotenants must be entitled to possession. Cotenants in remainder or reversion cannot maintain partitions. Nor can the heirs have partition pending the paramount right of the widow to quarantine, dower or homestead. Nor is it either the duty or the interest of the widow to proceed for the assignment of dower. She may await the action of heirs or personal representatives: Callahan v. Nelson, 128 Ala. 671, 29 South. 555. But creditors of the deceased owner, entitled to the present payment of their debts, may have lands sold subject to the widow's dower right, and the widow may consent that her dower interest be sold with the residue of the land, so as to vest a complete title in the purchaser: Code, sec. 2647.

The assignment of dower and the allotment of homestead are both steps appropriately incident to the administration of the estates of decedents in the probate court. If, on a bill filed for that purpose, the chancery court assumes jurisdiction of the administration of an estate, all incidental questions may and must be there settled, and nothing can thereafter



be done in the probate court. But a bill for partition among heirs does not necessarily involve the administration of the estate of the deceased owner, nor does it necessarily draw to the chancery court jurisdiction of such administration. And the bill in the case at hand not only does not seek to have the estate of the deceased owner administered in the chancery court, but distinctly proceeds upon the theory that no administration is necessary. The probate court acquired jurisdiction of the estate, by appropriate proceedings to that end as we must presume, and, until that jurisdiction was ousted by a decree of the <sup>175</sup> chancery court assuming jurisdiction, the probate court might proceed in due course to the appointment of an administrator and the settlement of the estate, and the determination of incidental questions, including the assignment of dower and homestead.

The decree of the probate court allotting homestead had no effect to oust the jurisdiction of the chancery court. As against the widow's quarantine, dower or homestead exemptions, and as against the rights of creditors, acting through the administrator, to have the lands sold for the payment of debts, the jurisdiction of the chancery court to award partition among the heirs was defectively invoked in the beginning. The plea setting up facts which destroyed the right of the complainants to have partition presently decreed in the chancery court was properly adjudged to be sufficient.

We may remark that the difficulties which will probably arise out of the present status of this cause may be obviated, and the principle declared in *Baker v. Mitchell*, 109 Ala. 490, 20 South. 40, and *Tygh v. Dolan*, 95 Ala. 269, 10 South. 837, observed, by amendment setting up the proceedings in the probate court, and praying a removal of the administration so begun into the chancery court, where all such questions may be settled. Such an amendment will also obviate the plea. Or, in the absence of such an amendment, the plea must be sustained and the administration allowed to proceed in the probate court. If the administration should proceed to a conclusion in that court without a sale of the lands for division, partition may then be had of such of the lands as remain after the allotment of homestead and assignment of dower, by an independent proceeding in either court.

Affirmed.

Dowdell, C. J., and Anderson and Mayfield, JJ., concur.

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*Partition of the Estates of Decedents* is the subject of a note to *Smith v. Smith*, 119 Am. St. Rep. 586. See, also, the subsequent cases of *Field v. Leiter*, 16 Wyo. 1, 125 Am. St. Rep. 996; *Stewart v. Jones*, 219 Mo. 614, 131 Am. St. Rep. 595; *Stout v. Stout*, 82 Ohio St. 353, 137 Am. St. Rep. 785.

*Partition Involving Estates in Remainder or Reversion* is the subject of a note to *Fitts v. Craddock*, 113 Am. St. Rep. 55. See, also,

Stewart v. Jones, 219 Mo. 614, 131 Am. St. Rep. 595, and cases cited in the cross-reference note thereto.

*Where a Wife Occupies as a Home the Homestead* set apart by order of the probate court for the use of herself and the family of her deceased husband, the same is not liable to partition at the suit of the assignee of some of the adult heirs: Funk v. Baker, 21 Okl. 402, 129 Am. St. Rep. 788.

*The Effect of Compulsory Partition* is the subject of a note to Carter v. White, 101 Am. St. Rep. 864.

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## STEPHENSON v. ALLISON.

[165 Ala. 238, 51 South. 622.]

**FIRE INSURANCE—Completion of Contract.**—A contract of fire insurance is complete when it appears that the terms of the contract have been settled by the concurrent assent of the parties, and nothing remains to be done but to deliver the policy. (p. 27.)

**FIRE INSURANCE.—The Actual Delivery of a Policy of fire insurance** is not essential to complete the contract; the insurer may be considered as holding it for the benefit of the assured. (p. 27.)

**FIRE INSURANCE—Delivery of Policy to Agent.**—The delivery of a fire insurance policy to the agent of the company is generally delivery to the insured, and is sufficient to put the insurance into effect, though the agent retains the policy in his own keeping. (p. 27.)

**PLEADING.—Amendatory Counts That Differ from the Original Only** in the date on which they state an account to have fallen due, the date in each, original and amendatory, being stated under a videlicet, are not necessary. (p. 27.)

**ACCORD AND SATISFACTION—Assumption of Debt.**—Where an insurance agent settles a debt by issuing a fire insurance policy to his creditor and paying the premium thereon, but subsequently the policy is canceled and he credited with the unearned premium, to that extent he fails to pay his indebtedness, and a judgment may go against him for that amount with interest from the date of the return of the premium. (p. 28.)

E. W. Godbey, for the appellant.

Callahan & Harris, for the appellee.

**239 SAYRE, J.** Plaintiff in error and in the court below sued as trustee in bankruptcy of the firm of Johnson & McDonald. In the circuit court, on appeal from the judgment of a justice of the peace, there was a judgment for the defendant. Defendant admitted the indebtedness sued upon, but sought to avoid liability by showing an accord and satisfaction, in that, pursuant to an agreement to that effect, he had issued to plaintiff a policy of fire insurance in a company for which he was agent, had assumed responsibility for the premium in settlement of the account, and in his settlement with



his company at the end of the month then current had been charged with the premium. The agreement was made in August, 1906, when the account was presented for payment, and was written across the face of the account as follows: "Balance of account \$10.00, which is to be taken up in insurance on policy now with Watson, Bowles & Curry, which will be taken out June 7, 1907. Johnson & McDonald." The agreement must be held to have contemplated a policy on such terms as were usually employed in such cases. June 4, 1907, agreeably to the contract for the discharge of the account in all substantial respects, so far as we can see, defendant wrote a policy in the Germania Insurance Company, insuring plaintiff's assignors against loss by fire. The evidence rather points to the conclusion that the policy was retained in the possession of the defendant; but he held it for the insured. A contract of fire insurance is complete when it appears that the terms of the contract <sup>240</sup> have been settled by the concurrent assent of the parties, and nothing remains to be done but to deliver the policy. The actual delivery is not essential to its completion. The insurer is considered as holding it for the benefit of the assured: *Flanders on Fire Insurance*, 104. The general rule is that delivery to the agent is delivery to the insured, and is sufficient to put the insurance into effect, though the agent retains the policy in his own keeping: *Cooley's Briefs*, 442-449; *Phoenix Assur. Co. v. McArthur*, 116 Ala. 659, 68 Am. St. Rep. 154, 22 South. 903. We do not doubt that there was a constructive delivery of the policy according to the intent of the parties, and that, if a loss had occurred prior to the cancellation, insured could have maintained his suit to recover.

But on July 4, 1907, plaintiff's assignors having become insolvent and having been put into bankruptcy, defendant, as agent for the company and in pursuance of the right reserved by the company, canceled the policy of insurance, whereupon the insured became entitled to the return of a certain proportion of the premium as unearned. Defendant drew for this unearned premium, and got credit for it with his company. This was admitted by the defendant. After the argument, and while the court was delivering its opinion, the plaintiff moved for leave to file amendatory counts. We infer from the argument submitted by the appellant that the purpose of the proposed amendments was to secure a recovery of the unearned premium. We have not been favored by appellee with any statement of the objections taken to the amendments. These amendatory counts differed from the original only in the date on which they state the account to have fallen due; the date in each, original and amendatory, being stated under a *videlicet*. We discover no necessity for

the amendments <sup>241</sup> in any event; but, whether they should have been allowed or not, it appears to us that plaintiff should have been awarded judgment for the balance of the indebtedness not consumed in the purchase of insurance. Plaintiff's assignors bargained, not for a policy of insurance, but for the thing evidenced by it, viz., protection against fire during a period of time. Defendant admits that, after the cancellation of the policy, credit for the amount of the premium unearned was restored to him by his company. To that extent he has failed to pay his indebtedness, and judgment should have gone against him for that amount, with interest from the date of the return of the premium. Judgment will be so rendered here: Acts 1894-95, p. 586.

Since writing the foregoing, a brief for appellee has reached our hands, which urges, to state them inversely to the order adopted by counsel: (1) There was no delivery of the policy; (2) The judgment of the trial court is not properly presented for review.

As to the first point: We are satisfied with what has already been said.

As to the second: On the authority of *Williams v. Woodward Iron Co.*, 106 Ala. 254, 17 South. 517, *Alabama Fruit Growing Assn. v. Garner*, 119 Ala. 70, 24 South. 850, and *Bridgeport Lumber Co. v. Ladd*, 107 Ala. 244, 18 South. 165, in which statutes similar to the act of 1894-95 governing appeals from the circuit court of Morgan county were considered, it is argued that the bill of exceptions in the case at hand does not sufficiently disclose the conclusions and judgment of the trial court, so that this court cannot review those assignments which predicate error of the judgment rendered. The act provides that either party may, by bill of exceptions, present for review "the conclusions and judgment of the court upon the evidence . . . and in case <sup>242</sup> there be error, shall render such judgment in the cause as the court below should have rendered, or reverse and remand the same, as to the supreme court shall seem fit." The bill of exceptions purports to contain all the evidence, and concludes: "Thereupon the court rendered judgment for the defendant, to which the plaintiff duly excepted." We are at a loss to know why this is not a compliance with every intent of the statute. The argument seems to proceed upon the idea that conclusions and judgment mean something different. Conclusion does not mean a special finding certainly, unless a special finding be requested, which was not the case here. The two terms are used in the statute redundantly and as practical synonyms. The statement of the bill that the court rendered judgment for the defendant is a statement necessarily of the conclusion of the court that

a judgment should be rendered, as well as that a judgment for the defendant was rendered.

Reversed and rendered.

Dowdell, C. J., and Anderson and Evans, JJ., concur.

## **THE DELIVERY AND ACCEPTANCE OF POLICIES OF INSURANCE.**

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### **IV. Acceptance of Policy, 63.**

#### **I. The Necessity and Purpose of Delivery.**

##### **a. In General.**

1. At Common Law.—A study of the necessity and purpose of "delivery" of written instruments leads the investigator into the oldest and mustiest chambers of the common law, where nearly every act attending the creation or assumption of liability under so-called specialty contracts, including the transfer of real property, was symbolic, and invested with a degree of solemnity and state, so utterly diverse from modern methods and practice, that jurists of the present find little need and less desire to comprehend the principles upon which they were founded. One of the most significant of all the acts expressive of the symbolism of the law was delivery, as applied to sealed instruments, and it remains to-day, perhaps for that very reason, one of the least understood by the rank and file of the profession. Delivery of all sealed instruments was necessary. Stripped of its symbolic character, such delivery could mean nothing save actual manual traduction, resulting in the transfer of the physical possession of the document in question from the obligor to the obligee, or the grantor to the grantee. But this was not always clearly understood or ac-

cepted. Hence arose most of the controversies touching delivery. The courts, in recognition of the principle that "delivery" possessed no special significance of itself, except as it might be regarded as expressive of the intent of the person who made it, or who was required to make it, to be bound by the instrument so delivered, a fact which might be expressed by other means, never demanded "manual traduction." In *Exton v. Scott*, 6 Sim. 31, 58 Eng. Reprint, 507, which may be cited as an extreme case, a mortgage was retained in the possession of the mortgagor for years, or until his death. The court held, nevertheless, that delivery had taken place contemporaneously with the signing and sealing, and that the conveyance was a valid one. In *Hall v. Palmer*, 13 L. J. Ch., N. S., 352, another somewhat extreme case, a bond, executed for the benefit of a woman with whom the obligor had cohabited, was retained in the obligor's possession until his death, and was held to have been delivered so as to be effective at the time of its execution, even though actual delivery had never taken place, and the obligee was ignorant of its existence. In *Doe dem. Garnons v. Knight*, 5 Barn. & C. 671, 108 Eng. Reprint, 250, which is interesting as an illustration of a symbolic delivery, the obligor at the time of signing and sealing put his finger on the seal, and used the words, "I deliver this as my act and deed." The delivery was held to have been complete and binding, although the obligor never parted with the manual possession at all.

These citations might be multiplied almost indefinitely. They merely express elementary law, that "delivery" was necessary to the validity and binding effect of all sealed instruments; but that the "delivery" contemplated by law was not the "manual traduction" of the document. Such "manual traduction" might or might not amount to the delivery required. Some act was essential, but any overt act which might be fairly deemed to express the intention of the obligor to be bound was sufficient; and the transfer of the physical possession might, or might not, mean what the law demanded the act of delivery to signify; and the rule in this respect has not changed, as will later appear.

2. **Sealed Instruments.**—But the necessity for any sort of delivery, actual or constructive, was limited to sealed instruments, and did not apply to "parol" contracts. A contract of insurance was a "parol" contract. There was almost always some bit of writing connected with the negotiations, and sometimes, though not always, there was a policy, which was sometimes, though not always, "sealed and delivered." Corporations could act only by means of sealed documents, expressive of their will, and it is assumed that insurance corporations always issued policies which were "signed, sealed and delivered." This subject was raised in the early leading case of *Zenos v. Wickham*, L. R. 2 Eng. & Ir. App. Cas. 296, but was not decided directly, although it was held that, in general, insurance contracts need not be under seal. However this may have been in the earlier stages of the development of the insurance business, it is now well settled that contracts of insurance are not distinguishable in any essential particular from other contracts of the business world whose character as "parol" contracts has been established so long as to leave no room for controversy or doubt. It is true, the courts have not always maintained the distinction between "parol" contracts, as at present intended, and "parol" contracts, such as was understood at common law; nor have they always taken the trouble to distinguish between

completed contracts of insurance without policies and mere contracts to insure, evidenced by a bare receipt for the premium; but contracts of insurance and contracts to insure, whether evidenced by bits of writing or by the words and acts of the parties, have been enforced in many cases, even though no policy was ever executed, and the principle which governed in every case, was that which recognized such a contract as one which might be made without either a written or a sealed instrument; in other words, that such a contract was a "parol" contract, which might be proved as other parol contracts: *Home Ins. Co. v. Adler*, 71 Ala. 516; *Commercial Fire Ins. Co. v. Morris*, 105 Ala. 498, 18 South. 34; *Lindauer v. Delaware Mut. Safety Ins. Co.*, 13 Ark. 461; *King v. Cox*, 63 Ark. 204, 37 S. W. 877; *Harrigan v. Home L. Ins. Co.*, 128 Cal. 531, 58 Pac. 180, 61 Pac. 99; *Sheldon v. Connecticut Mut. L. Ins. Co.*, 25 Conn. 222, 65 Am. Dec. 565; *Fowler v. Preferred etc. Co.*, 100 Ga. 330, 28 S. E. 398; *New York L. Ins. Co. v. Babcock*, 104 Ga. 67, 69 Am. St. Rep. 134, 30 S. E. 273, 42 L. R. A. 88; *Fireman's Fund Ins. Co. v. Pekor*, 106 Ga. 1, 31 S. E. 779; *People's Ins. Co. v. Paddon*, 8 Ill. App. 447; *Concordia Ins. Co. v. Heffron*, 84 Ill. App. 610; *Union Cent. L. Ins. Co. v. Pauly*, 8 Ind. App. 85, 35 N. E. 190; *Prudential Ins. Co. v. Sullivan*, 27 Ind. App. 30, 59 N. E. 873; *Smith v. Insurance Co.*, 64 Iowa, 716, 21 N. W. 145; *Barre v. Insurance Co.*, 76 Iowa, 609, 41 N. W. 373; *Sater v. Insurance Co.*, 92 Iowa, 579, 61 N. W. 209; *Fidelity & Casualty Co. v. Ballard*, 105 Ky. 253, 48 S. W. 1074; *Walker v. Insurance Co.*, 56 Me. 371; *McCullough v. Eagle Ins. Co.*, 1 Pick. 278; *Sanborn v. Fireman's Ins. Co.*, 16 Gray, 448, 77 Am. Dec. 419; *Baker v. Com. Un. Assur. Co.*, 162 Mass. 358, 38 N. E. 1124; *Michigan Pipe Co. v. N. B. & M. Ins. Co.*, 97 Mich. 493, 56 N. W. 849; *Salisbury v. Insurance Co.*, 32 Minn. 458, 21 N. E. 552; *Henning v. United States Ins. Co.*, 47 Mo. 432, 4 Am. Rep. 332; *Baile v. St. Joseph Ins. Co.*, 73 Mo. 371; *Lingenfelter v. Phoenix Ins. Co.*, 19 Mo. App. 252; *Agricultural Ins. Co. v. Fritz*, 61 N. J. L. 211, 39 Atl. 910; *Carpenter v. Mutual Ins. Co.*, 4 Sandf. Ch. 408; *Hamilton v. Lycoming etc. Ins. Co.*, 5 Pa. 339; *Trustees v. Brooklyn Ins. Co.*, 19 N. Y. 305, 28 N. Y. 153; *Audubon v. Insurance Co.*, 27 N. Y. 216; *De Grove v. Insurance Co.*, 61 N. Y. 594, 19 Am. Rep. 305; *O'Reilly v. Assurance Corp.*, 101 N. Y. 575, 5 N. E. 568; *Palm v. Medina Ins. Co.*, 20 Ohio, 529; *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345, 15 Am. Rep. 612; *Newark Machine Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768; *Cleveland Ins. Co. v. Norwich Ins. Co.*, 34 Or. 228, 55 Pac. 435; *Eureka Ins. Co. v. Robinson*, 56 Pa. 256, 94 Am. Dec. 65; *Pacific Mut. Ins. Co. v. Shaffer*, 30 Tex. Civ. App. 313, 70 S. W. 566; *Idaho Forwarding Co. v. Fireman's Fund Ins. Co.*, 8 Utah, 41, 29 Pac. 826, 17 L. R. A. 586; *Starr v. Mutual Life Ins. Co.*, 41 Wash. 228, 83 Pac. 116; *Fuller v. Madison Ins. Co.*, 36 Wis. 603; *Strohn v. Insurance Co.*, 37 Wis. 625, 19 Am. Rep. 777; *Taylor v. Phoenix Ins. Co.*, 47 Wis. 365, 2 N. W. 559, 3 N. W. 584; *Andrews v. Essex Ins. Co.*, 3 Mason C. C. 6; *Fed. Cas. No. 374*; *Fitton v. Insurance Co.*, 20 Fed. 766; *Potter v. Phoenix Ins. Co.*, 63 Fed. 382; *Tayloe v. Merchants' Ins. Co.*, 9 How. 390, 13 L. ed. 187; *Orient M. Ins. Co. v. Wright*, 23 How. (U. S.) 401, 16 L. ed. 524; *Humphrey v. Hartford Ins. Co.*, 15 Blatchf. 35; *Fed. Cas. No. 6874*; *Relief Fire Ins. Co. v. Shaw*, 94 U. S. 574, 24 L. ed. 291; *Zenos v. Wickham*, L. R. 2 Eng. & Ir. App. Cas. 296.

In all of these cases it was distinctly, though not always expressly, held that an insurance contract was a parol contract; and in most of

them the definition of "parol" was clearly intended as unwritten, or by word of mouth. But in some of them, as in the case last cited, that of *Zenos v. Wickham*, L. R. 2 Eng. & Ir. App. Cas. 296, the common-law distinction between parol contracts and contracts by specialty was maintained, and the decision of the court, based upon that distinction, was that a policy of insurance was not an instrument in the nature of a common-law deed, or other sealed instrument, requiring delivery to make it valid and binding; and that the parol character of the written instrument was not changed by the fact that it was executed by a corporation, and contained the phrase, "signed, sealed and delivered."

The rule that an oral contract of insurance may be valid, and enforced for a loss occurring before the issuance and deliverance of a written policy, is recognized in *Summers v. Mutual Life Ins. Co.*, 12 Wyo. 369, 75 Pac. 992, 109 Am. St. Rep. 992, and cases cited in the cross-reference note thereto. But it is necessary that there shall be a meeting of the minds of the parties to all of the essential provisions: *Whitman v. Milwaukee Fire Ins. Co.*, 128 Wis. 124, 116 Am. St. Rep. 25, 107 N. W. 291. Oral agreements for insurance are enforceable, it has been affirmed, although the charter of the insurer or the law of the state declares that the conditions of all policies shall be written on the face thereof, and that all policies and contracts of insurance made by the company shall be subscribed by the president or president pro tempore, and attested by the secretary: *King v. Phoenix Ins. Co.*, 195 Mo. 290, 113 Am. St. Rep. 678, 92 S. W. 892.

**b. As Evidence of Intent to Complete Contract.**—If, therefore, delivery of the policy of insurance is ever necessary, or desirable for any purpose, it is not because of the nature of the contract, but rests in the character and purpose of the act itself, or in an arbitrary requirement of statute, or the terms of the contract itself. And first, as to the nature of the act of delivery itself. Can mere formal delivery of the policy, or the want thereof, because of the nature of the act itself, ever be said to make or mar a contract of insurance?

A policy is merely evidence of the contract: *Goodall v. New England Fire Ins. Co.*, 25 N. H. 169; *Newark Machine Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768; *Cleveland etc. Co. v. Norwich Union Ins. Co.*, 34 Or. 228, 55 Pac. 435. The delivery thereof is merely an act indicative of the intention of the insurer to be bound by the contract, and is nothing more than prima facie evidence of such intent. "The mere manual possession of the policy is of little consequence, whether it be in the hands of the insurer or the insured. Its possession by the insured makes a prima facie case for him, subject to be met by proof that it was never delivered with the consent of the insurer; while its possession by the insurers makes a prima facie case for them, subject to be met by proof that, though not transferred, it was intended by the parties to be a valid contract, without further action by either party, and so in legal contemplation there was a delivery": *German Fire Ins. Co. v. Laggart*, 47 Kan. 663, 28 Pac. 718, quoting from *May on Insurance*, sec. 56. Or delivery is an act which may or may not mark the completion of the contract, and it is, therefore, to be regarded as evidence of such completion; but never, unless expressly so made, conclusive evidence thereof, though acceptance may be: *Hartford Ins. Co. v. Whitman*, 75 Ohio St. 312, 79 N. E. 459, 9 Ann. Cas. 218. Taken alone, it is



seldom more than a bare indication of the completion of the contract. It is nearly always associated with some other act, as payment of the premium, or an unchanged condition of health, which are of the essence of the contract.

When delivery and payment of the premium are thus associated together, it is obviously the latter, and not the manual traduction of the policy, that really counts; and the same may be said of delivery in life and sound health. The important thing, in the first instance, is a completed and binding assumption of liability on the part of the insurer, with respect to the risk involved, and payment of the consideration therefor by the insured; and in the other, that there should be no unfavorable change in the risk itself between the physical examination and the completion of the contract. In recognition of this principle, the courts have repeatedly held that even though the delivery of the policy is made a condition precedent, and though the contract cannot be regarded as complete and binding until delivery has been made, yet, if the contract is complete in all other respects, and nothing remains but the transfer of the physical possession of the policy, bare nondelivery of the policy would not affect the rights of the parties: *Phoenix Ins. Co. v. McAuthor*, 116 Ala. 659, 67 Am. St. Rep. 154, 22 South. 903; *Stephenson v. Allison*, 165 Ala. 238, ante, p. 26, 51 South. 622; *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 69 Am. St. Rep. 134, 30 S. E. 273, 42 L. R. A. 88; *Davenport v. Peoria Ins. Co.*, 17 Iowa, 277; *German Fire Ins. Co. v. Laggart*, 47 Kan. 663, 28 Pac. 718; *Franklin Fire Ins. Co. v. Hewett*, 3 B. Mon. (Ky.) 231; *Mutual Life Ins. Co. v. Thomson*, 94 Ky. 253, 22 S. W. 87; *Dibble v. Northern Ins. Co.*, 70 Mich. 1, 14 Am. St. Rep. 470, 37 N. W. 704; *Alabama Gold Life Ins. Co. v. Herron*, 56 Miss. 643; *Cooper v. Pacific Mut. Life Ins. Co.*, 7 Nev. 116, 8 Am. Rep. 705; *McCully's Admr. v. Insurance Co.*, 18 W. Va. 782; *Franklin Fire Ins. Co. v. Colt*, 87 U. S. (20 Wall.) 560, 22 L. ed. 423.

It is true, in many jurisdictions, by statute, delivery of the policy is made a condition precedent to the completion of the contract, without regard to other acts or matters connected with the negotiations; but the object of all provisions of this kind is to provide a definite point, though entirely arbitrary, for the commencement of the liability of the insurer in all cases alike, and so, to remove one prolific source of litigation. Where this has been done, the courts have been inclined to enforce it by requiring actual manual delivery. Thus in *Markey v. Mutual Benefit Life Ins. Co.*, 126 Mass. 158 (other reports, 103 Mass. 78, 118 Mass. 178), the policy, after being handed to the beneficiary, was handed back to the insurance agent to be handed to a third person, who would pay the premium and take the policy. The agent retained the policy, however, and refused to give it to the third person, although on the following day demand was made for the policy with tender of the premium. The court held that there was no such delivery as would meet the requirement that the contract was not complete and binding until the policy was delivered. So in *Wanier v. Milford Haven Ins. Co.*, 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598, where, through no fault of the insured, there was a failure of delivery at the time the policy was issued, and such delivery was not accomplished until a subsequent time, the court held that the contract took effect from the date of actual delivery. *Gallant v. Metropolitan Life Ins. Co.*, 167 Mass. 79, 44 N. E. 1073;

*Poste v. American Union Life Ins. Co.*, 32 App. Div. 189, 52 N. Y. Supp. 910; *More v. New York etc. Ins. Co.*, 130 N. Y. 537, 29 N. E. 757, and *Steinle v. New York Life Ins. Co.*, 81 Fed. 489, 26 C. C. A. 491, seem to sustain the principle involved. It is doubtful, however, if, in the case of *Markey v. Mutual Ben. Life Ins. Co.*, 126 Mass. 158, for example, the decision of the court would have been the same had the premium been paid and accepted, and all else done necessary to the completion of the contract, save the final act of formal delivery of the policy.

Aside from any arbitrary requirement to the contrary, therefore, the conclusion is obvious that, if the contract is complete, or the intent of the insurer to be bound thereby sufficiently manifest, without the delivery of the policy, there is as little necessity for such delivery as for the policy itself, where the insurer and insured have seen fit to bind themselves without one. A study of the cases lends unqualified support to this deduction. "It is well settled that, where a contract of insurance has been agreed upon, no policy need be made out, or, if made out, its delivery is not essential to the validity of the contract. If in such case loss occurs, the insured may bring suit upon the agreement, or file a bill for the specific performance of the contract": *Michigan Pipe Line Co. v. Michigan F. & M. Ins. Co.*, 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277.

### c. Completion of Contract.

1. **General Rule.**—No principle of this branch of the law is better settled than that which declares that if an insurance contract is completed and binding without actual manual delivery of the policy, such delivery is not necessary: *Phoenix Ins. Co. v. McAuthor*, 116 Ala. 659, 67 Am. St. Rep. 154, 22 South. 903; *Stephenson v. Allison*, 165 Ala. 238, ante, p. 26, 51 South. 622; *Sheldon v. Connecticut Mut. L. Ins. Co.*, 25 Conn. 207, 65 Am. Dec. 565; *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 69 Am. St. Rep. 134, 30 S. E. 273, 42 L. R. A. 88; *Milwaukee Mechanics' Ins. Co. v. Graham*, 181 Ill. 158, 54 N. E. 914; *Rose v. Mutual Life Ins. Co.*, 240 Ill. 45, 88 N. E. 204; *Prudential Ins. Co. v. Sullivan*, 27 Ind. App. 30, 59 N. E. 873; *Davenport v. Peoria Ins. Co.*, 17 Iowa, 277; *German Ins. Co. v. Laggart*, 47 Kan. 663, 28 Pac. 718; *Franklin Ins. Co. v. Hewitt*, 3 B. Mon. (Ky.) 231; *Mutual Life Ins. Co. v. Thomson*, 94 Ky. 253, 22 S. W. 87; *Warren v. Ocean Ins. Co.*, 16 Me. 439, 33 Am. Dec. 674; *Loring v. Proctor*, 26 Me. 18, 13 Shep. 18; *Blanchard v. Waite*, 28 Me. 51, 48 Am. Dec. 474; *Wass v. Maine Mut. Ins. Co.*, 61 Me. 537; *Dibble v. Northern Ins. Co.*, 70 Mich. 1, 14 Am. St. Rep. 470, 37 N. W. 704; *Michigan Pipe Line Co. v. Michigan Ins. Co.*, 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277; *Alabama Gold Life Ins. Co. v. Herron*, 56 Miss. 643; *Keim v. Home Mut. Life Ins. Co.*, 42 Mo. 38, 97 Am. Dec. 291; *Cooper v. Pacific Mut. Life Ins. Co.*, 7 Nev. 116, 8 Am. Rep. 705; *McCully's Admr. v. Insurance Co.*, 18 W. Va. 782; *Mattoon Mfg. Co. v. Oshkosh Ins. Co.*, 69 Wis. 573, 35 N. W. 12; *Kohne v. Insurance Co. of North America*, 1 Wash. C. C. 93, 14 Fed. Cas. (No. 7920) 835; *Franklin Ins. Co. v. Colt*, 87 U. S. (20 Wall.) 560, 22 L. ed. 423, 20 Wall. 570; *Zenos v. Wickham*, L. R. 2 Eng. & Ir. App. Cas. 296.

The case of *Kohne v. Insurance Company of N. A.*, 1 Wash. C. C. 93, 14 Fed. Cas. (No. 7920) 835, decided in the early part of the history of the Republic, presents a fair example of a contract of



insurance, fully complete and binding without delivery of the policy, and the principle under consideration was held to be clearly applicable. The "Gadsden," an American ship, en voyage from Newport to Port Passage, in Spain, was insured by an agent. Application was made to the president of the insurance company for the insurance. The terms were fully agreed upon; a note, with approved security, was given and accepted for the premium, but the agent did not wait for the policy. It was written up immediately afterward, however, and was in court upon the trial of the case. Prior to the application for the insurance, however, which was "lost or not lost," the vessel was captured. Information of the fact did not reach the agent or the insurers until after the insurance had been effected, but it did reach both parties prior to delivery of the policy, and prior to the demand which was made therefor by the agent. Delivery was refused, and the insurers contended that the contract of insurance was inchoate and that they were not bound. Mr. Justice Washington disposed of this contention in the following language: "The first objection to this action was not much relied upon by the defendant's counsel, and there is certainly nothing in it. There is no charge of unfairness on the part of the agent of the plaintiff, nor is it pretended that he knew of the loss on the 12th, when he waited upon the president of the insurance company. It appears that everything was agreed upon; and although on account of the fever then in the city, he did not wait to receive the policy, yet it was immediately after he left the office filled up and signed by the president. . . . The contract, therefore, was not inchoate, but perfected."

In *Lum v. United States Ins. Co.*, 104 Mich. 397, 62 N. W. 562, where an insurance agent, in the habit of issuing policies of insurance on blanks furnished him for that purpose, about to leave home, and anticipating a request for the renewal of a policy issued by him and about to expire, before his return, filled out and signed a new policy and left it with his clerk for delivery when called for, and insured called and inquired about the matter on the day the old policy expired, and the clerk told him the policy had been renewed, and showed him the entry in the register, it was held that there was such an offer and acceptance as would complete the contract and validate the insurance without delivery of the policy, notwithstanding the fact that no premium was paid or demanded, and the further fact that the agent was, upon his return two days later, notified by his superior to send the policy to him for cancellation, but did not notify the insured until after the loss had occurred.

Other illustrations of the principle here involved are to be found below under the discussion of the question as to when a contract of insurance may be deemed completed, and also in the section as to the subject of intent as related to the completion of such a contract.

The rule remains unaffected by the destruction of the property or the death of the insured—the happening of the contingency insured against—before delivery of the policy takes place: *American Home Ins. Co. v. Patterson*, 28 Ind. 17; *Mutual Life Ins. Co. v. Thomson*, 14 Ky. Law Rep. 800, 22 S. W. 87; *Mutual Life Ins. Co. v. Thomson*, 94 Ky. 253, 22 S. W. 87; *Michigan Pipe Line Co. v. Michigan Ins. Co.*, 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277; *Lum v. United States Ins. Co.*, 104 Mich. 397, 62 N. W. 562; *Alabama Gold Ins. Co. v. Herron*, 56 Miss. 643; *Keim v. Mutual Ins. Co.*, 42 Mo. 38, 97 Am. Dec. 291;

*Brownfield v. Phoenix Ins. Co.*, 35 Mo. App. 54; *Phoenix Ins. Co. v. Meier*, 28 Neb. 124, 44 N. W. 97; *Cooper v. Pacific Mut. Life Ins. Co.*, 7 Nev. 116, 8 Am. St. Rep. 705; *Union Central Life Ins. Co. v. Phillips*, 102 Fed. 19, 41 C. C. A. 263; *Lightbody v. Insurance Co.*, 23 Wend. 18.

This is not an application of the "relation back" theory, which has to do with contracts which are incomplete so long as the policy remains undelivered, but are so far completed and binding that nothing remains to give them full effect but bare delivery. Delivery there upon is said to "relate back" to some definite time in the past, prior to loss, if necessary, when the contract was otherwise complete. The subject is considered later on.

Where payment of the initial premium is a condition precedent to the binding effect of the policy, and essential to a valid delivery thereof, delivery is necessary to complete the contract unless the premium is paid as required, since delivery without payment is the only way to waive such payment: *Blue Grass Ins. Co. v. Cobb*, 109 Ky. 339, 58 S. W. 981; *Real Estate Mutual F. & M. Ins. Co. v. Roessle*, 67 Mass. (1 Gray) 336; *Hoyt v. Mutual Ben. Life Ins. Co.*, 98 Mass. 543; *Myer v. Liverpool Ins. Co.*, 121 Mass. 338.

2. *Its Converse.*—The converse of the proposition is also none the less true; i. e., if the conditions are such that the agreement of the parties cannot be manifested otherwise than by delivery of the policy, or the acceptance of the risk by the insurer can be shown in no other way, as a matter of course, delivery must be shown. An illustration of such a case is that of *Kerr v. Milwaukee Mechanics' Ins. Co.*, 117 Fed. 442, 54 C. C. A. 616. The plaintiff was the owner of a grain elevator at Western, Nebraska, which was leased and operated by Rohrer and McCann. One of the conditions of the lease provided that the lessees should insure the property for four thousand dollars for the owner's benefit. Accordingly, application having been made to Rohrer, an insurance agent at Hastings, a policy of insurance for that sum was issued and delivered to plaintiff, the premium, being at the rate of two per cent, having been paid by McCann. This insurance remained in force for a year. At its expiration the same agent re-insured for the same amount and at the same rate of premium in the Phenix Insurance Company of Brooklyn. Subsequently, and on December 8th, the general agent of that company notified both Rohrer and McCann that the rate of premium on the policy was too low, and that unless it was raised steps would be taken to cancel the policy. On the 10th, after a conversation with McCann, Rohrer promised to try to place the insurance in another company at the old rate, and so save the additional premium. He stated that the defendant company had seemed inclined to favor him in some other matters, and he thought he could place the insurance with that company. On the 12th, without further conference with anyone on the subject, Rohrer prepared a policy in the defendant company, countersigned the same as its agent, and placed it in his safe with the intention of afterward delivering it to plaintiff on the surrender of the Phenix policy. At the same time he marked the Phenix policy "canceled" on the register. On the 15th he notified defendants of the issuance of the policy, and on the 17th this report reached their office. Upon its receipt the officers of the company telegraphed Rohrer to cancel the policy. In the regular course of business November premiums are not turned in by the local agencies throughout the country until December 31st. The premium

paid on the Phenix policy had not, therefore, been paid into the treasury of the company. Rohrer, when he made out the policy in the Milwaukee company, merely transferred the premium from one account to the other, by charging the Phenix company with it and crediting the Milwaukee company. On Sunday, the 16th, information reached Rohrer that the property had been destroyed by fire. On Monday, the 17th, prior to receipt of the telegram directing cancellation of the Milwaukee policy, he took the policy of that company to the bank, plaintiff's place of business, and after informing the latter of the circumstances, offered to make the change. Plaintiff made no objection, but merely directed his clerk to get the old policy and return it to Rohrer. He had not heard of the fire, however, and when Rohrer informed him of it, he expressed a doubt as to the propriety of surrendering the old policy. When Rohrer told him that he had made out the policy on the 12th, he made no further comment, but returned the Phenix policy, and accepted the new one in lieu thereof. The court held that the acts here detailed did not show the existence of a contract of insurance on the part of the Milwaukee company, or that the attempted cancellation of the Phenix policy was authorized. The minds of the parties had never reached an agreement, in the one instance as to the making of the contract, or in the other, as to the cancellation of the other contract. The court thus expressed the principle involved: "There is no claim that there was, prior to the execution of the written policy of the defendant company, and its delivery to and acceptance by the plaintiff, any verbal agreement on behalf of that company to insure the property, which might make the contract of insurance take effect before the delivery of the written policy, and render that writing only the better evidence of the terms of the contract which the parties had agreed to: *City of Davenport v. Peoria M. & F. Ins. Co.*, 17 Iowa, 277. If, therefore, at the close of the testimony, it clearly appeared that the written policy of the defendant company had not, at the time of the burning of the elevator, become, by delivery and acceptance, a completely binding contract, then the defendant company never incurred any liability as insurer."

In *Rogers v. Charter Oak etc. Co.*, 41 Conn. 97, a life insurance solicitor, casually meeting C., proposed life insurance. C. replied that he was on a trip to New York for a few weeks, and could attend to the matter then. The agent was pressing, however, and finally obtained an application and a medical examination, with an understanding that, if accepted, the policy was to be forwarded to New York, and if it was as agreed to, would be accepted and the premium paid, the policy to take effect then. The policy was sent to New York to the address agreed upon, and was returned "uncalled for." It was sent to another address, but C. had died two days before. The court held that there was no contract, delivery never having been made. Clearly delivery was here wholly necessary.

Another illustration of the converse of the rule is to be found in *Milwaukee Mechanics' Ins. Co. v. Graham*, 181 Ill. 158, 54 N. E. 914. Graham, who was the owner and operator of a fruit evaporating plant, procured a policy of fire insurance thereon from plaintiff in error. The policy was delivered, but the premium was not paid, the agent declining to accept it until he should learn from the company whether it would accept the risk or not. The policy contained a provision that it should be void if other insurance on the same prop-

erty should be procured by the insured without the consent of the insurer, and that the insurance might be canceled at any time upon five days' notice. Delivery of the policy took place on October 27, 1897. On the 30th notice was received by the agent from the company declining the risk, and directing cancellation of the policy. The insured was accordingly notified, and he applied to another agent for insurance upon the same property. A policy was written out by the second agent, on blanks furnished for that purpose, bearing the signatures of the proper officers of the company, and providing for the counter-signing of the same by the local agent. Entries were made in the register in the usual way, but the policy was not delivered, nor was the insured notified of its execution. Within the five days' limit after notice of cancellation of the first policy, and consequently while it was still effectual protection, the property covered thereby and by the second policy was destroyed by fire, which was the contingency insured against. Upon the question of liability the court held that the second policy was ineffectual, that there was no additional insurance on the property within the meaning of the clause of the first policy invalidating its effect if such insurance should be procured thereon without the consent of the insured.

Another illustration of the principle is to be found where there is no application for insurance. Both delivery and acceptance are necessary to the completion of such a contract: *Stebbins v. Lancashire Ins. Co.*, 60 N. H. 65; *Folb v. Phoenix Ins. Co.*, 109 N. C. 568, 13 S. E. 798. And if the policy as issued does not conform to the application, it is not binding until it has been delivered and accepted: *Mutual Life Ins. Co. v. Gorman*, 19 Ky. Law Rep. 295, 40 S. W. 571; *Robinson v. United States Ben. Soc.*, 132 Mich. 695, 102 Am. St. Rep. 436, 94 N. W. 211; *New York Life Ins. Co. v. Manning*, 124 N. Y. Supp. 775; *Prince v. State Mutual Life Ins. Co.*, 77 S. C. 187, 57 S. E. 766.

If, however, the parties signify their agreement upon the terms and conditions of the altered contract in some other way, as by the acceptance of the premium, receiving proof of loss, and participating in an adjustment, on the part of the insurer, delivery is not necessary: *Star Lumber Co. v. Finney*, 35 Neb. 214, 52 N. W. 1113. It was held in *Stephens v. Insurance Co.*, 87 Iowa, 283, 54 N. W. 139, however, that the retention by the insurer of the premium notes until after the fire would not be regarded as dispensing with the necessity for delivery under circumstances which made delivery necessary to signify acceptance of the terms of an altered contract.

Other illustrations of the converse of the rule are to be found in the cases cited in subdivisions 3 and 4, below.

**3. What Constitutes a Completed Contract.**—A proper subject of inquiry in this connection is as to what may be deemed a completed contract of insurance; for if the contract is complete and binding without delivery, delivery is not necessary. No definite test, of uniform recognition, has, to our knowledge, ever been suggested. In *Blanchard v. Waite*, 28 Me. 51, 38 Am. Dec. 474, it was said: "A contract of insurance is completed, when there is an assent to the terms of it by the parties, upon a valuable consideration. Neither the giving of the premium note nor the reception of the policy by the insured are prerequisites to its consummation." In an earlier Maine decision, that of *Warren v. Ocean Ins. Co.*, 16 Me. 439, 33 Am. Dec. 674, where the insured gave no premium note, and took no evidence of

the contract from the company, the policy being left in the office of the latter, pending payment of the premium, the question as to whether the contract was complete without delivery of the policy was considered in connection with the custom of the insurer and other companies. It was shown that when, in the course of business, the applicant for insurance, having accepted the terms upon which the company was willing to assume the risk, signed a form of agreement in the proposal book, the risk was then, according to custom, considered taken. It was also shown that if the premium was to be paid in cash, such payment was usually deferred until delivery of the policy, which might be long after, or even not at all; but if credit was asked a note was usually signed by the assured at the time he signed the proposal book, by which he promised to pay the premium; but these were regarded as mere details, not essential to the validity of the insurance, which was complete and binding upon the signing, by the assured, of the proposal book. The insured recovered, though the premium was never paid, nor the policy delivered. The court intimated that any other view of the matter would enable the corporation, by procrastinating delivery of the policy and collection of the premium until the risk had elapsed, to evade payment, in the case of loss, and to compel payment, in any event. The principle here followed was that laid down in the leading cases of *Head and Amory v. Providence Ins. Co.*, 2 Cranch, 127, 2 L. ed. 229, one of Chief Justice Marshall's decisions, and of *Mead v. Davison*, 3 Ad. & El. 303, 111 Eng. Reprint, 428.

In the last cited case, that of *Mead v. Davison*, 3 Ad. & El. 303, 111 Eng. Reprint, 428, insurance was proposed on the plaintiff's ship, "Crisis," to a mutual society, called the British Association of London, of which the plaintiff and the defendant were members, in February, 1829, and the premium paid, lost or not lost. The policy was formally executed on the twenty-first day of October, 1829. The loss had, before that day, become known to both parties. By the practice of the society, policies used to be filled up and delivered out as members applied for them. By the rules of the society, the sums insured were to commence on the day of the ship being accepted by the committee, and to continue in force twelve months from that time, paying five per cent charge for policies, power of attorney, and two guineas for survey. The court said: "He, the plaintiff, bought and paid for the underwriter's promise to indemnify. If his ship had arrived, the underwriter would have kept the whole premium; though she has perished, he cannot be relieved from his agreement. Equity would have compelled him to execute the formal policy whenever tendered to him. In voluntarily executing, he has only performed a manifest duty, and cannot now retract the obligation." Obviously, the contract was completed and binding when the risk was assumed and premium paid.

In *Sheldon v. Connecticut Mut. Life Ins. Co.*, 25 Conn. 207, 65 Am. Dec. 565, where defendant claimed that delivery to the assured was essential to the completion of the contract, it was held that the jury were properly instructed that when an application for insurance had been approved and accepted by a company, or its agents, and a policy had been made and executed, and notice thereof given the applicant, the contract was complete. Similar language was made use of in *Cooper v. Pacific Mutual Life Ins. Co.*, 7 Nev. 116, 8 Am. Rep. 705. In that case application was made to agents of the defendant for a

policy on the life of plaintiff's husband, accompanied with fifty dollars, in accordance with the regulations of the company, which were to be applied on the first year's premium. The application thus made was forwarded to the main office of the company, through the regular channels, was accepted, and a policy was in due time made and executed, and forwarded, in turn, to the local agent for delivery. Before delivery, however, the applicant died. The court held that the contract was complete. "Here is undoubtedly sufficient proof to establish a contract for a policy. The application for a policy by the assured, with the payment of a portion of the premium, and acceptance of the risk by the defendant, left nothing to be done but the delivery of the policy, and the payment by the plaintiff of the balance of the premium, which, it appears, was not required by the rules of the company until the completion of the transaction. These facts show a valid contract for a policy between the parties. The moment the company concluded to make the insurance, the fifty dollars paid to its agent became its property, without any further action on its part. It was paid upon the condition that if the company concluded to make the insurance, it should be applied in payment of the premium; when, therefore, the risk was taken, it became the property of defendant, and at the same time the assured became entitled to the policy. Thus there was the acceptance of the application by the company, and the payment of a portion of the premium, as a consideration therefor, by the plaintiff, which is all that was necessary to make a valid contract between the parties."

A similar decision was that of *Perkins v. Washington Ins. Co.*, 4 Cow. 645. There the plaintiff applied on January 5, 1820, to defendant's agent at Savannah, Georgia, for insurance on a stock of goods. The terms and conditions were agreed upon and the premium was paid, but no policy was delivered. On the morning of the 11th of the same month a conflagration broke out in the city of Savannah, resulting in the destruction of much property, including that covered by this insurance. Plaintiff gave the agent notice of the loss, offered the usual preliminary proofs, and demanded a policy of insurance. The agent informed him that he had not forwarded the premium money, and had not received a policy, and intimated that the company would not feel bound by what had been done. The proper notice, with the usual proofs, were given the defendant, and demand was made for a policy; but defendant refused to execute the same, although plaintiff tendered the premium in person. Suit was brought. Defendant denied the authority of the agent to do more than receive applications, take the premiums offered, forward the same, make surveys, etc., all acts of an irresponsible and merely ministerial character. But the court held the contract to have been completed, and the defendant bound thereby.

In *Eames v. Home Ins. Co. of New York*, 94 U. S. 629, 24 L. ed. 301, upon the subject of the essentials of a completed contract, Justice Bradley said: "It is sufficient if one party proposes to be insured and the other party agrees to insure, and the subject, the period, the amount and the rate of insurance is ascertained or understood, and the premium paid, if demanded."

In the principal case, that of *Stephenson v. Allison*, 165 Ala. 238, ante, p. 26, 51 South. 622, it was said: "A contract of insurance is complete when it appears that the terms of the contract have been settled by the concurrent assent of the parties, and nothing remains to be done but deliver the policy."



"It is fundamental that, unless the parties have come to an agreement as to the terms of their contract, so that nothing remains to be done but to execute what has been agreed upon, the contract is still incomplete, and of no binding force upon either party. We can see no reason from departing from that familiar rule in the law of contracts in a case where the parties were negotiating over a contract of insurance. In the case at bar there was neither a delivery of the policy, a payment of the premium, a tender of the premium, nor a promise to pay": *Milwaukee Mechanics' Ins. Co. v. Graham*, 181 Ill. 158, 54 N. E. 914.

The same rule was followed in the case of *Michigan Pipe Co. v. Michigan F. & M. Ins. Co.*, 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277. There application was made to an insurance agent representing the defendant and a number of other insurance companies, for insurance upon the plaintiff's plant aggregating forty-five thousand dollars. The insurance was to be divided in unequal amounts between three separate blocks of property. Nothing was said of the rate or the period of the insurance, or the companies in which the insurance was to be placed. The insurance agent promised to attend to the matter at once, and the plaintiff's representative went away and paid no further attention to the matter. Within a fortnight the property was destroyed by fire. The insurance agent had neglected to make the insurance; but to cover his neglect he pretended that the policies were in his safe, and that he would forward them to the plaintiff on the following morning, which was Monday. In accordance with a plan of his own, the purpose of which was plainly to cover his negligence as well as to protect the insured, in whose property his relatives were interested, at the expense of the insurance companies, he made out a number of insurance policies. These policies were dated on the Saturday previous, which was July 5th, instead of June 26th, the date the insurance was understood to begin. The policies aggregated five hundred dollars less than the amount agreed upon. In at least two respects, therefore, the contract as outlined by the policies differed materially from that outlined in the application for insurance. The court held that the minds of the parties had not met. If the policies had been delivered, however, and accepted, this discrepancy would have been cured; and the court also intimated that if the policies had been written out in accordance with the understanding of the parties as manifested in their preliminary conversation on the subject, want of delivery would not have affected their validity. In other words, there was no completed binding contract until the policies were written out in accordance with the understanding of the parties, or until by delivery and acceptance of policies varying from such understanding the parties signified their waiver of the original terms. "When one applies for insurance, the insurer must accept the terms of the application before a contract can exist. If the insurer replies to the application by proposing different terms, or by sending a policy differing in essential matters from the application, no contract has been made until the counter-proposition or policy has been accepted by the applicant. The same rule applies to contracts for insurance as to other contracts. . . . Plaintiff had no contract with the defendant until the policies were written out and signed, and were in accordance with the terms of the application. If defendant had not made out and signed the policies, plaintiff would have no standing, because its agent had made no agreement to place any of the insurance applied for in the defendant

company. Plaintiff, at the time of its application, made no contract with Schmeck, binding upon any of the companies for which he was agent. The name of no company was mentioned, much less agreed upon. Granting that it was understood, when effected, that the rates were to be the usual ones, still the policies differed in two essential particulars from the applications, viz., the amount and the time from which they were to run."

In *Mattoon Mfg. Co. v. Oshkosh Fire Ins. Co.*, 69 Wis. 573, 35 N. W. 12, where plaintiff gave its note undated to the defendant, payable in installments at such time as defendant might order, with a blank application over its signature, which was accepted by the defendant's agent with the agreement that it would effect a contract of insurance, and that when plaintiff would give defendant the apportionment of the risk, the policy should issue, and the note and application be filled up to correspond, such arrangement was held not to constitute a completed contract of insurance. This case is interesting in view of the fact that the court intimated that if the plaintiff had proved what it alleged, it would have proved a complete and binding contract of insurance. It alleged: 1. That it gave its note for the premium, whereas the note was undated and bore no specific amount; 2. That there was an understanding upon the acceptance of the note and blank application, that the same would effect a contract of insurance, nothing remaining to be done but for the agent to fill out the blanks; 3. That the agent should fill it out with a description of the risk of which a printed form was then and there exhibited; 4. That there should be a policy, etc.; 5. That the agent neglected to do so, etc.; 6. That the insurer accepted the risk, etc.; whereas, in fact, the insurance company, after the destruction of the property, received a notification as follows: "The Oshkosh Mutual has accepted a risk of five thousand dollars on this property, but it has not yet been apportioned between building, machinery, and stock, and no policy yet issued."

The difficulty in chief, in this case, in the view of the court was a want of apportionment. "An oral agreement of an insurance agent to take five thousand dollars upon mill property is not a completed contract of insurance if there was to be an apportionment between real and personal estate, and none had been made when the property was destroyed by fire": *Kimball v. Lion Ins. Co.*, 17 Fed. 625. Similar language was used in *Thayer v. Insurance Co.*, 10 Pick. 326; *Hartshorn v. Insurance Co.*, 15 Gray, 240; *Faughner v. Insurance Co.*, 86 Mich. 536, 49 N. W. 643; *Tyler v. Insurance Co.*, 4 Rob. (N. Y.) 151; *Wood v. Insurance Co.*, 32 N. Y. 619; *Strohn v. Insurance Co.*, 37 Wis. 625, 19 Am. Rep. 777.

The case of *Franklin Fire Ins. Co. v. Colt*, 87 U. S. (20 Wall.) 560, 22 L. ed. 423, is often cited as an illustration of a contract complete in every respect prior to delivery, and even prior to execution, of the policy. The case is significant in other respects, particularly in the clear distinction drawn by the court between a contract of insurance and one to insure. It was a contract, entered into between Colt and the company's agents, for insurance upon certain property of the former, for a period of five years from that date, the insurance to be binding from said date, credit being given for the premium, and it being understood that the policy, when issued, should remain in the possession of the agents "until the first of October (date premium fell due) for his (Colt's) convenience." The property was destroyed prior to the date fixed for the payment of the premium and the delivery of



the policy, and before the policy itself was really executed. The policy was filled up and countersigned after the loss was incurred. The court thus outlined the rights of the parties, as under a completed and binding contract of insurance. "There is no suggestion that the preliminary contract in this case was not made in perfect good faith on both sides, with full knowledge by the agents of the condition, character and value of the property insured. The credit allowed for the payment of the premium was an indulgence which the agents were authorized by general usage to give. Its allowance did not impair the preliminary contract; that, being valid, could have been enforced in a court of equity against the company; and having been enforced by the procurement of the policy, an action could have been maintained upon the instrument; or the court in enforcing the execution of the contract might have entered a decree for the amount of the insurance. But no resort to a court of equity for specific performance was necessary in this case by reason of the action of the agents in filling up the blank policy, which was duly attested, as they should have done immediately after the preliminary arrangement with the assured. The agents were authorized to do after the fire that which they had previously stipulated to do on behalf of the company. The original neglect to fill up the blank policy at once constituted no valid reason for further delay. If the policy filled up at once would have bound the company, so must the policy subsequently filled up. The relations of the parties and the obligations of the company were not changed by the neglect of the agents. The filling up of the policy was a voluntary specific performance of the preliminary agreement. And, when filled up, the policy was, by express stipulation, to be held by the agents in their safe for the assured, and no actual manual transfer was, under these circumstances, essential to perfect the latter's title. It then became his property, and upon the refusal of the defendant to surrender it, two courses were open to him: either to proceed by action to recover the possession of the policy, or to sue upon the policy to recover for the loss, and in the latter case to prove its contents upon failure of the company to produce the instrument on the trial."

In *German-American Ins. v. Darrin*, 80 Kan. 578, 103 Pac. 87, it was held that a completed and binding contract of insurance may be effected upon the basis of an application, accepted by the insurer, a policy delivered and a premium paid and received. In *Powell v. Factor's Ins. Co.*, 28 La. Ann. 19, it was held that the receipt of the premium and the delivery of the policy completed the contract. A completed contract was similarly described in *Cunningham v. Connecticut Fire Ins. Co.*, 200 Mass. 333, 86 N. E. 787.

4. **Question of Intent.**—The principle is well established that the completion of a contract of insurance is a question of intent. Whenever the parties manifest their purpose to bind themselves irrevocably by such a contract, the law will say that the contract thereupon becomes a completed contract: *Union Central L. Ins. Co. v. Pauly*, 8 Ind. App. 85, 35 N. E. 190; *St. Louis Mut. L. Ins. Co. v. Kennedy*, 6 Bush (Ky.), 450; *Loring v. Proctor*, 26 Me. 18; *Heiman v. Insurance Co.*, 17 Minn. 153, 10 Am. Rep. 154; *Folb v. Insurance Co.*, 109 N. C. 568, 13 S. E. 798; *Newark Machine Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768; *McCully's Admr. v. Insurance Co.*, 18 W. Va. 782; *Cronkhite v. Insurance Co.*, 35 Fed. 26; *Zenos v. Wickham*, L. R. 2 Eng. & Ir. App. Cas. 296.

In the case last cited—*Zenos v. Wickham*, L. R. 2 Eng. & Ir. App. Cas. 296—the appellant and his associates, owners of the ship “*Leonidas*,” employed Lascaridi, an insurance broker, to effect for them two thousand pounds insurance on the vessel, at eight pounds eight shillings per cent, for six months, from April to October. “In the case of private underwriters at Lloyds, it is customary to have only one slip, which is signed by the different underwriters, for the amounts they are willing to undertake the insurance. In the case of insurance companies a separate slip is prepared by the brokers of the assured for each company, and the policy is afterward prepared and filled up from the slip by the officers of the company, and is kept by the company until sent for by the assured or his broker. . . . In accordance with the usual practice Lascaridi prepared . . . a slip embodying the terms of the proposed insurance, and got it initiated by . . . a clerk of the company for the sum of two thousand pounds. This was left at the office of the company in order that the policy might be made out. Before the policy was made out the plaintiffs sent to Lascaridi . . . desiring him to ‘cancel “*Leonidas*” insurance, and issue same for all the year and for all seas at ten pounds ten shillings per cent.’” This was done, and Lascaridi sent the owners a statement of the premium, which they paid. It was the custom of the companies to allow the brokers credit from month to month, and the premium in the “*Leonidas*” insurance was charged to Lascaridi, and presented at his office with the policy on the 8th of the following month, May. A clerk of Lascaridi declined to pay it on the ground that the issue of the policy was error. The policy with the statement was again, in the course of the day, presented a second time at the office of Lascaridi, who was absent, and was again declined. It was thereupon canceled, and credit was given Lascaridi for the premium. When loss of the ship occurred, and the case came into court for determination, it was held that the insured had done everything that he could possibly be expected to do on his part, including payment of the premium, and that when the clerk of the insurer signed the slip, the contract was complete and binding. The court discussed the question of delivery at some length, but only in connection with the subject of a sealed instrument, and not as evidencing the completion of the contract. The policy was “signed, sealed and delivered,” and it was suggested that a corporation could contract only by a sealed instrument; but the court, without deciding that question, held that if there was any necessity for delivery, the delivery above described was sufficient, and the contract having been completed and rendered effectual and binding by an adequate meeting of minds, it could not be canceled by anything short of an equally solemn act, certainly not without the expressed or implied consent of the party most deeply interested, or without returning to him the premium that he had paid for the protection that he thought he had received and was enjoying.

The case of *Newark Machine Co. v. Kenton Machine Co.*, 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768, illustrates another phase of the insurance business, with reference to the necessity of a meeting of minds, and an intent to be bound, as upon a completed contract. The facts are thus stated: “There was an understanding between the managing officer of the plaintiff and Murphy that the latter should keep the insurance of plaintiff up to a certain amount, either by renewals or new policies in good companies represented by him;

and his course of dealing with the plaintiff under that understanding was to charge up the amount of the premiums to the plaintiff when policies were issued or renewed, and have periodical settlements, usually once a month, when the premiums would be paid." The Norwich Union Insurance Company carried five thousand dollars' insurance on plaintiff's plant. Not desiring to carry so much that company directed Murphy to reduce the same by half. Murphy thereupon filled out two new policies for two thousand five hundred dollars each, one on a form provided by the Norwich Union and the other on a form provided by defendant, and prepared them for delivery to the plaintiff when it should deliver up for cancellation the five thousand dollar policy referred to. The account of the Norwich Union was charged with the amount of the unearned premium, and the defendant was credited therewith. Duly authorized representatives of the plaintiff were informed of the proposed change and consented thereto. The five thousand dollars was never delivered up for cancellation, nor were the two policies issued in lieu thereof ever delivered. Murphy made an entry in his cancellation register, but no other step was taken. The plant was destroyed by fire, and defendant contended that the facts did not show such a mutual assent of the parties, or their representatives, as would constitute a completed contract of insurance short of actual delivery of the policy. The following clearly presents the contention and the views of the court: "It does not appear that the names of the companies in which the new policies had been written were mentioned in the interview between Wright (plaintiff's manager) and the defendant's agent, nor the rate or amount of the premium, nor the duration or conditions of the policies; and it is claimed by the defendant that there was, therefore, no mutual assent of the parties to either of those terms, and so no completed contract of insurance between them. It is undoubtedly true that those are essential elements of a contract of insurance, and if there was not a meeting of the minds of the parties upon them, the contract was not consummated, and no risk attached. But it is equally true that the agreement need not be expressed in words; it may be implied from the circumstances and conduct of the parties. . . . It is now well settled that a policy is only evidence of the contract, and the latter may be shown by parol, when the policy has not been written, or is withheld, unless such contract is forbidden by statute or a provision of the company's charter which is brought to the notice of the other contracting party: *Ostrander on Insurance*, secs. 13, 14; *Richard on Insurance*, sec. 140; *Relief Fire Ins. Co. of New York v. Shaw*, 94 U. S. 574, 24 L. ed. 291; *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345, 15 Am. Rep. 612; *Palm v. Medina Mut. Fire Ins. Co.*, 20 Ohio 529, 337. And as in other cases of parol contracts, the terms of the agreement and the assent of the parties to them may be shown by their acts and the attending circumstances, as well as by the words they have employed. There was in this case no express agreement in regard to the property to be insured by the new policies. The property was not mentioned in the interview between the defendant's agents and Wright. But as it was agreed the new policies were to be exchanged for the canceled policy, it must have been as clearly understood as if it had been expressly stated that they were to cover the property included in the canceled policy. So in regard to the rate and amount of the premium, and

form and conditions of the policy. . . . It is not necessary that all the particulars of a contract should be made the subject of express stipulation, 'for it may well be understood, in the absence of express declaration to the contrary, that the usual form of policy is acceptable to both parties.' . . . Upon the facts of the present case, there can be but little doubt that the contract of insurance made by defendant through its agent, with the plaintiff, was complete in all its terms. The plaintiff had previously arranged with the agent to keep its insurance up to a certain amount in good companies for which he was authorized to act. This arrangement virtually left the selection of the companies to the discretion of the agent, and acting under it he had written the policy of the defendant and the new policy of the Norwich Union Company, . . . and duly countersigned both, ready for delivery to the plaintiff, and entered the cancellation of the policy which Wright had in his possession. . . . The policy of the defendant was then complete, containing a description of the property, the amount, commencement and duration of the risk, the rate and amount of the premium, and all the terms and conditions usual in such policies. This policy and the new policy of the Norwich Union, the agent proposed to Wright to exchange for the canceled policy, without condition or qualification. The proposition was immediately assented to and accepted without any qualification or condition whatever. The terms of the contract of insurance thus proposed by the defendant, through its agent, were definite and certain in every particular. They were those set forth in the policy. The acceptance was as broad as the proposition, and was therefore an acceptance of all the terms and conditions of the policy as it was written. That the plaintiff chose to accept the proposition unqualifiedly without further inquiry or examination affords the defendant no ground for claiming the contract was, on that account, incomplete. The only reason the exchange was not then made was, that the canceled policy was locked up in the bank. The parties evidently regarded the exchange as complete, and thereafter the agent was a mere custodian of the policy in question for the plaintiff, and the actual handing of it over was not essential to the risk. Effect will be given the intention of the parties, and what their conduct shows they considered a delivery must control, in determining whether it was made."

In *Loring v. Proctor*, 26 Me. 18, the court thus expressed the principle involved: "Ordinarily an instrument in writing to be effectual, is expected to be delivered to the obligee therein. But in reference to parol agreements, and policies are not often, if ever, under seal, everything must depend upon the intention and understanding of the parties. They may consent that a writing which is intended to contain the evidence of an agreement between them, though it may be left in the hands of the one party, or the other, without any formal delivery of it by either to the other, shall be evidence of their agreement. What the intention of the parties may be, as to a writing prepared between them, in reference to its efficacy, is a question referable to a jury as matter of fact, and not altogether of law, referable to the court. To ascertain such understanding and intention, resort may be had to the nature of the contract, the subject matter of it, the habits and modes usual in such cases, and to the language and declarations of the parties. The defendants, in this instance, with others, held themselves out as general insurers, and as keeping an office for the purpose, by their agent, Smith, allowing him to style

himself president of their board of directors. A jury might infer that they were fully conversant with that business, and that they had adopted the usages incident to it. If it was customary for the insured to be content that their policies should, when made out, remain in the office of the underwriter, and still be obligatory; and it should appear that such had been the case in the office of the defendant; and, at the same time, that the agent or insurance broker had all along declared that the risk had been taken, and was upon the company; and if it should be believed, that, in case there had been no loss, the premium would have been executed and recovered, a jury might conclude, that it was intended that the policy, so made out, should constitute a binding contract."

In *New York Lumber etc. Co. v. People's Ins. Co.*, 96 Mich. 20, 55 N. W. 434, a policy was executed and sent to an agent of an insurer without an application having been made, but in expectation that the agent would tender it to the insured as a renewal of a contract of insurance that had expired. The agent received it on Sunday, after the loss of the property on the day before. On the same day he also received a telegram from the general agent not to deliver the policy, to which he replied, "All right, will return," and communicated the facts to another agent of insurer, who also cautioned him not to deliver the policy. The premium was tendered, and demand made for the policy, but it was never delivered. The court held that the insurer had not given adequate expression of an intent to be bound by the contract of insurance, and that the owner of the property was not, under the circumstances, entitled to the delivery of the policy.

5. **Effect of Arbitrary Provisions.**—Though not otherwise so, the completion of contracts of insurance may be made arbitrarily to depend upon delivery of the policy. The laws of many states require such contracts to be evidenced by written or printed policies, and provide that they shall not be deemed complete or binding upon the insurer until they have been delivered. Again, most insurance companies, particularly those engaged in life insurance, are required by their charters, and make it a condition of all their contracts of insurance that they shall not be bound by such contracts unless the same are evidenced by written or printed policies, and until such policies are delivered. Finally, similar provisions are to be found in the by-laws of practically all mutual beneficial associations and fraternal orders devoted to life and health insurance. The effect is the same in all such cases, and it is well settled that even though such provisions may not be incorporated by an express provision of the contract, or a recital of the application or the policy based thereon, the contract must be read and construed as though it actually contained such express provision: *Sterling v. Head Camp etc. W. O. W.*, 28 Utah, 505, 80 Pac. 375. The general rule, heretofore considered, is therefore subject to modification, and in many decisions upon the subject of the necessity of delivery such general rule has been stated in effect in the following modified form: Delivery of the policy is not necessary to complete the contract and bind the insurer, unless made so by its terms: *Lindauer v. Delaware Mut. Safety Ins. Co.*, 13 Ark. 461; *Harrigan v. Home Life Ins. Co.*, 128 Cal. 531, 58 Pac. 180; *Sheldon v. Connecticut Mut. Life Ins. Co.*, 25 Conn. 207, 65 Am. Dec. 565; *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 69 Am. St. Rep. 134, 30 S. E. 273, 42 L. R. A. 88; *Fireman's Fund Ins. Co. v. Pekor*, 106 Ga. 1, 31 S. E. 779; *Milwaukee Mechanics' Ins. Co. v. Graham*, 181

Ill. 158, 54 N. E. 914; Union Central Life Ins. Co. v. Pauly, 8 Ind. App. 85, 35 N. E. 190; Prudential Ins. Co. v. Sullivan, 27 Ind. App. 30, 59 N. E. 873; Davenport v. Peoria Ins. Co., 17 Iowa, 277; Springfield F. & M. Ins. Co. v. Jenkins, 9 Ky. Law Rep. 932; Lee v. Union Central Life Ins. Co., 19 Ky. Law Rep. 608, 41 S. W. 319; Bragdon v. Appleton Ins. Co., 42 Me. 259; Faunce v. State Mut. Ins. Co., 101 Mass. 279; Michigan Pipe Line Co. v. Michigan Ins. Co., 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277; Wagner v. Supreme Lodge K. & L. of H., 128 Mich. 660, 87 N. W. 903; Equitable Life Assur. Soc. v. Alexander (Miss.), 12 South. 25; Keim v. Home Mut. Life Ins. Co., 42 Mo. 38, 97 Am. Dec. 291; Brownfield v. Phoenix Ins. Co., 35 Mo. App. 54; Star Union Lumber Co. v. Finney, 35 Neb. 214, 52 N. W. 1113; National Aid Assn. v. Bratcher, 65 Neb. 378, 91 N. W. 379, 93 N. W. 1122; Cooper v. Mutual Life Ins. Co., 7 Nev. 116, 8 Am. Rep. 705; Commercial Ins. Co. v. Hallock, 27 N. J. L. 645, 72 Am. Dec. 379; Baldwin v. Golden Star Fraternity, 47 N. J. L. 111; Fried v. Royal Ins. Co., 47 Barb. 127, affirmed in 50 N. Y. 243; Hicks v. British N. A. Assur. Co., 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424; Pennsberg Mfg. Co. v. Penn. F. & M. Ins. Co., 16 Pa. Sup. Ct. 91; Going v. Mutual Ben. Life Ins. Co., 58 S. C. 201, 36 S. E. 556; Pledger v. Sovereign Camp W. O. W., 17 Tex. Civ. App. 18, 42 S. W. 653; Phillips v. Union Cent. Life Ins. Co. (C. C.), 101 Fed. 33.

Where, therefore, a contract of insurance, by its terms, either express or implied, provides that it shall not be complete or binding upon the insurer, until the policy which is its written or printed memorial is delivered, such delivery is a condition precedent of the contract, and must be complied with: Newcomb v. Provident Fund Soc., 5 Colo. App. 140, 38 Pac. 61; Cotton States Life Ins. Co. v. Scurry, 50 Ga. 48; Reese v. Fidelity etc. Assn., 111 Ga. 482, 36 S. E. 637; Reserve Loan Life Ins. Co. v. Hockett, 35 Ind. App. 842, 73 N. E. 842; Michigan Mutual Life Ins. Co. v. Thompson, 44 Ind. App. 180, 86 N. E. 503; Hawley v. Michigan Mut. Life Ins. Co., 92 Iowa, 593, 61 N. W. 201; St. Louis Mut. Life Ins. Co. v. Kennedy, 6 Bush (Ky.), 450; Blue Grass Ins. Co. v. Hobb, 109 Ky. 339, 58 S. W. 981; Cummings v. Webster, 43 Me. 193; Real Estate Mut. F. & M. Ins. Co. v. Roessle, 1 Gray, 336; Hoyt v. Mutual Ben. Life Ins. Co., 98 Mass. 543; Marks v. Hope Mut. Life Ins. Co., 117 Mass. 528; Myers v. Liverpool Ins. Co., 121 Mass. 338; Markey v. Mutual Life Ins. Co., 103 Mass. 78, 118 Mass. 178, 126 Mass. 158; Wainer v. Milford Haven Ins. Co., 153 Mass. 335; 26 N. E. 877, 11 L. R. A. 593; Home Ins. Co. v. Curtis, 32 Mich. 402; Noyes v. Phoenix Mut. Life Ins. Co., 1 Mo. App. 584; Wilcox v. Sovereign Camp W. O. W., 76 Mo. App. 573; McClave v. Mutual Res. Fund Life Assn., 55 N. J. L. 187, 26 Atl. 78; May v. New York Safety Res. Fund Life Ins. Soc., 14 Daly (N. Y.), 339; Taylor v. Grand Lodge A. O. U. W., 29 N. Y. Supp. 773, 75 Hun, 612; Roblee v. Masonic Life Assn., 38 Misc. Rep. 481, 77 N. Y. Supp. 1098; Ray v. Sec. F. & L. Ins. Co., 126 N. C. 166, 35 S. E. 246; Lathrop v. Modern Woodmen of America (Or.), 106 Pac. 328; McLendon v. Sovereign Camp W. O. W., 106 Tenn. 695, 64 S. W. 36, 52 L. R. A. 444; Coker v. Atlas Acc. Ins. Co. (Tex. Civ. App.), 31 S. W. 703; Sterling v. Head Camp etc. W. O. W., 28 Utah, 505, 80 Pac. 375; McCully's Admr. v. Insurance Co., 18 W. Va. 782; Kohen v. Mutual Res. Fund Life Ins. Co., 28 Fed. 705; Misselhorn v. Mutual Res. Fund Life Ins. Co., 30 Fed. 549; Paine v. Pacific Mut. Life Ins. Co., 51 Fed. 689, 2 C. C. A. 459.



In the case of *Reserve Loan Life Ins. Co. v. Hockett*, 35 Ind. App. 842, 73 N. E. 842, the application contained the clause as to delivery, and it was repeated in the policy, to the effect that the insurance would not be binding or effective unless the initial premium should be paid and the policy delivered to the insured. The application was made and the premium paid on the 5th. It was received at the home office of the company on the 7th, "rejected" by the medical director on the 9th, and on the same day this rejection was overruled by the secretary of the company, whose decision, under the regulations of the company, was final, and a policy was issued and mailed to the local agent of the company for delivery. The insured died on the 8th. The court held that inasmuch as delivery was required before the insurance should be effective, it was a condition precedent, and that until it should be complied with there was no contract. Since delivery could not take place prior to the issue of the policy, it could not take place earlier than the 9th of April. But death had, on the preceding day, removed the subject of the insurance contract, and it no longer existed. Hence no liability had arisen.

So in *Hawley v. Michigan Mut. Life Ins. Co.*, 92 Iowa, 593, 61 N. W. 201, where there was a similar clause in both application and policy, the latter was sent to the local agent of the insurer for delivery under the conditions of the contract. The agent handed the policy to a third person with instructions not to deliver it until certain indorsements should be made relating to the payment of the premium and the health of the insured. The latter died before receiving the policy. The court held that inasmuch as delivery was a condition precedent, and that it had not occurred prior to the death of the insured, the completion of the contract became impossible by the nonexistence of the subject of the insurance. In *Markey v. Mutual Ben. Life Ins. Co.*, 126 Mass. 158 (other reports, 103 Mass. 78 and 118 Mass. 178), where prepayment of the initial premium was a condition precedent as well as delivery in the life time and health of the assured, the policy, after being handed to the beneficiary, was handed back to the agent to hand to a third person and get the premium. The policy was retained by the agent, however, pending a change in the health of the assured, and was not handed to the third person, a demand and tender of payment on whose behalf was refused. The court held that there was no such compliance with the conditions of the policy in the matter of delivery as would render the insurance effective.

As above noted, the provision under consideration is oftenest to be met with in life insurance contracts, and more particularly in those of mutual benefit and fraternal associations. The case of *Lathrop v. Modern Woodmen of America (Or.)*, 106 Pac. 328, is often cited as a leading authority on the point. In that case, one Lathrop applied for membership in the Modern Woodmen, and was duly elected or "adopted" as a member of the order. A benefit certificate in plaintiff's favor was executed November 8th, by the proper officers, and mailed to the camp clerk of the Grant's Pass camp for delivery in the usual way, and in accordance with the by-laws of the order, which provided, in effect, that the member must pay certain assessments, dues and fees, and must be in good health, upon delivery of the benefit certificate. The certificate, which corresponds to a policy of insurance in "old line" business, was received by the camp clerk on No-

vember 13th, and Lathrop was notified on that date to appear, pay the necessary dues, assessments, fees, etc., and receive the certificate. This he neglected to do until November 21st, when he was fatally injured by an explosion, remaining in an unconscious condition until the 26th, when he died. On the 23d his son called on the camp clerk, paid the dues, etc., and received the certificate. As soon as the facts became known to the officials of the order, they refused to be bound, and offered to refund the money paid at the time of the delivery of the certificate. The contention of the beneficiary of the certificate was that there was a valid delivery of the same when it was mailed to the camp clerk for delivery to the member, on the ground that such delivery was to be unconditional, citing the Babcock case, heretofore referred to, reported at length in 69 Am. St. Rep. 134, with an extensive note on the subject. But the court held that the delivery was not to be unconditional: "But these cases turn upon the theory of the intent that the policy shall be unconditionally delivered, and that the parties have not stipulated for anything else as a condition precedent to the policy taking effect, and are readily distinguishable from a case of this kind, where the contract in its inception states just what shall be done and how the policy shall be delivered in order to make it binding and effective. So it has been held with practical unanimity that, in policies issued by fraternal beneficial societies, requirements of the character above indicated are conditions precedent, and a part of the contract of insurance, and will be enforced accordingly."

In *Sterling v. Head Camp etc. W. O. W.*, 28 Utah, 505, 80 Pac. 375, where enough of the facts appear in the opinion of the court without quoting more extensively, the following views were expressed: "It is contended by appellant that Sterling at the time of his death was not a member, because not obligated, and not having paid one assessment, and, even if he was not required to be obligated, still he was not a member in good standing, in not having paid the requisite dues and assessments for the three months preceding his death, and, with much force, urges that the certificate was not a completed contract, because not signed by the local consul commander or by the deceased, and, because of the express stipulations between the parties, the delivery of the certificate was made a condition precedent to give it effect, and therefore it never had any force, and never became an executed or completed contract between the parties. We think appellant's position is sound. By the clear and positive terms of the application for membership and for a certificate, as well as by the laws of the society, it was stipulated between the parties that the receipt of the certificate by the deceased (that is, a delivery thereof to him) was made a condition precedent to any right of the insured or his beneficiary in or to the certificate, and before any liability of the appellant commenced. In such case the certificate, not having been delivered, did not become a completed or operative contract."

## II. What Constitutes Delivery.

a. **In General.**—Where delivery is thus made a condition precedent to the completion of the contract, it becomes a question of first importance as to what shall be deemed to constitute a valid delivery, for it is well settled that nothing short of a valid delivery will be accepted: *National Mutual Church Ins. Co. v. Trustees M. E. Church*, 105 Ill. App. 143; *Commonwealth Mut. Fire Ins. Co. v. Wm. Knabe & Co.*, 171 Mass. 265, 50 N. E. 516; *Shields v. Equitable Life Assur.*



Soc., 121 Mich. 690, 80 N. W. 793; *Bushaw v. Women's Mut. Ins. & Acc. Co.*, 55 Hun, 607, 8 N. Y. Supp. 423; *Travelers' Ins. Co. v. Jones*, 32 Tex. Civ. App. 146, 73 S. W. 978. And this applies with equal force to all cases where delivery is essential to the binding effect of the contract, whether made so arbitrarily by the terms of the contract, or intrinsically necessary, as where the contract is incomplete without it, and delivery is necessary to show the intent of the insurer to be bound. Actual "manual traduction" is no more the delivery that the law will recognize as sufficient in the one case than in the other, and such delivery may often be far short of the delivery required. If there is no coming together in agreement upon the terms of a contract of insurance, no "meeting of the minds" of insurer and insured, mere delivery, or transfer of the physical possession of the policy, will not complete such contract or bind the insurer. This was made plain in the case of *German Ins. Co. v. Downman*, 115 Fed. 481, 53 C. C. A. 213, where eighteen policies of insurance were delivered by the agent in response to intimidation on the part of an agent of the insured, the conditions being such that there was manifestly no "meeting of minds" prior thereto. So in other cases where policies were obtained surreptitiously, the same principle was held to govern: *Equitable Life Assn. Soc. v. McElroy*, 83 Fed. 631, 28 C. C. A. 368; *Cable v. U. S. Life Ins. Co.*, 111 Fed. 19, 49 C. C. A. 216, and cases cited in both.

There are, indeed, a number of cases where the court seemed to hold that "manual traduction" was not the delivery required by law, unless accompanied with intent on the part of the insurer to be bound, and if such intent was clear, any act which would be a manifestation of that intent would be accepted as a valid delivery, whether accompanied by a transfer of the physical possession of the instrument or not. Thus in *Union Central Life Ins. Co. v. Pauly*, 8 Ind. App. 85, 35 N. E. 190, where a policy was sent to a local agent of the insurer for delivery under the terms of the contract, which required payment of the premium upon delivery of the policy, and such payment had not been waived except as to a portion thereof, a notice to the beneficiary from such agent that "your policy" has arrived and is ready for delivery, was held not to constitute delivery, since until the premium agreed upon should be paid, it could not be said that there was any manifestation of intent on the part of the insurer to deliver the policy and complete the contract. On the other hand, in *Dibble v. Northern Insurance Co.*, 70 Mich. 1, 14 Am. St. Rep. 470, 37 N. W. 704, where an application was made, approved, accepted, a policy executed and sent to the local agent of the company, and notice thereof given the applicant that the policy was ready for delivery, all the details of the contract having been agreed upon, and all conditions precedent performed, it was held that the notice was sufficient delivery to render the contract complete and binding. Other cases to the same effect are *Stephenson v. Allison*, 165 Ala. 238, ante, p. 26, 51 South. 622; *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 69 Am. St. Rep. 134, 30 S. E. 273, 42 L. R. A. 88; *Fireman's Fund Ins. Co. v. Pekor*, 106 Ga. 1, 31 S. E. 779; *Mulligan v. Metropolitan Life Ins. Co.*, 149 Ill. App. 516; *Rose v. Mutual Life Ins. Co.*, 240 Ill. 45, 88 N. E. 204; *St. Louis Mut. Life Ins. Co. v. Kennedy*, 6 Bush (Ky.), 450; *Bragdon v. Appleton Ins. Co.*, 42 Me. 259; *Home Ins. Co. v. Curtis*, 32 Mich. 402; *Heiman v. Insurance Co.*, 17 Minn. 153, 10 Am. Rep. 154; *Equitable Life Assurance Soc. v. Alexander* (Miss.), 12 South. 25; *National Aid Assn. v. Bratcher*, 65 Neb. 378, 91 N. W. 379,

93 N. W. 1122; *Folb v. Phoenix Ins. Co.*, 109 N. C. 568, 13 S. E. 798; *Newark Machine Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768; *McCully's Admr. v. Insurance Co.*, 18 W. Va. 782; *Franklin Fire Ins. Co. v. Colt*, 87 U. S. (20 Wall.) 560, 22 L. ed. 423; *De Camp v. New Jersey Ins. Co.*, 7 Fed. Cas. 313; Fed. Cas. No. 3,719; *Cronkhite v. Accident Ins. Co.*, 35 Fed. 26; *Zenos v. Wickham*, L. R. 2 Eng. & Ir. App. Cas. 296.

**b. Actual or Constructive Delivery.**—Where delivery is essential, either actual or constructive is intended: *Heiman v. Phoenix Ins. Co.*, 17 Minn. 153, 10 Am. Rep. 154. Either is sufficient, and a valid delivery may be made though the policy never leave the possession of the insurer or his agent: *Phoenix Ins. Co. v. McAuthor*, 116 Ala. 659, 67 Am. St. Rep. 154, 22 South. 903; *Home Ins. Co. v. Curtis*, 32 Mich. 402; *Dibble v. Northern Assur. Co.*, 70 Mich. 1, 14 Am. St. Rep. 470, 37 N. W. 704; *Gallagher v. Metropolitan Life Ins. Co.*, 67 Misc. Rep. 115, 121 N. Y. Supp. 638; *Cassville Roller Mill Co. v. Aetna Ins. Co.*, 105 Mo. App. 146, 79 S. W. 720; *Phoenix Ins. Co. v. Meier*, 28 Neb. 124, 44 N. W. 97; *Newark Machine Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768; *Young v. St. Paul Ins. Co.*, 68 S. C. 387, 47 S. E. 681; *Franklin Fire Ins. Co. v. Colt*, 87 U. S. (20 Wall.) 560, 22 L. ed. 423. And in the case of renewals, where the agent is authorized to execute and issue the same without the immediate intervention of the home office, the delivery is sufficient though the policy remains in the hands of the agent: *Brown v. German-American Ins. Co.*, 10 N. Y. Supp. 412, 57 Hun, 586; *Tennant v. Travelers' Ins. Co. (C. C.)*, 31 Fed. 322.

Where constructive delivery is claimed, the question whether such delivery has taken place will be determined largely by what the facts disclose to have been the intent of the parties. Thus in *Brown v. American Central Ins. Co.*, 70 Iowa, 390, 30 N. W. 647, where an insurance agent made out a policy for an applicant, and placed it in the hands of a third person for delivery, with instructions not to deliver until he could learn whether the insurer would accept the risk, and the latter declined it, it was held that there was no manifestation of an intent on the part of the insurer to be bound, and therefore that there was no delivery, and no consummation of the contract of insurance, although the agent had received the premium. A similar case was that of *Nutting v. Minnesota Fire Ins. Co.*, 98 Wis. 26, 73 N. W. 432, where the agent handed the policy to the insured, but without any intention to deliver the same, and the latter took possession of it and retained it with the remark that he would like to keep it until he knew whether the insurer would carry the risk, it was held that there was no manifestation of a purpose to deliver the policy. With reference to all such cases, the general rule was stated in *Brown v. American Central Ins. Co.*, above cited, that until the insurer passes on the risk and accepts it, there can be no valid delivery. But delivery to a third person for delivery to the insured would be valid and complete the contract where, under like conditions, a delivery direct to the insured would be effective: *Connecticut Ins. Co. v. Grogan's Admr. (Ky.)*, 52 S. W. 959.

Where a life insurance solicitor procured three applications for insurance, one for himself and two for others, and the policies issued thereon were left in the desk of the local manager for the insurance company, in envelopes addressed to the respective parties insured, to be taken by the solicitor and delivered, and he took the policies, delivered two and retained his own, it was held that de-

livery was complete: *Massachusetts Ben. Life Assn. v. Sibley*, 158 Ill. 411, 42 N. E. 137.

In *Heiman v. Phoenix Ins. Co.*, 17 Minn. 153, 10 Am. Rep. 154, Heiman made an application for insurance through an agent of the defendant. Soon afterward he departed from the state. During his absence a policy was issued and forwarded to the agent with instructions to deliver it on receipt of the initial premium. The agent took the policy to the place of business of the insured for delivery and informed Heiman's son that one hundred dollars cash must be paid, and a note for the remainder, about the same amount. The son replied that he could not make the cash payment, but gave the agent his father's note for the balance. The agent took the note and policy, saying that he would keep the insurance alive until Heiman returned. Soon afterward the insured died. It was held, upon this state of facts, that there was neither actual nor constructive delivery; that the insurer had not signified its intent to be bound by the contract without the payment of the cash required; that while the acts shown were indicative of an acceptance of Heiman's application, they were evidence of an acceptance only as the basis of a future contract to be entered into when the policy was delivered, and the premium paid.

Delivery by mail is said to be constructive delivery: *Yonge v. Equitable Life Assur. Soc.*, 30 Fed. 902.

c. **Delivery to an Agent for unconditional delivery to the insured is delivery to the insured:** *Harrigan v. Home Life Ins. Co.*, 128 Cal. 531, 58 Pac. 180, 61 Pac. 99; *Southern Life Ins. Co. v. Kempton*, 56 Ga. 339; *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 69 Am. St. Rep. 134, 30 S. E. 273, 42 L. R. A. 88; *Michigan Mut. Life Ins. Co. v. Thompson*, 44 Ind. App. 180, 86 N. E. 503; *Mutual Life Ins. Co. of New York v. Thomson*, 94 Ky. 253, 22 S. W. 87; *Hallock v. Commercial Ins. Co.*, 26 N. J. L. 268; *Fried v. Royal Ins. Co.*, 47 Barb. (N. Y.) 127; *Porter v. Mutual Life Ins. Co. of New York*, 70 Vt. 504, 41 Atl. 970; *Yonge v. Equitable Life Assur. Co.*, 30 Fed. 902. This rule has, however, been subjected to certain limitation. Thus, it is said that whether such delivery to and possession by the agent is to be deemed delivery to the insured depends upon the agent's authority: *New York Life Ins. Co. v. Greenlee*, 42 Ind. App. 82, 84 N. E. 1101. But, in general, the rule is founded upon the theory that the agent is also the agent of the assured: *Morrison v. Insurance Co.*, 64 N. H. 137, 7 Atl. 378; *Hallock v. Insurance Co.*, 26 N. J. L. 268. In *Southern Ins. Co. v. Kempton*, 56 Ga. 339, it was held that delivery to the agent for unconditional delivery to the applicant makes such agent the agent of the applicant also. But in *Heiman v. Phoenix Ins. Co.*, 17 Minn. 153, 10 Am. Rep. 154, it was insisted that the possession of the agent must appear to be on account of the insured; and it has also been held that if the delivery is made under such conditions that the agent, or other person acting for the insurer, cannot be said to be acting otherwise than exclusively for the insurer, such delivery is not a delivery to the insured: *Mutual Life Ins. Co. v. Sinclair*, 24 Ky. Law Rep. 1543, 71 S. W. 853. And this has been held to be the correct doctrine even though the agent is a broker: *Ikeller v. Hartford Ins. Co.*, 24 Misc. Rep. 136, 53 N. Y. Supp. 323. If the agent has advanced the premium and retained the policy for self-protection, it has been held not to be delivery to the assured: *Fireman's Fund*

*Ins. Co. v. Pekor*, 106 Ga. 1, 31 S. E. 779; *Wheeler v. Watertown Ins. Co.*, 131 Mass. 1; *United States Life Ins. Co. v. Ross*, 102 Fed. 722, 42 C. C. A. 601. But this seems doubtful.

The principle of delivery to an agent for unconditional delivery to the insured has been applied to mutual benefit insurance; and it has been held that inasmuch as members become insured and entitled to a benefit certificate upon being initiated and payment of fees, dues and assessments, a delivery to the proper officers of the lodge is a delivery to the member: *Wagner v. Supreme Lodge K. & L. of H.*, 128 Mich. 660, 87 N. W. 903; *Supreme Court of Patricians v. Davis*, 129 Mich. 318, 88 N. W. 874; *Tracy v. Supreme Court of Honor*, 4 Neb. (Unof.) 195, 93 N. W. 702; *Baldwin v. Golden Star Fraternity*, 47 N. J. L. 111; *Supreme K. of H. v. Martin*, 16 Phila. (Pa.) 97; *Pledger v. Sovereign Camp W. O. W.*, 17 Tex. Civ. App. 18, 42 S. W. 653. In *Supreme Court of Patricians v. Davis*, 129 Mich. 318, 88 N. W. 874, it is true, the court laid some stress upon the fact that the officer had been asked to act as custodian for the member.

**d. Contracts Completed by Constructive Delivery and Executory Contracts Distinguished.**

1. **General Principles.**—It is not always easy to distinguish between a case where constructive delivery has taken place so as to complete a contract of insurance and permit an action to be brought thereon, and one where the rights of the insured have fully matured, although no such delivery of the policy has taken place, and there is no completed contract of insurance, but an executory contract to insure, necessitating a suit in equity for specific performance, or an action for damages for breach of contract. The necessity for such a distinction was clearly set forth in the case of the *Consumers' Match Co. v. German Ins. Co.*, 70 N. J. L. 226, 57 Atl. 440, where it was held, not only that delivery of the policy terminated the preliminary contract to insure, but was necessary to the completion of the permanent contract. In that case plaintiff applied to one Marcellus, an insurance broker, for insurance on its plant, and Marcellus agreed to procure two thousand five hundred dollars insurance thereon in the defendant company. Marcellus applied to defendant's agent, who agreed to issue a policy in accordance with the terms agreed upon. A policy was issued, but was never delivered, and the conditions were such that there was an inchoate contract to insure, but not a completed contract. An action was brought as upon a completed contract, when the property was destroyed prior to the completion of the contract. The court held that the defendant had not agreed to keep plaintiff's property insured pending the making of a completed contract. The court said: "A contract to write and deliver a policy of insurance and a failure to perform that contract can no more be transmuted into a contract of insurance than a promise of marriage, and a breach of that promise by one of the parties to it, can be transformed into a marriage ceremony."

This case was not, it is true, on all-fours with cases where everything but the delivery of the policy has been done on both sides, and the only condition precedent remaining uncomplished with is such delivery, an act within the control of the insurer alone. Nevertheless, even in these cases it would seem that delivery is necessary to

enable the insured to bring an action for completed insurance, and that unless there has been such delivery, his relief must come either through a suit for specific performance, or for breach of contract. The cases themselves are not very clear, for the courts have sometimes treated facts as constituting delivery, and a sufficient basis for an action on the policy, which in other cases only equity would recognize as a sufficient basis for an action for specific performance.

The importance of the question in some jurisdictions is amply outlined in the case above cited, for there the court clearly intimated that if a plaintiff assumed that constructive delivery had taken place, and sued upon the completed contract, he must satisfy the forum that the acts proved constituted constructive delivery, and he may fail. But it is also obvious that he might have failed if he sued for specific performance, or for breach of contract, for the forum may have deemed that the facts showed constructive delivery, and a completed contract. The difficulty is of little or no practical importance, however, in jurisdictions where there is but one action recognized. In other jurisdictions, the cases themselves require to be studied to obtain a clear view of the proper distinction.

In *Southern Ins. Co. v. Kempton*, 56 Ga. 339, which was a bill in equity, the application for insurance was made on November 13th. At the time of making the application, the premium was tendered, but the agent declined it, saying that it would do when the policy was delivered, and that he would be insured anyhow, if his application was accepted. On November 15th the policy was issued. December 9th the applicant received a letter from the agent to the effect that "he was insured," and he, the agent, had the policy, and would be down the following week with it. Accordingly, on December 15th the agent did visit the town where the applicant resided. The latter was sick, but an agent of his tendered the amount of the premium, and demanded the policy. The insurance agent refused to deliver it unless the attending physician would certify that there was no immediate danger of dissolution. The certificate was made but the agent still refused to deliver the policy. On the 17th of December, applicant died. The court held that in accordance with the principle of equity that that would be treated as done which ought to have been done, the contract was completed before death.

In *Franklin Fire Ins. Co. v. Colt*, 87 U. S. (20 Wall.) 560, 22 L. ed. 423, the leading case upon the point, the principle was thus discussed:

"The charter of the company defendant in the same clause which authorizes its president and directors to make insurance against fire, and for that purpose to execute such 'contracts, bargains, agreements, policies, and other instruments,' as may be necessary, declares that every such contract, bargain, agreement and policy, shall be in writing or in print, and be under the seal of the corporation, and be signed by the president, and attested by the secretary or other officer appointed for that purpose.

"Where similar language as to the form of the contract or policy was used in connection with a like grant of power to insure in a general statute of Pennsylvania respecting insurance companies, it was held by the late Mr. Justice Greer, in a case before the circuit court of the United States, that a company to which the law applied, could make an insurance, which would be legally valid, only by a policy attested by the officers and seal of the corporation: Constant

*v. Insurance Co.*, 3 Wall. (C. C.) 313, Fed. No. 3136. The learned justice undoubtedly considered that the mode in which the contract or policy could be made was so associated with the grant of power as to be essential to a valid exercise of the power. And such appears to be the natural import of the language of the clause of the charter of the defendant under consideration in this case, when the whole clause—that which confers the power and that which prescribes the mode of its exercise—is read.

“But the learned justice at the same time very justly observed that before the policy was attested in due form, the president or secretary, or whoever else might act as general agent of the company, might make agreements and parol promises as to the terms on which a policy should be issued, so that a court of equity would compel the company to execute the contract specifically; and that where a loss had happened, to avoid circuitry of action, the chancellor would enter a decree directly for the amount of the insurance for which the company ought to have delivered its policy properly attested.

“The requirement of the charter in this case has reference, in our judgment, only to executed contracts or policies of insurance, by which the company is legally bound to indemnify against loss, and not to those initial or preliminary arrangements which necessarily precede the execution of the formal instrument by the officers of the company. The preliminary arrangements for the amount and conditions of insurance are, in a great majority of instances, made by agents. It is always so where the insurance is effected out of the state where the company is incorporated, and has its principal place of business. . . . It would be impracticable, . . . or at least the business would be attended with great embarrassment and inconvenience, if such preliminary arrangements required for their validity and efficacy the formalities essential to the executed contract. The law distinguishes between the preliminary contract to make insurance or issue a policy, and the executed contract, or policy. And we are not aware that in any case, either by usage or the by-law of any company, or by any judicial decision, it has been held essential to the validity of these initial contracts that they should be attested by the officers and seal of the company. Any usage or decision to that effect would break up or greatly impair the business of insurance as transacted by agents of insurance companies.

“In a recent case of the court of appeals of Kentucky, this precise question was considered, and its determination was in accordance with the views we have expressed: *Security Ins. Co. v. Kentucky Ins. Co.*, 7 Bush, 81, 3 Am. Rep. 301. There the suit was to enforce a parol contract of insurance made by the agent of the company, whose charter provided that all policies or contracts of insurance made by the corporation should be ‘subscribed by the president, or president pro tempore, and signed and attested by the secretary, and being so signed and attested,’ should be binding and obligatory upon the corporation without its seal, according to the tenor, extent, and meaning of the policies or contracts. And the court held that this clause did not require an executory contract for an insurance to be in writing, and said that it knew of no American charter which did so require, observing that whilst a policy as an executed contract of insurance was defined to be documentary and authenti-



cated by the underwriter's signature, yet a contract to issue a policy as an executory agreement to insure might be binding without a written memorial of it; that no statute of frauds applied, and that the common law did not require writing."

The language of the Kentucky court in *Security Ins. Co. v. Kentucky Ins. Co.*, 7 Bush, 86, 3 Am. Rep. 301, above referred to, is as follows: "Although a policy, as an executed contract of insurance, is defined to be documentary and authenticated by the underwriter's signature, yet a contract to issue a policy as an executory agreement to insure may be binding without any written memorial of it. . . . In our judgment the appellee's charter does not require such executory contract to be in writing. If it does it is an anomaly, for we know of no other American charter that does so require."

In the case of *Davenport v. Insurance Co.*, 17 Iowa, 277, the power of an agent to issue a policy after the loss had occurred was fully and ably considered with reference to the leading decisions upon the subject. In that case the agreement for insurance was made between the parties by their agents on March 20th. That night the property was destroyed. The policy was executed on the following morning, and delivered, in accordance with the agreement made the previous day, both parties being ignorant of the loss. The court held that the contract was valid and binding, and that the policy was authorized. The court thus outlined the principle involved:

"Indeed, it is laid down as a general rule . . . that in commercial towns, actions on mere agreements to insure, whether against fire or the perils of the sea, are not uncommon; and they are always sustained whenever it appears that the terms of the agreement have been fully settled by the concurrent assent of the parties, so that nothing remains to be done but to deliver the policy. The contract is executory in the first instance, and completed when the policy is drawn up. Mere receipts for premiums are very common in the city of New York, and much insurance is effected, in the first instance, by means of such receipts. When the negotiation for insurance is so far completed that nothing remains to be done but to deliver the policy corresponding with the terms and date of the application, should a loss occur before the execution of a policy, a court of equity would relieve the assured; and upon a bill properly framed, instead of confining itself to a specific execution of the agreement to insure, would probably decree the payment of the loss. There are very many other cases fully sustaining the doctrine that an agreement by the agent to insure will be specifically enforced against the insurance company for which he acts, even where no policy has been executed: *Hamilton v. Lycoming Ins. Co.*, 5 Pa. 339; *Andrews v. Essex F. & M. Ins. Co.*, 3 Mason C. C. 6 Fed. Cas. No. 374; *McCullough v. Eagle Ins. Co.*, 1 Pick. 278; *Palm v. Medina Ins. Co.*, 20 Ohio, 529; *Tayloe v. Merchants' Fire Ins. Co. of Baltimore*, 9 How. (U. S.) 390, 13 L. ed. 187."

The principle was also recognized in *Carpenter v. Mutual Safety Ins. Co.*, 4 Sand. Ch. (N. Y.) 408, where the court held that an agreement to insure, evidenced by the receipt for the premium, may be specifically enforced, and that, if a loss happened, payment may be compelled in equity.

The principle followed in these cases is not different in its fundamentals from that followed in those decisions where it was held that the delivery of the policy was not necessary where the contract was complete and binding without it. In both it was held that the "meeting of minds" controlled, and in both, application was made of the prevailing rule of the courts of all jurisdictions alike, in dealing with parol contracts, to uphold the intent of the contracting parties, and to respect substance rather than form. In both classes of cases the necessity for delivery was considered from the viewpoint of the acts of the parties as expressive of their will and purpose. In one case, for example, it was said: "The contract of insurance may be perfected and become mutually obligatory, without a policy executed in form and delivered," and an instruction upheld, to the effect, that when an application for insurance had been approved and accepted by the company or its agents, and a policy made and executed and notice thereof given the applicant, the contract was complete, the insurer having done everything requisite to express his willingness and intent to bind himself, even without delivering the policy; and that while the insured was entitled to the policy, its mere physical possession could add nothing to his right of action: *Sheldon v. Connecticut Mut. Life Ins. Co.*, 25 Conn. 207, 65 Am. Dec. 565. So, in *Phoenix Ins. Co. v. McAuthor*, 116 Ala. 659, 67 Am. St. Rep. 154, 22 South. 903, it was said, in substance, that the question whether there had been sufficient delivery to complete the contract and give it binding effect depended upon the intention of the parties, as manifested by their acts and agreement, rather than upon its manual possession by the insured; and that if the policy is executed and the agent of the company notifies the insured that it has been issued, and that it is in his possession ready for him, the premium having been paid, and nothing remaining to be done but to pass the policy from the agent of the insurer to the insured, the contract is complete, and there is sufficient delivery to give it validity and binding effect. In the case of *McCully's Admr. v. Insurance Co.*, 18 W. Va. 782, recognized as a leading case on the point, the rule was laid down that while a condition that a contract shall not take effect except upon delivery is a reasonable and valid one, and must be complied with before the contract can be regarded as completed and binding, yet, if the parties have done everything else required to manifest an entire agreement and a completed contract, and nothing remains but the formal delivery of the policy, "bare nondelivery will not affect" their rights.

Without multiplying illustrations, these three cases may be said fairly to outline both the similarity and the difference between the two rules. The principle is obviously the same.

The distinction between these rules lies in the fact that in one no delivery at all is necessary, and no departure from the law forum is contemplated; while in the other, it must be conceded, either that some sort of delivery, short of actual manual tradition, is necessary, in order that there may be legal compliance with the condition which, as above stated, the courts regard as reasonable and valid; or, application must be made to the equity jurisdiction to compel that to be done which the right of the insured demands shall be done; and, in determining whether there has been such delivery or not, the rule of intent should be held to control.



2. "Relation Back" Theory.—The doctrine known as the "relation back" theory has long been recognized: *Klock v. Cronkhite*, 1 Hill, 107; *Jackson ex dem. v. Ramsay*, 3 Cow. 75, 15 Am. Dec. 242; *Jackson ex dem. v. Dickenson*, 15 Johns. 309, 8 Am. Dec. 236. In *Brownfield v. Phoenix Ins. Co.*, 35 Mo. App. 54, it was held that the formal delivery of the policy might take place after the completion of the contract to insure, and, if done as of the date of such completion, it would relate back as having effect as of that date. In *Baldwin v. Chouteau Ins. Co.*, 56 Mo. 151, 17 Am. Rep. 671, it appeared that an application for insurance was made and accepted, and the policy made out and executed. The insured not having the money to pay the premium, the policy remained in the hands of the insurer for two months, when the insured paid the money due for the premium, and received the policy. In the meantime the property covered by the insurance was destroyed, but the insurer was not informed of this fact. The court held that the delivery of the policy after the loss occurred related back to the date of the execution of the policy. It is obvious that this is not in entire harmony with some other decisions, unless there were other facts than those appearing in the report of the case more strongly expressive of the intent of the insurer to be bound, notwithstanding the failure of the insured to pay the premium and take the policy. In *Hubbard v. Hartford Ins. Co.*, 33 Iowa, 325, 11 Am. Rep. 125, application was made for insurance on the 18th of the month. The application was accepted, but the policy was not delivered and the premium paid until the 22d. It was held that the contract related back to the 18th, the date of the acceptance of the application. See, also, *Lightbody v. Insurance Co.*, 23 Wend. 18, where it was held that a policy of insurance, dated on the day the premium was paid and delivered several days afterward, related back to the date of payment of premium.

In the case of *Davenport v. Peoria Ins. Co.*, 17 Iowa, 277, the agreement for insurance was made on the 20th. The property was destroyed that night. On the following morning, the policy was executed and delivered, in accordance with the terms of the agreement made the previous day, in ignorance of the destruction of the property covered thereby. The court held that the contract was valid and binding, that the doctrine that an act done at one time may take effect as of a prior date, by relation back, was applicable to contracts of insurance; that the agreement to insure was the principal act, and that the formal execution of the policy might be concurrent therewith, or subsequent thereto, and when subsequent, and made as of the date of the principal act, it took effect by relation as of that date.

This is not "retrospective insurance," however—insurance often made in marine business, designed to afford protection to vessels overdue, where the policies read "lost or not lost."

### III. Conditional Delivery.

a. General Rule.—Delivery may be conditioned upon the performance of some act or the happening of some event, and when this is so, delivery is not complete, or the contract evidenced by the policy binding upon the insurer until the event has happened or the act is performed: *Hartford Fire Ins. Co. v. Wilson*, 187 U. S. 467, 23 Sup. Ct. Rep. 189, 47 L. ed. 261, reversing *Wilson v. Hart-*

ford Fire Ins. Co., 17 App. D. C. 14. Thus delivery may be conditioned that the contract shall not be binding until another policy in the same company has been canceled: *Moore v. Farmers' Ins. Co.*, 107 Ga. 199, 33 S. E. 65. Also valid delivery may depend upon a proviso that the agent shall obtain the surrender value of other policies, which are paid up: *Harickell v. New York Life Ins. Co.*, 111 N. Y. 390, 18 N. E. 632, 2 L. R. A. 150.

Many policies of insurance require to be countersigned by the local agent, and when so required, as by a clause in the policy itself, the contract cannot be regarded as binding unless the provision is complied with. But this has been held not to affect the condition precedent as to delivery: *Noyes v. Mutual Life Ins. Co.*, 1 Mo. App. 584.

Since membership is a condition precedent to insurance in all mutual societies or fraternal associations, no valid delivery can be made in the absence of such membership: *Hiatt v. Fraternal Home*, 99 Mo. App. 105, 72 S. W. 463.

The "issuing" of a policy is the signing and execution thereof, and not its delivery: *Stringham v. Mut. Life Ins. Co.*, 44 Or. 447, 75 Pac. 822.

**b. Delivery by Mail.**—Delivery direct to the insured, by mail, takes effect as of the date of the deposit in the postoffice, instead of the date of actual reception: *Triple Link Mut. Ins. Assn. v. Williams*, 121 Ala. 138, 17 Am. St. Rep. 34, 26 South. 19; *Mutual Res. Fund Life Assn. v. Farmer*, 65 Ark. 581, 47 S. W. 850; *Travelers' Fire Ins. Co. v. Globe Soap Co.*, 85 Ark. 169, 122 Am. St. Rep. 22, 107 S. W. 386; *Harrigan v. Home Life Ins. Co.*, 128 Cal. 531, 58 Pac. 180, 61 Pac. 99; *Kentucky Mut. L. Ins. Co. v. Jenks*, 5 Ind. 96; *Armstrong v. Mutual Life Ins. Co.*, 121 Iowa, 362, 96 N. W. 954; *Ford v. Insurance Co.*, 6 Bush, 133, 99 Am. Dec. 663; *Commonwealth Mut. Fire Ins. Co. v. Wm. Knabe & Co.*, 171 Mass. 265, 50 N. E. 516; *Dailey v. Preferred Masonic Assn.*, 102 Mich. 289, 57 N. W. 184, 26 L. R. A. 171; *Horton v. New York Life Ins. Co.*, 151 Mo. 604, 52 S. W. 356; *Hallock v. Insurance Co.*, 26 N. J. L. 268; *Peever etc. Co. v. State Mut. F. Ins. Co.*, 23 S. D. 1, 119 N. W. 1008; *Fidelity Mut. Life Ins. Co. v. Harris*, 94 Tex. 25, 86 Am. St. Rep. 813, 57 S. W. 635; *Hartford State Boiler Insp. & Ins. Co. v. Lasher Stocking Co.*, 66 Vt. 439, 44 Am. St. Rep. 859, 29 Atl. 629; *Yonge v. Equitable Life Assur. Soc. (C. C.)*, 30 Fed. 902.

This rule is not affected by the destruction of the policy while in transit: *Travelers' Fire Ins. Co. v. Globe Soap Co.*, 85 Ark. 169, 122 Am. St. Rep. 22, 107 S. W. 386; nor by the death of the assured: *Harrigan v. Home Life Ins. Co.*, 128 Cal. 531, 58 Pac. 180, 61 Pac. 99; *Dailey v. Preferred Masonic Assn.*, 102 Mich. 289, 57 N. W. 184, 26 L. R. A. 171.

Where a policy is mailed to an agent for unconditional delivery to the insured, the receipt of the agent is delivery to the insured: *Michigan Mut. Ins. Co. v. Thompson*, 44 Ind. App. 180, 86 N. E. 503.

**c. Payment of Premium.**—The question as to whether a valid delivery has taken place often arises in connection with a condition that the delivery of a policy shall not be made unless the premium is paid. As a matter of course, a delivery in regard of this condition would not be a valid delivery: *Smith v. Provident Sav. Life Assur. Soc.*, 65 Fed. 765, 13 C. C. A. 284, 31 U. S. App. 163. But this does not mean that payment in cash is necessary: *Jones v. New York*

Life Ins. Co., 168 Mass. 245, 47 N. E. 92. Generally speaking, an insurance agent may bind his principal by any act, agreement, waiver, or representation, within the ordinary scope of the insurance business, unless the insured is charged with notice of his want of authority: *National etc. Co. v. Barnes*, 41 Kan. 161, 21 Pac. 165; and if prepayment of the premium is a condition, but the agent delivers the policy notwithstanding, the insured has a right to assume waiver of the condition: *Critchett v. American Ins. Co.*, 53 Iowa, 407, 36 Am. Rep. 230, 5 N. W. 543. So a general agent of a life insurance company may waive payment of premium, deliver the policy and thus make a valid contract, notwithstanding a provision in the policy that it shall not take effect until the premium has been paid, and the policy delivered to insured while in health: *Berliner v. Travelers' Ins. Co.*, 121 Cal. 451, 53 Pac. 922. Again, individual credit of insured may be accepted as payment of premium by the agent who delivers the policy, notwithstanding valid delivery is conditioned upon payment of premium: *White v. Connecticut Ins. Co.*, 120 Mass. 333. So, the agent is authorized to deduct the amount of the premium from money owed by him individually to the insured, and delivery is valid and binding, even though retained in the safe of the agent for insured's convenience: *Phoenix Ins. Co. v. Meier*, 28 Neb. 124, 44 N. W. 97. Delivery by an insurance agent authorized to deliver the policy and receive the premium, and the acceptance by him of a note for the premium, has been held to be such delivery as completes and binds the contract of insurance, even though the policy contained a provision that the agent shall be deemed the agent of the insured as well as of the insurer, and that the latter shall not be bound until the premium is received by it: *Carson v. Jersey City Ins. Co.*, 43 N. J. L. 300, 39 Am. Rep. 548.

As a matter of course, the insurer may waive the condition as to prepayment of premium, and make a valid delivery of the policy without such payment. In *Griffith v. New York Life Ins. Co.*, 101 Cal. 627, 40 Am. St. Rep. 96, 36 Pac. 113, it was held that a provision as to prepayment before delivery was waived by the unconditional delivery of the policy under an agreement, expressed or implied, that credit should be given for the premium. So, it would seem, the issue and delivery of a policy acknowledging the receipt of the premium constitutes an estoppel in so far that the insurer cannot afterward deny that payment was actually made for the purpose of establishing a want of the completion of the contract: *Dobyns v. Bay State Assn.*, 144 Mo. 95, 45 S. W. 1107, so, in *Mulligan v. Metropolitan Life Ins. Co.*, 149 Ill. App. 516, where there was an agreement between the agent and the insured waiving prepayment of premium as provided in the application and policy, it was held that delivery to the agent for the purpose of delivery to the assured was tantamount to a ratification of such agreement, and constituted a valid delivery to the assured, so as to render the contract complete and binding.

#### **d. Delivery in Life and Health.**

1. **In General.**—The question of adequate delivery also arises occasionally in connection with the proviso that delivery shall be made only when the insured is in health. This provision is a condition of nearly every life insurance contract, in mutual benefit and fraternal insurance, as well as in what is known as "old line" business. If the contract is complete without delivery, as a matter of course, it is un-

affected by any unfavorable condition of bodily health when delivery takes place: *Southern Ins. Co. v. Kempton*, 56 Ga. 339; and the right of the insured to have the protection of his insurance is not affected by private instructions given by the insurer to the agent, unknown to the insured, as to delivery only when the latter is in health, unless there is an express condition that delivery shall take place only when the insured is in good health, and if delivery is essential to the completion of the contract, he may demand it, or the court will assume that constructive delivery took place when the policy was forwarded to the agent: *Schwartz v. Germania Life Ins. Co.*, 18 Minn. 448, 21 Minn. 215; *Fried v. Royal Ins. Co.*, 50 N. Y. 243.

Where change in health, resulting in an increase in the risk assumed, takes place after the consummation of the contract, the insurer being once bound, remains so: *Fried v. Royal Ins. Co.*, 50 N. Y. 243. For this reason, therefore, as a measure of self-protection, almost all life insurance contracts contain the proviso that delivery shall not be deemed binding, or the contract complete, unless the insured is in "good" or "sound" health at the time of such delivery, and the proviso has been held to be a reasonable and proper one, which the court will enforce: *Volker v. Metropolitan Life Ins. Co.*, 1 Misc. Rep. 374, 21 N. Y. Supp. 456; *Metropolitan Life Ins. Co. v. Howle*, 68 Ohio St. 614, 68 N. E. 4. In *Misselhorn v. Mutual Res. Fund Life Assn.*, 30 Fed. 545, the plaintiff declared on a preliminary contract to insure and on the policy itself, as a completed contract of insurance. He lost on both counts. The court held that in view of the provision as to delivery in health, in both the application and the policy, it was impossible to hold that a contract could be created by the delivery of the policy unless the provision in question could be abrogated.

As in case of the proviso as to prepayment of the premium, the authority of the agent, by delivery with knowledge of the unfavorable change in health of the insured sufficient to constitute notice, to waive this proviso, has been repeatedly recognized: *John Hancock Mutual Life Ins. Co. v. Schlink*, 74 Ill. App. 181; *Ames v. Manhattan Life Ins. Co.*, 167 N. Y. 584, 60 N. E. 1106, 31 App. Div. 180, 52 N. Y. Supp. 759; *Northwestern Life Ins. Co. v. Findley*, 29 Tex. Civ. App. 494, 68 S. W. 695; *Home F. Ben. Order v. Varnado* (Tex. Civ. App.), 55 S. W. 364. The doctrine here sustained was questioned in *McClave v. Mutual Res. Fund Life Assn.*, 55 N. J. L. 187, 26 Atl. 78, but is believed to be the correct view.

If material facts are concealed, however, as to the condition of the assured, or statements are made of a kind to induce the agent to refrain from making inquiry, it has been held that delivery, even with notice, will not operate as a waiver of the proviso, and a delivery under such conditions will be invalid and ineffective: *Maloney v. Northwestern Masonic Aid Assn.*, 8 App. Div. 575, 40 N. Y. Supp. 918; *Cable v. United States Life Assn.*, 111 Fed. 19, 49 C. C. A. 216. A delivery procured by misrepresentations as to the physical condition of the insured is no such delivery as will meet the proviso: *Equitable Life Assur. Soc. v. McElroy*, 83 Fed. 631, 28 C. C. A. 365.

The mere mailing of the policy to the agent is no such delivery as will express a waiver on the part of the insurer of the proviso as to delivery in good health: *Mutual Life Ins. Co. v. Sinclair*, 24 Ky. Law Rep. 1543, 71 S. W. 853. But delivery directly to the insured, through the mail, will accomplish such waiver: *Mutual Res. Fund Life Assn. v. Farmer*, 65 Ark. 581, 47 S. W. 850.

**2. Sound Health Defined.**—It has been said that “sound” health or “good” health, in so far as the proviso under consideration may be said to control the validity of the delivery of an insurance policy, will depend largely upon the circumstances of each case. A mere temporary indisposition will not be regarded as indicative of unsound health; but the ailment must be such as will have a tendency to shorten the life of the insured: *Plumb v. Penn Mutual Life Ins. Co.*, 108 Mich. 94, 65 N. W. 611; *Packard v. Metropolitan Life Ins. Co.*, 72 N. H. 1, 54 Atl. 287; *Baldi v. Metropolitan Life Ins. Co.*, 18 Pa. Supt. Ct. 599; *Woodmen v. Locklin*, 28 Tex. Civ. App. 486, 67 S. W. 331.

It has been held that unsoundness of health, such as is here intended, refers only to such as arose after the examination and application for insurance; and that although the insured was not in sound health when examined, a valid delivery and completion of the contract might be made, if there had been no change between examination and delivery. The insurer must look to the statements of the application and the corresponding provisions of the policy, and not to the clause as to sound health to be relieved from liability based upon conditions that render the contract an uninsurable risk: *Metropolitan Life Ins. Co. v. Moore*, 25 Ky. Law Rep. 1613, 79 S. W. 219. The decisions are not entirely in harmony upon this point, however, as will appear from an examination of *Austin v. Mutual Res. Fund Life Assn.*, 132 Fed. 555, where it was held that where an applicant for insurance died several years after the delivery of a policy containing a health clause, from a disease of a fatal character existing in an incipient stage prior to and at the time of the examination and application for insurance, he could not be regarded as in good health when the policy was delivered so as to make such delivery a valid completion of the contract.

**3. Delivery in Life.**—If the contract is conditioned upon delivery in the lifetime of the insured, as a matter of course, the policy must be delivered in compliance with the condition: *Hawley v. Michigan Mut. Life Ins. Co.*, 92 Iowa, 593, 61 N. W. 201; *Dickerson's Admr. v. Prov. Sav. Life Ins. Co. (Ky.)*, 52 S. W. 825; *Busher v. New York Life Ins. Co.*, 72 N. H. 551, 58 Atl. 41; *Stringham v. Pacific Mut. Life Ins. Co.*, 44 Or. 447, 75 Pac. 822; *McLendon v. W. O. W.*, 106 Tenn. 695, 64 S. W. 36, 52 L. R. A. 444; *Piedmont etc. Co. v. Ewing*, 92 U. S. 377, 23 L. ed. 610; *Misselhorn v. Mutual Res. Fund Life Assn.*, 30 Fed. 549. There can be no such thing as either actual or constructive delivery of a policy of insurance to a person who is dead: *Roblee v. Masonic Life Assn.*, 38 Misc. Rep. 481, 77 N. Y. Supp. 1098. There can be no valid delivery to the administrator of the estate of the deceased insured in a contract where delivery to the insured himself, in life, is a prerequisite. Thus in *Newcomb v. Provident Fund Soc.*, 5 Colo. App. 140, 38 Pac. 61, where the agent received the membership fee and premium and countersigned and sent the policy to the solicitor for delivery, in ignorance of the death of the insured, and the solicitor delivered the policy to the administrator of the insured, such delivery was held to be ineffective for any purpose.

#### IV. Acceptance of Policy.

Acceptance of the policy is the act of the insured, and is expressive of his intent to be bound by the conditions of the contract in the same

manner that delivery is expressive of the intent of the insurer; and is not only equally necessary, but is subject to the same limitations as are heretofore outlined with respect to delivery. Assuming that the contract is one requiring delivery to complete it, the interdependent relation between the two acts is such, that such contract is obviously subject to the qualification that acceptance, either actual or constructive, is as necessary as a valid delivery to render it complete and binding: *National Mutual Church Ins. Co. v. Trustees M. E. Church*, 105 Ill. App. 143; *Commonwealth Mut. Fire Ins. Co. v. Wm. Knabe & Co.*, 171 Mass. 265, 50 N. E. 516; *Shields v. Equitable Life Assur. Soc.*, 121 Mich. 690, 80 N. W. 793; *Bushaw v. Women's Mut. Ins. & Acc. Co.*, 55 Hun, 607, 8 N. Y. Supp. 423; *Travelers' Ins. Co. v. Jones*, 32 Tex. Civ. App. 146, 73 S. W. 978.

The principles which govern the necessity of acceptance, and its connection with the completion of the contract, are so far identical with those already considered in relation to the subject of delivery, that it may be disposed of briefly. Thus, it may be stated as a general rule that acceptance is necessary to the completion of a contract, where the policy does not conform in every essential particular to the application: *Mutual Life Ins. Co. v. Gorman*, 19 Ky. Law Rep. 295, 40 S. W. 571; *Robinson v. United States Ben. Soc.*, 132 Mich. 695, 102 Am. St. Rep. 436, 94 N. W. 211; *New York Life Ins. Co. v. Manning*, 124 N. Y. Supp. 775; *Prince v. State Mutual Life Ins. Co.*, 77 S. C. 187, 57 S. E. 766. Nor is the insured bound to accept such a policy: *Mutual Life Ins. Co. v. Gorman*, 19 Ky. Law Rep. 295, 40 S. W. 571, where the application contained no hint of a limited risk, but the policy excepted death by smallpox.

Although, as heretofore noted, delivery to an agent for unconditional delivery to the insured is, in effect, delivery to the insured, yet such doctrine does not rest upon the principle that the agent is the agent of the insured in the transaction: *Dibble v. Northern Ins. Co.*, 70 Mich. 1, 14 Am. St. Rep. 470, 37 N. W. 704; but the agent is merely the custodian of the policy. Thus, in *St. Louis Life Ins. Co. v. Kennedy*, 6 Bush, 450, it was held that where an insurance policy upon a contract for delivery upon payment of the initial premium, and in health, reaches the insurance agent for delivery under the terms of the contract, it becomes thereupon an escrow in the prosecution of the agent, and the contract is inchoate and incomplete until the policy is delivered and accepted in accordance with such terms. It has also been held, for the same reason, that the local agent of an insurance company is not the agent of the insured in receiving a policy, so as to be authorized to bind the insured by the receipt of a policy different in a material respect from the application, without having had an opportunity to know and ratify the changed contents: *Robinson v. United States Ben. Soc.*, 132 Mich. 695, 102 Am. St. Rep. 436, 94 N. W. 211.

Changes in contracts of insurance of the character here referred to do not, however, affect the validity of such contracts, since the insured is at liberty to accept the changed contract or not, as he pleases, and when accepted the contract becomes the contract agreed upon: *McMaster v. New York Life Ins. Co.*, 183 U. S. 25, 22 Sup. Ct. Rep. 10, 46 L. ed. 64; *Home Life Ins. Co. v. Myers*, 112 Fed. 846, 50 C. C. A. 544.

The acceptance of a changed policy with notice binds the insured: *Arnhorst v. National Union*, 179 Ill. 486, 53 N. E. 988; *In re Millers'*



& Manufacturers' Ins. Co., 97 Minn. 98, 106 N. W. 485, 4 L. R. A., N. S., 231, 7 Ann. Cas. 1144; Overton v. American Central Ins. Co., 79 Mo. App. 1. If, however, he cannot read, but accepts the policy nevertheless, the contract is not binding upon him, if he should desire to avoid liability thereunder. He is not compelled to take it to some one who can read for the purpose of ascertaining whether the company has given the contract agreed upon, but has the right to assume that the contract is in accord with his application. But the company is bound: Dryer v. Security Fire Ins. Co. (Iowa), 82 N. W. 494.

If an application for insurance is made with the understanding that the applicant is not bound to accept the policy, acceptance is necessary to complete the contract: Hogben v. Metropolitan Life Ins. Co., 69 Conn. 503, 61 Am. St. Rep. 53, 38 Atl. 214; Dickerson's Admr. v. Prudential Sav. Life Ins. Soc., 21 Ky. Law Rep. 611, 52 S. W. 825; New York Ins. Co. v. Manning, 124 N. Y. Supp. 775. In the Dickerson case the court thus gave expression to the principle involved: "We are of opinion that when the application was made, and medical examination had, with the understanding and agreement that Dickerson was under no obligation to take the policy when it came, if one should be issued, there was no meeting of the minds that was essential to the formation of every contract." In the Hogben case the court contented itself with showing that no contract at all existed where the applicant for insurance refused to comply with any of the conditions of the contract or to accept the policy. In the Manning case there was a more complicated state of facts to be dealt with. A life insurance policy was left at the office of the insured for several weeks. When the agent called to collect the premium, which he claimed to have himself paid the company, the insured declined to accept the policy at all, but agreed to take one for half the amount, or two thousand five hundred dollars. But when a policy for this amount was presented to him he again declined to accept it. Subsequently, the assured, while very ill, executed an assignment of the five thousand dollar policy to the agent for the alleged purpose of securing the latter's advanced premium. The agent then returned the two thousand five hundred dollar policy, and received one for five thousand dollars, which he, on his part, assigned for a consideration, and on which he paid premiums. Upon the death of the assured, it was held that the facts did not show that delivery and acceptance had ever taken place.

The assured is at liberty, at any time, to waive the condition under which his application was made and accept the policy. This was decided in Going v. Mutual Ben. Life Ins. Co., 58 S. C. 201, 36 S. E. 556, where the applicant for insurance became fatally ill after the issuance but before delivery of his policy. He had reserved the right to inspect the policy before accepting it and paying the initial premium; but he waived that right and tendered payment of the first premium. The court held that the reservation, which was for his sole benefit, would not defeat recovery under the contract, provided there was a distinct waiver. But only the assured himself may waive such a waiver. The executor of his will cannot do so: Mutual Life Ins. Co. v. Logan, 87 Fed. 637, 31 C. C. A. 172.

A policy which has been handed to the assured for examination requires to be accepted before it becomes effective: Equitable Life

*Assur. Soc. v. Mueller*, 99 Ill. App. 460; *Rey v. Equitable Life Assur. Soc.*, 16 App. Div. 194, 44 N. Y. Supp. 745. But if an applicant receives a policy and retains it without objection, it is acceptance: *New York Life Ins. Co. v. Easton*, 69 Ill. App. 479; *Massachusetts etc. Soc. v. Sibley*, 158 Ill. 411, 42 N. E. 137; *Adams v. Eidam*, 42 Minn. 53, 43 N. W. 690.

Where a policy is issued voluntarily, without an application therefor, both delivery and acceptance are essential, particularly the latter: *Stebbins v. Lancashire Ins. Co.*, 60 N. H. 65; *Folb v. Phoenix Ins. Co.*, 109 N. C. 568, 13 S. E. 798.

As heretofore noted, the delivery of a policy of insurance is not, in the absence of an express stipulation to that effect, conclusive evidence of the completion of the contract, but unconditional acceptance is: *Hartford Ins. Co. v. Whitman*, 75 Ohio St. 312, 79 N. E. 459, 9 Ann. Cas. 218. A policy of insurance merely left at the house of the insured may be adequate delivery, according to the circumstances, but is not evidence of its acceptance: *Lauze v. New York Life Ins. Co.*, 74 N. H. 334, 68 Atl. 31.

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## MCINTYRE LUMBER AND EXPORT COMPANY v. JACKSON LUMBER COMPANY.

[165 Ala. 268, 51 South. 767.]

**CONTRACT TO MANUFACTURE — Certainty and Mutuality.** The mere fact that the amount of a product called for by a contract is uncertain or depends upon the will or efforts of the manufacturer does not render the contract void. (p. 67.)

**CONTRACT TO MAKE TIES—Certainty and Mutuality.—**A contract to purchase all the cross-ties of a given kind made by a manufacturer of lumber, at a given price, until the purchaser orders the manufacturer to make no more, is valid. It binds the manufacturer, probably not to make any ties, but, if he does make any, to sell them to the purchaser at the agreed price; and it binds the purchaser to take any ties already made at any time he chooses to terminate the agreement. (p. 68.)

Fitts & Leigh, for the appellant.

Roach & Chamberlain, for the appellee.

**270 MAYFIELD, J.** Appellee, a company engaged in the manufacture and sale of lumber, including cross-ties, sued appellant, a lumber company, engaged in the purchase, sale and export of lumber, including cross-ties, for a breach of an alleged contract. Issue was joined on count 3 as last amended, and counts 4 and 5 added by amendment.

The third count as last amended was as follows: “(3) The plaintiff claims of the defendants the further sum of one hundred and six and 39/100 dollars (\$106.39) and the interest thereon, damages, for the breach of an agreement entered into by them on, to wit, July 20th, 1907, in sub-



stance as follows: The defendants agreed to purchase all of the heart ties 5 in. x 8 in. x 8 ft., meaning thereby 5 inches thick by 8 inches wide by 8 feet long, that the plaintiffs manufactured at their mill, until the defendants notified the plaintiffs to discontinue the cutting, the plaintiffs to load the ties on the cars on the railroad near the plaintiffs' mill, at and for the price of fifteen dollars (\$15.00) per thousand feet f. o. b. cars; and plaintiffs agreed to sell to the defendants the said ties at the price and on the terms above specified. And the plaintiffs aver that they made, to wit, 7,093 feet of such ties for the defendants, and had the ties ready to load on cars, whereupon the defendants instructed, or advised, plaintiffs that they would take no more ties from the plaintiffs, and although the plaintiffs continued to have the said ties so manufactured, ready for loading, the defendants refused to accept the said ties, and to pay for same."

The other counts were practically the same as this, except that they averred that the ties were ready to be delivered on board the cars, and that defendant refused to accept the ties or to allow plaintiff to load and deliver, etc.

<sup>271</sup> It is first insisted by appellant that the counts do not state a cause of action, in that they do not show any mutual agreement, binding alike on both parties, and that the alleged contract is so vague and indefinite as to be wholly void for uncertainty. It is true that a contract for the future delivery of personal property may be void because there is no consideration or mutuality, if the contract or any material part of it is wholly conditioned upon the will, wish or want of only one of the parties; but an accepted offer to furnish or deliver such articles as may be needed or consumed by a person in a given business, during a limited time, is binding, because it contains the accepted offer to purchase all the articles thus required during this time, and from the party who invokes the offer, but a mere offer to furnish such as a party might want or desire would be void. A contract to purchase the entire output of a mill or plant, for a given and reasonable time, at a given price, is valid, and so likewise is a contract to purchase the entire output of a certain product of a plant, such as all the heart lumber, at a certain price; but an agreement to purchase all that the manufacturer desires to sell to the purchaser, at a certain price, or all that the purchaser desires to take, at a certain price, would be void. The mere fact that the amount of the product is uncertain or depends upon the will or efforts of the manufacturer does not render the contract void. It is the fact that whether he will be bound depends upon his will or caprice that renders the contract void. All contracts for the entire output of a given plant or business, of course, as to amount produced depend more or less upon the will and efforts of the manufacturer; likewise does the amount of the

purchase of all the materials a party may need in his business depend in a measure upon his will and efforts.

<sup>272</sup> The contract in question was nothing more or less than an agreement on the part of the defendant to purchase all of the cross-ties of a given kind manufactured by the plaintiff, who was engaged in the business of manufacturing lumber, at a given price, until the purchaser ordered the manufacturer to make no more. It is true that the purchaser could terminate the contract at its pleasure, but it was required, as a part of the contract, to take all those on hand at that time, at the agreed price, and on the conditions fixed by the contract. It is likewise true that the manufacturer might have been unable to manufacture any ties of this kind, or it may have had the choice not to manufacture them if it willed, but if it did manufacture them, then it was to sell to this purchaser and to no one else, and at this price and no other. After it had manufactured one or one thousand of these ties, it was bound by this contract to sell them to defendant and at this price, and the purchaser was bound to take them at this price and under the conditions of the contract. There was nothing indefinite or uncertain then. The contract was mutually binding on the parties, and was as definite and certain as any contract could be. All contracts or agreements of this nature are indefinite and uncertain in their incipency, but if they are capable of being made certain, and are made certain by words or deeds of the parties, they are thereafter binding on both parties. There are many contracts of this kind—options, contracts to purchase the output or products of certain plants, etc.—where the quantity of the purchase is in its very nature uncertain until the article is produced; but, after this term is made certain, the contract is as binding as any other. If plaintiff had sold the ties in question to a third party, it would have been liable to the defendant as for a breach of this contract. If it <sup>273</sup> had refused to sell or deliver to the defendant at this agreed price, it would have been liable as for a breach of the contract. So it is a mistake to say that plaintiff was not bound by the contract. It was not bound to manufacture any given number of these particular ties, and probably not any; but if it did manufacture them, it was bound to sell them to this defendant at this price. This was the contract, and it was valid. Of course the defendant could not have compelled the plaintiff to manufacture these particular ties; that was not the contract. The contract was that if it did manufacture such ties, it would sell them to defendant at this price. After it had manufactured the particular kind of ties which the defendant offered to purchase of it, if it would make them, and to purchase all of that kind which it would manufacture, until defendant notified it to manufacture no more, it would be unconscionable to allow the defendant to

say, "I will not take the ties because I could not have compelled you to manufacture them." The plaintiff had made certain that which was at first uncertain. The defendant had caused the plaintiff to become bound, and it cannot now escape liability on the ground that the plaintiff could have avoided being bound by declining to manufacture the ties.

The supreme court of the United States, in the case of *Storm v. United States*, 94 U. S. 76, 24 L. ed. 42, speaking of a written contract something like the one in question, uses this language: "Where the defendant has actually received the consideration of a written agreement, it is no answer to an action brought against him for a breach of his covenants in the same to say that the agreement did not bind the plaintiff to perform the promises on his part therein contained, provided it appears that the promises in question have in fact been performed in good faith, and without prejudice to the <sup>274</sup> defendant: *Morton v. Burn*, 7 Ad. & El. 19, 34 Eng. Com. L. 18. Agreements are frequently made which are not, in a certain sense, binding on both sides at the time when executed, and in which the whole duty to be performed rests principally with one of the contracting parties. . . . Cases often arise where the agreement consists of mutual promises, the one promise being the consideration for the other; and it has never been seriously questioned that such an agreement is valid, and that the parties are bound to fulfill their respective obligations."

This court, in *Sheffield F. Co. v. Hull C. & C. Co.*, 101 Ala. 446, 14 South. 672, in construing a contract to manufacture and sell coke, which, like the contract in this case in its inception, was optional and unilateral, said: "The evidence is clear and free from conflict to the proof of the efforts of the coke company to induce the building of additional ovens and the manufacture of the requisite coke by the operators, as was contemplated in the agreement, and of the entire success of these efforts. Thereby the condition of plaintiff's absolute obligation to sell and deliver the coke was met and removed, and the unilateral agreement, not binding on either party because in terms not binding on one, was converted into a mutually obligatory contract."

The law does not favor, but leans against the destruction of contracts because of uncertainty; it will, if feasible, so construe the contract as to carry into effect the reasonable intention of the parties if that can be ascertained: *Boykin v. Bank of Mobile*, 72 Ala. 262, 47 Am. Rep. 408. If by the terms of an agreement an option is reserved to one party, to determine it, or to consummate it to a contract, the law will give the like option to the other, until both are bound; then it becomes a binding contract: *Eskridge v. Glover*, 5 Stew. & P. 264, 26 Am. <sup>275</sup> Dec. 344. This was the case here; either party could have terminated this agreement or option, before

the plaintiff had manufactured any of the ties; until then it was binding on neither, after that it was binding on both. All the cases cited and relied upon by appellant are clearly distinguishable from the case at bar on the grounds stated above. On the undisputed evidence in the case the plaintiff was entitled to recover.

The case was tried by the court without the intervention of a jury; the finding of the court stands for the verdict of a jury. There was evidence to support the finding of the court as to the amount of the judgment. While there may have been evidence to support judgment for a less amount, we cannot revise the findings or judgment of the court, on this appeal, because they are supported by the evidence.

We are not prepared to say that there is any reversible error, and the judgment of the lower court is affirmed.

Anderson, McClellan, and Sayre, JJ., concur.

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*A Contract for a Specified Amount of Glass*, leaving the privilege to the party purchasing to change sizes from those specified or to cancel in an emergency such portion of the order as has not been taken in work by the other party, is not void for want of mutuality: *Semon Bache & Co. v. Coppes, Zook & Mutschler Co.*, 35 Ind. App. 351, 111 Am. St. Rep. 171. But a contract reciting that one party has bought of another party "all the colored noils for the year 1887, at forty cents, to be delivered monthly," which one of the parties contends was a purchase of the output of his mill for that year, while the other contends that it was a purchase of such noils as he required in the course of his business during such year, is void for ambiguity, and by itself and without competent evidence to make it certain cannot be made the basis of an action: *Hall v. Chambersburg Woolen Co.*, 187 Pa. 18, 67 Am. St. Rep. 563. And if there is no consideration for the promise of one person to furnish or sell so much of a commodity as the other may want, except the promise of such other to take and pay for so much thereof as he may want, and there is no agreement that he shall want any certain quantity, and no method by which it can be determined whether he will want any of the commodity, or what quantity he will want, the contract is void for lack of mutuality: *Higbie v. Rust*, 211 Ill. 333, 103 Am. St. Rep. 204. See, also, *Louisville & Nashville R. R. Co. v. Coyle*, 123 Ky. 854, 124 Am. St. Rep. 384.

MONTGOMERY LIGHT AND WATER-POWER COMPANY v. WATTS.

[165 Ala. 370, 51 South. 726.]

**GAS—Rates—Charging for Meter.**—Where the Charter of a gas company fixes the maximum rate that can be charged at one dollar and sixty-two cents per thousand feet for lighting and one dollar and eight cents for other purposes, the company is not authorized to charge consumers a minimum of one dollar per month as meter rent when they do not consume one dollar's worth of gas during the month. (pp. 71, 72.)

Steiner, Crum & Weil, for the appellant.

Arrington & Houghton, for the appellee.

<sup>371</sup> SIMPSON, J. This is an appeal from the action of the court on a petition for mandamus to compel the appellant to furnish gas in accordance with certain rates fixed by the ordinance of the city of Montgomery granting the franchise on the conditions therein named. Section 4 of the ordinance, which was accepted by the appellant, provided that said company should "at all times supply the inhabitants of the city with gas for lighting and heating purposes" at prices not exceeding <sup>372</sup> one dollar and sixty-two cents per one thousand cubic feet for lighting purposes, and one dollar and eight cents per one thousand cubic feet for heating and other purposes. There is no provision in the ordinance in regard to meters, and the question at issue between the parties is whether or not the said company is authorized to charge to consumers a minimum amount of one dollar per month as meter rent, when said consumer does not consume one dollar's worth of gas during the month.

The decisions are not in harmony on this question, though it will be found that the cases generally, which justify such a charge, are based upon ordinances or contracts differently worded, or upon general principles without regard to any contract—all of which can be ascertained from an examination of the cases cited in appellant's brief. However, the ordinance constitutes the charter of the company, and the contract between it and the city is for the benefit of the citizens; and the reasoning of the cases which deny such right to the company under like circumstances commends itself to our judgment. It may be admitted that, upon general principles, it would be reasonable to allow such a rule, where the amount of gas consumed is so small as to render it unreasonable that the company should furnish a meter and keep it up for so small an amount of business, yet we do not see how a court can write into the contract an additional provision. The agreement of the company is to furnish gas at so much per cubic foot, and that must necessarily mean that all the means

and instrumentalities necessary to furnish it, at those rates, shall be provided by the company. It may adopt any means, suitable and accurate, for ascertaining the number of feet consumed, and the customer cannot direct or provide what means shall be used; his only concern being that he receives the service, and is not charged more than the rate fixed by the law or the <sup>373</sup> contract. If the company desired the privilege of charging more in certain cases, it should have had a provision to that effect inserted in the ordinance before it accepted the same.

It will not do to say that the charge fixed was only for the gas, and does not refer to the meter. The meter belongs to the company, and is placed there by it in order to ascertain how much gas is being consumed. As has been aptly said: "Presumably the company was aware, when it obtained its charter and established its monopoly, that there would be small customers, as well as large ones, and there would be less profit in furnishing the one class than the other; but it did not, on that account, reject the charter, or obtain the right to add to the price of the small consumer's bill": *Louisville Gas Co. v. Dulaney & Alexander*, 100 Ky. 405, 38 S. W. 703, 36 L. R. A. 125; *Thornton on Oil and Gas*, secs. 552, 561, 562. It is true that this court has held that a citizen who is using electric lights and does not propose to use gas cannot insist on having a meter placed in his house merely to provide against accidents; but no such proposition is suggested in this case, as the petitioner proposes to use gas: *Fleming v. Montgomery Light Co.*, 100 Ala. 657, 13 South. 618.

Section 5 of the ordinance is ambiguous in its meaning; but, whatever may be its meaning, it does not affect the merits of this case. Whether the additional charge be called a meter rent or a minimum charge, neither is provided for in the ordinance; and to permit it would be to allow the company to charge more than is authorized by its charter.

The judgment of the court is affirmed.

Dowdell, C. J., and McClellan and Mayfield, JJ., concur.

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*The State, Either Directly or by Delegation to Some Appropriate Agency*, has the right to prescribe the charge or rates to be made by a public service corporation for a public service, provided, under the facts and circumstances, the charge fixed is sufficient to afford a reasonable compensation: *City of Madison v. Madison Gas etc. Co.*, 129 Wis. 249, 116 Am. St. Rep. 944. See, also, *Brooklyn Union Gas Co. v. City of New York*, 188 N. Y. 334, 117 Am. St. Rep. 868; *State v. Board of Water etc. Commrs.*, 105 Minn. 472, 127 Am. St. Rep. 581; *Twitchell v. Spokane*, 55 Wash. 86, 133 Am. St. Rep. 1021. When an ordinance authorizes an electric company to make a specified maximum charge for furnishing electricity to consumers by meter rate, and a specified maximum charge by flat rate, it has been affirmed that the company has the option to furnish at a reasonable charge electricity upon either the flat or meter basis: *Horner v. Oxford Water & Electric Co.*, 153 N. C. 535, ante, p. 681.



**MANISTEE MILL COMPANY v. HOBODY.**

[165 Ala. 411, 51 South. 871.]

**NAMES.—A Person may Adopt Any Name, Style, or Signature,** wholly different from his own name, by which he may transact business, execute contracts, issue negotiable paper, and sue and be sued. (p. 75.)

**PARTIES—Amendment Changing.—A Complaint** against "Manistee Mill Company" may be amended by substituting as defendant "Vastine J. Herlong, doing business under the name of Manistee Mill Company," it appearing that the individual and the company are one and the same person or entity. Whether the company is a corporation, a partnership, or a name assumed by an individual, is a matter merely of description, as to which an amendment may be made without changing the parties to the suit. (p. 75.)

**LIMITATION OF ACTIONS—Amendment Changing Parties.—**Where a complaint is filed in time against the Manistee Mill Company, but it is amended by substituting as defendant Vastine J. Herlong, doing business under the name of Manistee Mill Company, the statute of limitations is no defense, if the company and the individual are the same person or entity. (p. 76.)

**DAMAGES—Personal Injuries—Partial Disability.—**In an action for personal injuries that leave the plaintiff still capable of doing something for a livelihood, the burden is on him to show the difference between his earning capacity before and that since the injury. (p. 76.)

**TRIAL—Instructions.—The Use of the Word "Even"** in an instruction that "even should you find for the plaintiff, he can recover in this action only his actual damages," carries an intimation of the court's opinion and is an invasion of the province of the jury. (p. 76.)

Charge 14 referred to in the opinion is as follows: "The court charges the jury that, even should you find for the plaintiff, he can recover in this action only his actual damages."

Stevens & Lyons, Barnett & Bugg, and Bayles, Hybart & Burns, for the appellant.

McCorvey & Hare and J. N. Miller, for the appellee.

**413 SIMPSON, J.** This action for damages, on account of a personal injury, was brought by the appellee, on September 14, 1906, against "Manistee Mill Company, a corporation." There appears in the record, after the organization of the court, the statement that "plaintiff amends his complaint by adding as a party defendant Vastine J. Herlong, doing business under the name of Manistee Mill Company, and alias summons and complaint to be issued to said party and the case continued." Immediately following is the summons and complaint dated February 4, 1907. Although the order of amendment is not dated, yet it is treated by the parties as a part of the entry of October 8, 1906. It was also so consid-

ered by this court, when the case was here at a previous term; the court holding that "at the first term of the court after its filing and service the complaint was amended by adding as a party defendant, Vastine J. Herlong, doing business under the name of Manistee Mill Company." We held, also, that subsequently an entirely new complaint was filed, and the words "body corporate" were stricken out, "leaving the <sup>414</sup> complaint against Herlong and Manistee Mill Company as parties defendant, thus leaving undefined the entity of the company, whether a corporation, a partnership, or an individual doing business under that name." The appeal then, was by the plaintiff, and it was held that whether the several amendments were properly allowed was not a question presented by the record, that the plaintiff could not complain of it, and the only way in which it was presented was that the appellee (defendant) justified the court in giving the general charge in favor of the defendant on the ground of variance, but, inasmuch as the evidence showed that Herlong and the Manistee Mill Company were the same, there was no variance: *Hobdy v. Manistee Mill Co.*, 156 Ala. 308, 47 South. 69.

In the case of *Ex parte Nicrosi*, 103 Ala. 104, 15 South. 507, this court held that where the affidavit, bond and writ in an attachment case, described the defendant as "R. G. Co., a corporation," it was permissible to amend the affidavit, bond and writ, so as to describe the defendant as "E. R., a married woman doing business by the written consent of her husband, filed and recorded in the probate court, under the name and style of the R. G. Co.," and granted a writ of mandamus, directing the allowance of said amendment. The reasoning of the court is that the R. G. Co. was the party sought to be made liable, that it was the entity sued, and whether it was a partnership, a corporation, or a name assumed by an individual were matters of mere description, and that any change in the description of the entity did not work a change of parties to the suit.

In a previous case, in which the defendant was sued as the "W. Ry. of Ala.," without other descriptive <sup>415</sup> words, the plaintiff was allowed to amend, by adding the words "a body corporate," as it only added words of more definite description: *Western Railway of Alabama v. Sistrunk*, 85 Ala. 352, 5 South. 79.

On the other hand, it was held that a complaint against "D. McG., President of D. A. R'd Co.," could not be amended by substituting the "D. A. R'd Co." as defendant, for the reason that suit was originally against the individual and could not be changed to include a suit against the corporation: *Davis Ave. R. Co. v. Mallon*, 57 Ala. 168.

Again, it was held that a complaint against the "A. & W. P't R'd, and W. R'y Co. of Ala., a foreign corporation under the laws of Ga.," could not be amended by changing the name



of the defendant to the "W. R'y Co. of Ala., a corporation incorporated under the laws of Ala.," the court saying that it could not judicially know that there was not a railroad company, incorporated under the laws of Georgia, known as the "A. & W. P't R'd and W. R'y of Ala.," nor that there was not a railroad corporation in Alabama known as the "W. R'y of Ala.": *Western Railway of Alabama v. McCall*, 89 Ala. 375, 7 South. 650.

A suit in the name of "A B, agent for C D," was simply a suit of A B's and could not be amended so as to make it the suit of C D: *Hallmark v. Hopper*, 119 Ala. 78, 72 Am. St. Rep. 900, 24 South. 563.

Where a suit was brought in the name of a corporation as plaintiff, it could not be amended by substituting another, as the assignee of said corporation: *Vinegar Bend Lumber Co. v. Chicago Title & Trust Co.*, 131 Ala. 411, 30 South. 776.

A suit against "S. & B. S., doing business as S. Bros.," could not by amendment be converted into a suit against "S. Bros., a corporation," as the words "doing business" <sup>416</sup> as S. Bros." were mere *descriptio personae*, so that the suit was against the individuals, and could not be so amended as to be against another party, to wit, the corporation. The court said that this case was not within the principle of the *Nicrosi* case (103 Ala. 304, 15 South. 507), "where descriptive words were eliminated by amendment, and other descriptive words were substituted": *Steiner Bros. v. Stewart*, 134 Ala. 568, 33 South. 343.

Where the complaint described the defendant as "the L. Lumber Co., a firm composed of B. A. L. et al., and B. A. L., individually," this court held that the complaint could be amended by striking out the words "a firm, etc.," and inserting in lieu thereof, the words "a corporation organized under the laws of the state of Maine" (*Lewis Lumber Co. v. Camody*, 137 Ala. 578, 35 South. 126), the court saying that "the party sued is the Lewis Lumber Company, and the words stricken out, and those added, are merely descriptive."

Where the affidavit was against the "W. Saw Mill Co.," it was properly amended so as to make the action against, "G., doing business as the W. Saw Mill Co.": *First Nat. Bank v. Gobey*, 152 Ala. 517, 44 South. 535.

It is also laid down as a principle of law that "a person may adopt any name, style, or signature, wholly different from his own name, by which he may transact business, execute contracts, issue negotiable paper, and sue and be sued": 29 Cyc. 270; *Pease v. Pease*, 35 Conn. 131, 95 Am. Dec. 225.

It must be admitted that the margin is very close between some of our own decisions, but we hold that the entity sued in this case is the Manistee Mill Company, and whether it be a corporation, a copartnership, or a name assumed by an indi-

vidual is a matter merely of description, as to which an amendment may be made <sup>417</sup> without changing the parties to the suit. This view is strengthened by section 5367 of the Code of 1907, which fixes the only limit to amendments which "relate back to the commencement of the suit," that they shall "refer to the same transaction, property, title and parties, as the original, and where this is not apparent on the averments of the pleading, it shall be a question of fact for the jury." Under this section it was a question of fact for the jury whether or not V. J. Herlong and the Manistee Mill Company, originally sued, were one and the same person or entity, and if they were, the statute of limitations was no defense to the action; and there was only one party defendant to the action. As the previous part of the complaint had described the Manistee Mill Company as, simply, V. J. Herlong, the mere addition of that name did not render it necessary to state again what the Manistee Mill Company was.

The court, in its oral charge, after instructing the jury that, if they found for the plaintiff, they should give him, as part of his damages, his reasonable expenses, compensation for loss of time, reasonable compensation for mental and physical suffering, and also for the permanent injury; and after speaking of his probable expectancy said: "You may give the plaintiff the amount of his earnings during such expectancy, as a part of his damages." In the present case the plaintiff testified that he was incapacitated to do sawmill work—that is, "the physical part of it"—but, as it is evident that he is still capable of doing something for a livelihood, the burden was on the plaintiff to show the difference between his earning capacity before, and that since, the injury.

The use of the word "even," in charge No. 14, requested by the defendant, carries with it an intimation of the court's opinion to the effect that it is not probable they <sup>418</sup> will so find, and was an invasion of the province of the jury. The charge was properly refused.

The judgment of the court is reversed and the cause remanded.

Dowdell, C. J., and McClellan and Mayfield, JJ., concur.

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*Amendments to Pleadings Changing the Parties* are discussed in the note to *Flanders v. Cobb*, 51 Am. St. Rep. 427. The limitation upon the right of amendment is that no new cause of action shall be introduced and no new parties brought in after the statute of limitations has become a bar: *Holmes v. Pennsylvania R. R. Co.*, 220 Pa. 189, 123 Am. St. Rep. 685, and see cases cited in the cross-reference note thereto. But an amendment which works an entire change of party plaintiff is not allowable. Thus if an action is brought in the name of "A, agent for B," an amendment by which the action would be made to stand in the name of B, as plaintiff, would work an entire change of party plaintiff, and is not allowable: *Hallmark v. Hopper*, 119 Ala. 78, 72 Am. St. Rep. 900.

**SOUTHERN RAILWAY COMPANY v. LEWIS.**

[165 Ala. 555, 51 South. 746.]

**MASTER AND SERVANT—Acts of Independent Contractor.**

If the work to be done by an independent contractor cannot be done without danger or injury to third parties, if its very nature and existence is such as to cause or produce danger or injury, the owner, master or contractor is liable as if he performs it himself. But if the work is not necessarily dangerous, and will not, if properly executed, result in danger or injury to third parties, but is rendered so only by the negligent manner in which it is performed, then the owner, master or operator is not liable, but only the independent contractor. (p. 80.)

**SURFACE WATERS—Flooding Land.**—Where an Excavation made by a railroad company of itself causes surface waters to flood the land of the lower proprietor, the company is not relieved of liability because the work was done by its contractor and without negligence. (p. 80.)

**SURFACE WATERS—Flooding Land—Act of God.**—Where the making of an excavation by a railroad company is in itself unlawful, and its very nature is to turn surface waters upon a lower proprietor, the company cannot escape liability for flooding his land by setting up unprecedented rains as the cause thereof. (p. 81.)

**SURFACE WATERS.**—Although the Rights and Duties of adjoining owners as to surface water and its drainage differ from the rights and duties as to streams flowing through their lands, some of the maxims apply to both cases, such as "so use your own property as not thereby to injure that of another," and "water flows, and as it flows, so it ought to flow." (p. 81.)

**SURFACE WATERS—Owners of Land Do not have Property Rights** in surface waters thereon by virtue of their ownership of the land. (p. 82.)

**SURFACE WATERS.**—Natural Drains for Surface Waters must be kept open by the owner, and the lower estate is subject to the servitude of receiving the water through its accustomed and natural channels. (p. 82.)

**SURFACE WATERS—Casting upon Neighbor's Land.**—The owner of land on which surface waters come by nature cannot collect it in artificial drains and ditches and thereby cast it upon his neighbor's land or so near the line that it will thereby naturally flow on his premises. (p. 82.)

**SURFACE WATERS—Flooding Foundry and Coal Yard.**—When a railroad company, in making an excavation, casts surface waters upon premises occupied by a foundry and coal and coke yard, where there is no artificial drainage provided by law, nor any necessity therefor, and the excavation is not occasioned by the building of the city or the improvement of a city lot, the company cannot invoke the doctrine that a land owner has a right to discharge surface waters on city lots for which artificial drainage is or must be provided. (p. 83.)

**SURFACE WATERS—Flooding Land—Pleading.**—In an action for damages for the flooding of land caused by an excavation made by the defendant, the complaint need not allege that the work of excavation is negligently done; it is sufficient to show that it was wrongfully done and that the plaintiff was damaged in consequence thereof. (p. 83.)

**SURFACE WATERS—Flooding Land—Evidence.**—In an action for damages for the flooding of land caused by an excavation

made by the defendant, it is competent for the plaintiff to show that he told the defendant the excavation was too near a ditch, and that by reason of the excavation the banks of the ditch were so weakened that they broke and allowed the water to flow on the plaintiff's premises. (p. 83.)

**SURFACE WATERS—Flooding Land—Opinion of Witness.**—On the issue whether an excavation was made so near a ditch as to cause the walls thereof to break and the water to flow upon neighboring land, a question to a witness, "Did you leave enough bank to hold the water in the ditch?" is objectionable because calling for an opinion or conclusion. (p. 83.)

**SURFACE WATERS—Flooding Lands—Evidence.**—Where a railroad company makes an excavation close to the banks of a ditch, so that they break and permit the water to flow upon neighboring land, it is competent for the land owner to show, in his action for damages, what work the company did on the banks and ditch, after the third overflow, and that thereafter no further flooding occurred. (p. 83.)

**SURFACE WATERS—Flooding Lands—Evidence.**—In an action for the flooding of lands through making an excavation so near the banks of a ditch that they broke and permitted the overflow complained of, conversations between the plaintiff's agent and the person doing the excavating for the defendant corporation relative to the cutting down of the banks and made during the progress of the work are admissible as part of the *res gestae* and to show that the defendant knew or should have known of the injury that would result. (p. 84.)

Action by S. A. Lewis against the Southern Railway Company. From a judgment for the plaintiff, the defendant appeals.

The complaint follows: (1) "Plaintiff claims of the defendant two hundred and fifty dollars as damages, for that heretofore, to wit, on and prior to the seventh day of July, 1906, and subsequently thereto, defendant maintained a railroad track or tracks in Anniston, Calhoun county, Alabama; said tracks running in a northerly and southerly direction, and near to a foundry and machine-shop and coal and coke yard operated and owned by plaintiff in Calhoun county, Alabama, alongside or near said track or tracks. Plaintiff further avers that shortly prior to the seventh day of July, 1906, defendant caused to be excavated, or excavated, the lands west of said track or tracks, and by such excavation the course of the surface drainage of the lands to the north and west of plaintiff's said shop and yard was changed, so that great quantities of water, which otherwise would have flowed away from said property without injury thereto, were by reason of, and as a proximate consequence of, said excavation caused to overflow plaintiff's said property, and said foundry was flooded. Plaintiff incurred great expense in cleaning up and remedying the results of said flooding. The work in said foundry was stopped for several days on account of said flooding. The coal and coke in plaintiff's yard was washed away in large quantities, and was greatly damaged and depreciated in value by reason of being so

flooded and washed away. Great quantities of mud and slush and debris were caused to get mixed with said coal and coke, and great quantities of such material were washed into said foundry, and plaintiff was greatly inconvenienced and incommoded in and about the operation of said foundry and machine-shop, and in and about the conduct of said coal and coke yard. Plaintiff further avers that said flooding occurred on, to wit, the seventh day of July, 1906, and plaintiff was damaged as aforesaid on and subsequently to that date."

(2) Same as the first, down to the last allegation, with the following addition: "Said flooding occurred heretofore, to wit, on the seventeenth day of July, 1906, and was a separate and distinct flooding from that alleged in the first count."

(3) Same as 1 down to the last paragraph, with the following addition: "Said flooding occurred heretofore, to wit, on the fifth day of September, 1906, and was a separate and distinct flooding from that alleged in the first and second counts."

Knox, Acker & Blackmon, for the appellant.

Matthews & Matthews, for the appellee.

<sup>559</sup> MAYFIELD, J. This is an action by appellee, a lower land owner, against appellant railroad company to recover damages caused by the flooding of plaintiff's premises. The flooding is alleged to have been caused by the defendant's company's excavating, or causing to be excavated, the land west of its railroad track, thereby changing the course and flow of the surface drainage of the land to the north and west of plaintiff's land and plant, so that the surface drainage water from this territory, above plaintiff's land and plant, was made thereby to flow upon and over plaintiff's property to his great damage, etc.; that but for the excavation complained of the water would, and did prior thereto, naturally flow away from plaintiff's property, and not to or over it, as it did after the excavation, with appropriate averments as to damages suffered in consequence thereof. The complaint contained three counts, all alike except that each claimed special damages for a particular and distinct overflow or flooding occurring at a different <sup>560</sup> date named therein, caused by the excavation. To the complaint the defendant pleaded the general issue the statute of limitations of ten years, contributory negligence, the act of God in sending unprecedented rains, and that the excavation was done by an independent contractor. All of these pleas were stricken from the file, except the general issue, upon which the trial was had, which resulted in a verdict for plaintiff, as to each of the three counts, in the aggregate sum of three hundred dollars. From this judgment defendant appeals.

The first assignment insisted upon is that the defendant is not liable in this action, because the excavation directing the

waters was done by the defendant's independent contractor, and not by it, its agents or servants. True, the law is, as is insisted by counsel for appellant, that a master, principal, owner or operator is not liable for the negligence of his independent contractor, and is not so liable though he may direct, control and approve the work which is negligently done; but it is equally well-settled law that if the work contracted to be done is of itself hazardous or will, in its progress, however skillfully done, be necessarily or intrinsically dangerous, or liable to result in injury to another, or if the law imposes on the master or owner the duty to keep the subject of the work in a safe condition, the owner or contractee is liable, the same as if he performs it himself: Wood on Master and Servant, 2d ed., p. 603; Cuff v. Newark etc. R. Co., 35 N. J. L. 17, 10 Am. Rep. 205; Mayor etc. v. McCary, 84 Ala. 472, 4 South. 630, in which the above and many other authorities are cited. If the work to be done by the contractor cannot be done without danger or injury to third parties, if its very nature and existence is such as to cause or produce danger or injury, the owner, master or contractor is liable as if he performs it himself. If the work is not necessarily <sup>561</sup> dangerous, and will not, if properly executed, result in danger or injury to third parties, but is rendered so only by the negligent manner in which it is performed, then the owner, master or operator is not liable, but only the independent contractor. In this case there is no allegation or claim that the work was negligently done. It was the doing of the work in any manner that was alleged to have constituted the wrong. Probably the better it was done the greater was the wrong or injury to the plaintiff. There was no attempt on the part of either party to show that the work was negligently done, or was done in a manner not contemplated, ordered and directed by the defendant. Hence, as to this action, it was immaterial that the work was done by the defendant's contractor. While the later cases in this state, cited by counsel for appellant, to wit, Alabama M. Ry. Co. v. Martin, 100 Ala. 511, 14 South. 401, Scarborough v. Alabama M. Ry. Co., 94 Ala. 497, 10 South. 316, Rome & D. R. Co. v. Chasteen, 88 Ala. 591, 7 South. 94, and many others not cited, emphasize the rule that the master, owner or contractor is not liable for the torts, negligence, etc., of the contractor, his agents or servants, none of them deny the other rule above announced and amplified by Mr. Wood, on Master and Servant: Dillon on Municipal Corporations, 3d ed., sec. 1029, and Mayor etc. v. McCary, 84 Ala. 472, 4 South. 630. Hence there was no error in the various rulings of the trial court as to the question of law: Central of Ga. Ry. Co. v. Windham, 126 Ala. 552, 28 South. 392; Chattahoochee etc. R. Co. v. Behrman, 136 Ala. 508, 35 South. 132; Alabama M. Ry. Co. v. Coskry, 92 Ala. 254, 9 South. 202; Massey v. Oates, 143 Ala. 248, 39 South. 142.



Partly, but not wholly, for the same reason that the defendant in this case cannot escape liability, because the excavation was done by its independent contractor, it cannot escape liability because the flooding in question <sup>562</sup> was the act of God—that is, unprecedented rains. Had the defendant undertaken and attempted to protect the plaintiff's property from the surface and drainage waters diverted by it, and had done so, the work of excavating had been necessary and proper and not unlawful in itself, so far as the rights of the plaintiff were concerned, and the plaintiff's property had been injured only on account of the unprecedented rain, the act of God might have been a defense. But where the act itself, as in this case, was unlawful, and the very nature of it was to turn the flood upon the plaintiff, which would have gone in another direction but for the wrongful act, the flood can be no defense, unless it be shown that the injury suffered would have resulted with or without the alleged wrongful act of defendant. All rains are in a sense the act of God; and, as all surface water falling in this state is the result of rain—there being very little snow or sleet—the very act complained of here was the turning upon plaintiff's premises of this water (to his damage) which would have gone away from it but for the wrongful act. The greater the rains, the greater the damage. It would indeed be a strange law that would say: "If you do a small damage, you will be liable therefor, but if you do a very great wrong—greater than was anticipated—the excess will of itself constitute a defense." Could a man who wrongfully tore the roof off his neighbor's house in order to get the shingles to cover his own defend an action brought by his neighbor to recover damages for the destruction and injury to plaintiff's house and household goods by the rain, snow or hail, on the ground that the rain, snow or hail was unusual, unprecedented and excessive—that is, be liable for the damages done by a moderate and usual rain, snow or hail, but not for an unusual and excessive one? We think not. This is, in effect, what defendant <sup>563</sup> sought to do in this case by pleading and attempting to set up the act of God as a defense. The defense is no doubt a righteous one in a proper case, but this is not such a case.

The rights and duties of adjoining land owners as to surface water and the drainage thereof are different from the rights and duties as to streams of water flowing through their lands, as to which streams they are riparian owners. However, some of the same maxims apply to both cases, and upon these most all the law of waters is said to be based, to wit: (1) "So use your own property as not thereby to injure that of another." (2) "Water flows, and as it flows, so it ought to flow." The owners of land bordering upon flowing streams or through which such streams flow, or bordering upon

lakes and ponds, or upon which such lakes and ponds are wholly situated, have certain property rights in and to such water by virtue of their ownership of the land. These rights constitute a part of the land, and pass with it by conveyances of the land. But they have no such rights as to surface water. The question as to this is, How may the owner of the land get rid of it? Thus is raised the question of the right of drainage of it. One owner has no right to drain the water off his land and discharge it onto that of his neighbor by purely artificial channels which flow through his own land.

There is some conflict of authority as to whether natural depressions such as washes, gulleys and ravines must be kept open by the owner, so as to let the surface water go in its accustomed and natural channels across the owner's land. The better, or at least the more general rule, seems to be that the natural drains must be kept open, and that the lower estate is subject to the servitude of receiving this water through its accustomed and natural channels. However, some courts (but this <sup>564</sup> is not one of them) hold that there is no such servitude or duty upon the lower land to receive the surface water flowing naturally onto it, as that the owner may not dam and levy against it and throw it back upon his neighbor. This is sometimes called the "common law and common enemy" doctrine or rule—probably because these cases and this doctrine denominated surface water as the "common enemy of mankind," and held, therefore, that everyone had a right to fight it as he pleased, without regard to the rights of others. That is, that every land owner could take it off, or keep it off his premises in any manner or by any means he chose, provided he did not go on his neighbor's land to do it. This is one instance in which this state has adopted the rule of the civil law instead of that of the common law. Under this rule this court has repeatedly announced the doctrine that the owner of land on which surface water comes by nature cannot collect it in artificial drains or ditches, and thereby cast it upon his neighbor's land, or so near the line that it will thereby naturally flow on or to his neighbor's; that he cannot change the natural flow of such water so as to divert it onto his neighbor A, whereas naturally it would go onto his neighbor B. The owner has no right to so grade his land or to so erect embankments as to thus turn the natural flow of the surface water, nor can he gather this surface water into a body on his own land, and then discharge it in a body, when without being so collected and discharged it would have been scattered and diffused over greater territory.

There is an exception or a limitation to the rule above announced, and that is, it does not apply to city or village lots, property for which artificial drainage has been obtained, or which, from necessity, must be so drained. This may be



necessary under the laws of hygiene. <sup>565</sup> The question of drainage involves not only the private property rights of the owner, but it sometimes involves the rights, health and well-being of the public—in which case the individual rights of the owner yield to the common right of all. But if there be no artificial drainage provided by law, and no necessity therefor, and the land be not the usual city lots for ordinary building purposes, then the reason for the rule ceases, and the rule with it.

We do not think that the case in question falls within the rule that excepts city lots from the general rule of servitude: *Crabtree v. Baker*, 75 Ala. 9, 51 Am. Rep. 424; *Hall v. Rising*, 141 Ala. 43, 37 South. 586; 3 *Farnham on Waters and Water Rights*, p. 2607, sec. 889e. The work in question complained of cannot be said to have been occasioned by the building of a city or the improvement of a city lot, so as to fall within this exception. Each count of the complaint stated a cause of action, and was certainly not subject to any ground of demurrer interposed thereto, and there was abundant evidence to support the verdict and judgment found by the jury under each. It was not necessary that the complaint should allege that the work of excavation was negligently done. It was sufficient to show that it was wrongfully done and that plaintiff was damaged in consequence thereof.

It was competent for plaintiff to show that he had called to the attention of the persons who were doing the excavating that it was too near the ditch on the road, and to prove that, by reason of it, the banks of the ditch were so weakened that they would not hold the water, and that the banks, in consequence thereof, broke and allowed the water to flow out of the ditch onto plaintiff's premises to his damage. This evidence was proper, both to show that the excavation complained of <sup>566</sup> caused the injury and also to show scienter on the part of the defendant that the damage and injury would probably follow the wrong being done. Such evidence might authorize the jury to award punitive damages.

The court properly sustained the objection to the question propounded to the witness Mable, "Did you leave enough bank to hold the water in the ditch," etc. This clearly called for the gratuitous opinion or conclusion of the witness. He should have been required to state the facts, and let the jury draw the conclusions. The undisputed facts answered the question against the contention of the defendant. It was perfectly competent for plaintiff to prove what the railroad company did to the embankment and ditches in question after the third overflow. The fact that this evidence was favorable to defendant, as to the amount of damages recoverable, in that it tended to show that the injury to plaintiff's premises was no longer a continuous one—that there had been no further flooding after the defendant repaired its embankment

and ditches—did not render it incompetent. It also tended to show, or was admissible for the purpose of showing, that the overflow was the result of the defendant's excavating, as alleged, and not the result of some other cause, according to the tendency of some of defendant's evidence. The conversation between plaintiff's agent and Mable, who was doing the excavating in question for the defendant, relative to the cutting down of the embankment of the ditches, made, as it was, during the progress of the work, was admissible as a part of the *res gestae*, and also to show that the defendant knew, or ought to have known, of the damage and injury it would thereby cause the plaintiff to suffer. This knowledge or notice would tend, or might tend, to show that the act complained of was wantonly done—done with knowledge of the probable consequence, <sup>567</sup> and in utter disregard of plaintiff's rights in the premises: *Central of Georgia Ry. Co. v. Windham*, 126 Ala. 552, 8 South. 392.

This disposes of all the assignments insisted upon, and we find no reversible error in these or any others assigned.

The judgment of the court is affirmed.

Anderson, McClellan, and Sayre, JJ., concur.

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*The Right of a Land Owner to Accelerate or Diminish the Flow of Surface Water* to or from the land of another is discussed in the note to *Mizell v. McGowan*, 85 Am. St. Rep. 726. Recent important cases on this question are *Mason v. Commrs. of Fulton County*, 80 Ohio St. 151, 131 Am. St. Rep. 689; *Launstein v. Launstein*, 150 Mich. 524, 121 Am. St. Rep. 635; *Elser v. Village of Gross Point*, 223 Ill. 230, 114 Am. St. Rep. 326. The owner of a city lot in grading and improving it may shut out the surface flow of water upon his lot with no obligation to prevent it from flowing over adjacent lots, provided he does not proceed negligently so as to do unnecessary damage to others, nor obstruct a natural channel for the flow of the water, nor a channel that has acquired the character of an easement, nor can he gather surface water into a body and discharge it on the adjoining land: *Rielly v. Stephenson*, 22 Pa. 252, 128 Am. St. Rep. 804. See, also, *Ginter v. St. Mark's Church*, 95 Minn. 14, 111 Am. St. Rep. 438.

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## MOBILE, JACKSON AND KANSAS CITY RAILROAD COMPANY v. BAY SHORE LUMBER COMPANY.

[165 Ala. 610, 51 South. 956.]

**CARRIER—Liability for Delivery to Wrong Person.**—A carrier who delivers a shipment of lumber to the wrong person, without the production or the assignment of the bill of lading, is liable for a conversion. (p. 88.)

**CUSTOM—Necessity of Being General and Established.**—For a custom or usage to vary the implications of a contract, it must be established and acted upon generally and sufficiently long to raise

a presumption of its knowledge, and it can never vary the expressed stipulations of a contract. (p. 88.)

**CUSTOM—Necessity of Being Fair and Just.**—It is only a reasonable custom, not opposed to law, which is admissible to aid in the interpretation of contracts. Unfair and unrighteous ones the law should not allow to exist, much less to encourage or enforce. (p. 88.)

**CARRIER—Custom of Delivering Without Bill of Lading.**—Custom or usage is never admissible to justify the doing of an act which is negligent per se, such as a custom of carriers to deliver goods to persons other than the consignee, or to whom the consignee has not directed or authorized the delivery. (p. 88.)

**CARRIER—Delivery to Wrong Person.**—In an Action against a carrier for conversion in delivering lumber to the wrong person, it is necessary that a plea that the plaintiffs ordered the wrongful delivery by delivering an invoice to the person who received the lumber should identify the lumber sued for. And the plea is not sustained by evidence showing that the invoice described lumber in a car actually sold to him, but did not accurately describe the lumber sued for. (pp. 89, 90.)

Action by the Bay Shore Lumber Company against the Mobile, Jackson and Kansas City Railroad Company for the conversion of lumber. The plaintiff had judgment, and the defendant appeals.

The following is plea 2 as amended:

“For further answer to said complaint, defendant said: That plaintiff shipped over defendant’s line of railroad from some point in the state of Mississippi two car loads of lumber to the city of Mobile, in the state of Alabama, said lumber being loaded on cars of the defendant No. 3212 and No. 242 respectively, and consigned to plaintiff’s company at Mobile; that said cars of lumber were designated on one freight way-bill. Defendant further says that said lumber had been shipped to Mobile for the purpose of selling and disposing of the same in the market, and that upon the arrival of said cars in Mobile plaintiff by its agents and servants prepared and delivered to the Lewis Land & Lumber Company, a corporation engaged in the purchase and sale of lumber in the city of Mobile, an invoice or statement in writing, in words and figures as follows:

“ ‘Mobile, Ala., Nov. 28, 06.

“ ‘Our No. B. D. Order No. 45-G. Lewis Land & Lumber Co., Mobile, Ala., Dr. To Bay Shore Lumber Co., Manufacturers Yellow Pine Lumber. Cars. Nos. 3212 & 242, initial K. C. Shipped to Lewis Land & Lbr. Co., Mobile, Ala. Care of Munson S. S. Line.

32 pcs. 5x12x38.....6,089

23 “ 4 1-2x5 1-2x43 .....2,040

49 “ 6x8x43 .....8,248

—————16,548

16,548 ft. at 30.00.....\$579.18

“ ‘F. o. b. Mill. Copy’—

and that upon the demand of the said Lewis Land & Lumber Company, and upon the representation made by it that it had purchased the lumber upon said cars, the same was delivered to the said Lewis Land & Lumber Company. And the defendant further said that the lumber described in said complaint was contained in said cars; and defendant says that in delivering said cars to the Lewis Land & Lumber Company it acted upon the representation of the said Lewis Land & Lumber Company that it had purchased the lumber upon said cars indicated in said invoice or statement in writing as aforesaid, and that in delivering said cars to the Lewis Land & Lumber Company it acted in accordance with its custom of dealing with said plaintiff and said Lewis Land & Lumber Company, both of which said corporations were constantly shipping lumber over its line of railroad from points in the states of Mississippi and Alabama to the city of Mobile; and in accordance with said custom defendant delivered to the Lewis Land & Lumber Company and to plaintiff corporation the various and sundry shipments of lumber made by them without the production of any bill of lading. And defendant further alleges that, when the plaintiff corporation prepared and delivered to the Lewis Land & Lumber Company the invoice or statement in writing hereinabove set out it knew that the defendant railroad company would, in accordance with said custom, which was well known to the plaintiff, deliver said cars of lumber to the Lewis Land & Lumber Company; and defendant further alleges that the negligence of plaintiff in preparing and delivering to the Lewis Land & Lumber Company said invoice or statement in writing, indicating a sale by the plaintiff to the Lewis Land & Lumber Company of said two cars of lumber, caused the defendant to surrender possession of said two cars of lumber as aforesaid."

McIntosh & Rich, for the appellant.

Inge & Armbrecht, for the appellee.

<sup>613</sup> MAYFIELD, J. Appellee sued the lumber in trover for the conversion of certain lumber or timber which is minutely described in the complaint. The facts of the case are substantially as follows: The plaintiff shipped two cars of lumber over defendant's road from some point in Mississippi to Mobile, Alabama. These cars in which the lumber was shipped were cars of the defendant railroad <sup>614</sup> company, and were numbered 3212 and 242, respectively. Upon the arrival of the lumber in Mobile one Bates, representing plaintiff, called on one White, who was cashier of the railroad company and authorized to represent the defendant in the matter, and paid the freight on the two cars, and then told White that the two cars were for different parties to whom

plaintiff had contracted to sell the lumber, that car 3212 was to go to the Munson Line Docks for the account of the Lewis Land and Lumber Company, and that car 242 was to be carried to the defendant's dump to await the order of Hunter, Benn & Co., to whom they had contracted to sell the same. Later Bates called at the railroad office to know what had become of car 242, as Hunter, Benn & Co. had not received it. At this time Bates talked to White, the cashier, and one Holt, who was the defendant's chief clerk, and to another of defendant's agents, Mr. Drago. In this conversation Mr. White told Mr. Bates that it was not Bates' fault that the car had not been delivered, that he (Bates) had given the proper instructions that the car should be delivered to Hunter, Benn & Co.; but one of the defendant's agents at this time told Bates that the car had been delivered to the Lewis Land and Lumber Company on the 4th or 6th of November, and that Drago told him that the car had been delivered to the Lewis company as ordered, and not to the Hunter company. It was undisputed that the car of lumber No. 3212 was delivered to the Lewis company, to whom it was ordered to be delivered, and that about a week after it was delivered an agent of the Lewis company telephoned defendant for the delivery of car 242, and that after some controversy it was delivered to the Lewis company, and not the Hunter company, as directed by plaintiff, and delivered without the production of a bill of lading or any order from plaintiff, except the invoice furnished <sup>615</sup> the Lewis company by plaintiff and upon which it had theretofore delivered car 3212. It is undisputed that the defendant delivered the car to the wrong party and to a party who had no claim or right to it, and delivered it without the production or the assignment of the bill of lading.

Without more, this, of course, would render defendant liable to plaintiff in action of trover for the car of lumber so wrongfully delivered. This court, in the case of Louisville etc. R. R. Co. v. Barkhouse, 100 Ala. 543, 13 South. 534, speaking through McClellan, J., said: "A bill of lading does not pass by delivery, and the possession of it by one other than the consignee, without indorsement, will not authorize or justify the carrier in delivering the consignment to such person: Hutchinson on Carriers, sec. 344; 2 Am. & Eng. Ency. of Law, 241. The obligation to deliver only to the party having title to the bill of lading is imposed by law on the carrier, and is absolute. Any custom of a particular carrier, or of carriers generally at a particular place, to make deliveries to persons merely in possession of the bill of lading, is a bad custom, and cannot be adduced in evidence to exempt such carrier or carriers from liability for deliveries to wrong persons. Trover is the proper action, where there has been a delivery of property by a common carrier to a person not

entitled to it, by mistake. Such wrongful delivery is a conversion: *Bullard v. Young*, 3 Stew. 46; *Alabama & Tenn. River R. R. Co. v. Kidd*, 35 Ala. 209." For a custom or usage to vary the implications of a contract, it must be established and acted upon generally and sufficiently long to raise a presumption of its knowledge, and it can never vary the expressed stipulations of a contract. It is only a reasonable custom, not opposed to law, which is admissible to aid in the interpretation of contracts. Unfair and unrighteous ones the law should not allow to exist <sup>616</sup> much less to encourage or enforce. Custom or usage is never admissible to justify the doing of an act which is negligent per se, such as a custom of carriers to deliver goods to persons other than the consignee, or to whom the consignee has not directed or authorized the delivery: *Louisville etc. R. Co. v. Barkhouse*, 100 Ala. 543, 13 South. 534; *Andrews v. Birmingham M. R. Co.*, 99 Ala. 438, 12 South. 432; *Anderson v. Whitaker*, 97 Ala. 690, 11 South. 919; *Haas v. Hudmon*, 83 Ala. 174, 3 South. 302; *Barlow v. Lambert*, 28 Ala. 704, 65 Am. Dec. 374; *Smith v. Rice*, 56 Ala. 417.

The defendant attempted to avoid liability by setting up a special defense, as shown by plea No. 2 as amended. (The reporter will set out this plea in the statement of facts.) Demurrers were interposed to this plea and were overruled, and the trial was had upon it and that of the general issue. It is unnecessary for us to pass upon the sufficiency of this plea, because it was ruled sufficient by the trial court, which ruling was in favor of appellant. If the plea was sufficient, and not subject to the demurrers interposed, and we will so treat it, for reasons before assigned, it is, as was intimated by this court on the former appeal (see 158 Ala. 622, 48 South. 377), on the theory of a plea of estoppel, and not as one setting up a reasonable custom which would justify the delivery to the wrong person. The allegations as to custom were mere inducements to show that plaintiff had directed or ordered defendant to deliver the lumber in question to the Lewis company, and not to plaintiff or to the Hunter company, to whom it had sold the lumber in question, and that, having so ordered defendant to deliver to the Lewis company, it was now estopped to claim or show a wrongful delivery of the lumber sued for.

It was claimed and alleged that the plaintiff so ordered, directed or caused the wrongful delivery of the lumber sued for by making out and delivering to the Lewis <sup>617</sup> company an invoice which described both cars, and the lumber sued for, as well as that sold to the Lewis company. This is the effect, if not the words, of the plea. As was ruled by this court on former appeal, it was necessary that the pleas should identify the lumber sued for. It is true that the invoice fur-



nished by plaintiff to the Lewis company did describe both cars; but it did not describe the lumber sued for, and there is no pretense in the evidence that it did so describe the lumber sued for. If the lumber sold to the Lewis company could be said to be in both cars, it was because it lapped over onto the other car. The lumber or timber in both cars is shown to be in very long pieces, some of it longer than the car, and that it overlapped onto the other car, and for this reason the cars were shipped together, and one answered as an idler for the other; and it is only in this sense that the lumber sold to the Lewis company was in car 242. For this reason, it was proper to mention the car in the invoice; but it is not contended or shown that the Lewis company bought any of the lumber in car 242, for which this suit is brought, but that they only bought that in car 3212, and that they only paid for the freight and switching of this one car, and not for both, and that car 242 was only an idler or trailer, because the lumber in the two cars overlapped. Their letter to plaintiff clearly shows this. The letter is as follows:

“The Lewis Land & Lumber Company,  
“Wholesale Lumber and Timber,  
“City Bank & Trust Company Building.  
“Mobile, Ala., 12-1-06.

“Messrs. Bay Shore Lumber Co., Mobile, Ala.

“Gentlemen: Remittance car number 3212. Enclosed herewith find our check for \$44.66 covering freight and switching on car K. C. 3212 which you ordered to the Munson Line for us. Please accept our thanks for looking after this car for us.

Yours very truly,  
“LEWIS LAND & LUMBER CO.,  
“J. HOWARD SMITH, Secretary.”

It was some time after <sup>618</sup> the delivery of the lumber from this car that the delivery was made from car 242, which contained the lumber in question.

It indisputably appears that the invoice to the Lewis company did not describe the lumber in car 242 sued for, either in quantity or quality; but it did accurately describe the lumber in car 3212, which was sold to the Lewis company, both as to quantity and quality. Hence the defendant wholly failed to establish the material averments of its plea, and all the evidence shows that the wrongful delivery was made on account of defendant's own negligence and wrong, and in violation of its bill of lading, and in violation of expressed and explicit instructions of the plaintiff consignee. It cannot be contended that the invoice called for a delivery of the cars, rather than the lumber described therein; and because the lumber described therein might be in two cars, or in one car, would not be an order to deliver other lumber as good, which might be in the cars and which were not described in the invoice or directions to deliver. Under all the

evidence, and under every theory of it, the defendant delivered plaintiff's lumber to the wrong party without a bill of lading, and without authority, and contrary to express and specific directions from plaintiff. The verdict and judgment rendered were the only verdicts or judgments that could have been properly rendered under the issues and evidence in this case. The general affirmative charge should have been given for the plaintiff.

We find no errors in the record of which defendant can complain. If there be any, they are necessarily without injury to the defendant, appellant. The judgment of the lower court is affirmed.

Dowdell, C. J., and Anderson and Sayre, JJ., concur.

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*A Custom is not Good if It is Unreasonable or Contrary to Law or public policy:* Dempsey v. Dobson, 184 Pa. 588, 63 Am. St. Rep. 809; Jackson v. Bank, 92 Tenn. 154, 36 Am. St. Rep. 81; Columbus etc. C. & I. Co. v. Tucker, 43 Ohio St. 41, 29 Am. St. Rep. 528. Hence custom cannot extinguish the liability imposed by law upon common carriers for a failure to perform their duties and obligations: Missouri Pac. R. R. Co. v. Fagan, 72 Tex. 127, 13 Am. St. Rep. 776. A usage which compels a shipper of lumber to abide by the mere unsworn report of the consignee, in whose selection he has no choice, transmitted to the shipper by the unsworn statements of the party ordering the lumber, cannot be allowed: Byrd v. Beall, 150 Ala. 122, 124 Am. St. Rep. 60.

*The Conversion of Goods by a Carrier* is discussed in the note to Bollings v. Kirby, 24 Am. St. Rep. 815. A carrier may be held as for a conversion where he delivers freight to a person not entitled to it, or where he wrongfully sells it for the charges of transportation: Marshall etc. Co. v. Kansas City etc. R. R. Co., 176 Mo. 480, 98 Am. St. Rep. 508; Central Ry. Co. v. Chicago Portrait Co., 122 Ga. 11, 106 Am. St. Rep. 87. See, also, Central of Georgia Ry. Co. v. Montmollen, 145 Ala. 468, 117 Am. St. Rep. 58.



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**FLORIDA.**

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**BUNCH v. STATE.**

[58 Fla. 9, 50 South. 534.]

**CRIMINAL LAW—Verdict—Intention—Certainty.**—A verdict should be regarded from the standpoint of the jury's intention, and when this can be ascertained, if consistent with legal principles, such effect should be given to the findings, as will really conform to their intention. If a verdict is not sufficiently certain to clearly show what the jury intended, it will be fatally defective. (p. 91.)

**CRIMINAL LAW—Verdict—"Assault With Attempt to Murder."**—The verdict of the jury was in these words: "We the jury find the defendant, Mamie Bunch, guilty of assault with *attempt* to murder in the second degree, so say we all." Held, that the word "attempt" carries with it the idea of *intent* in this verdict, and that the verdict is not fatally defective. (p. 92.)

(Syllabi by the court.)

L. E. Roberson, for the plaintiff in error.

Park Trammell, attorney general, for the state.

<sup>10</sup> **HOCKER, J.** Mamie Bunch, the plaintiff in error, was informed against in the criminal court of record of Suwannee county, the information charging that she and another, on the 14th of November, 1908, unlawfully assaulted one Lela Russel, from a premeditated design to kill and murder the latter. On the trial the jury found the following verdict, viz.: "We the jury find the defendant, Mamie Bunch guilty of assault with *attempt* to murder in the second degree, so say we all." There was a motion to arrest the judgment on the grounds: 1. The verdict does not find this defendant guilty of any crime known to the criminal laws of the state of Florida; 2. The verdict is so irregular upon its face as to be unintelligible, in its meaning and its findings.

This motion was overruled, and the plaintiff in error sentenced to two years in the penitentiary.

The only assignment of error is based on the action of the court in overruling this motion, and questions the sufficiency of this verdict.

<sup>11</sup> In the case of *Washington v. State*, 55 Fla. 194, 46 South. 417, the general requisites of a verdict are stated. It

is also stated that the verdict should be regarded from the standpoint of the jury's intention, and when this can be ascertained, if consistent with legal principles, such effect should be allowed to their findings as will really conform to their verdict. If the verdict is not sufficiently certain to clearly show what the jury intended, it will be fatally defective: *Nickles v. State*, 48 Fla. 46, 37 South. 312.

The contention here is that the use of the word "attempt" instead of the word "intent" vitiates the verdict, rendering it unintelligible and describing no crime. We do not think this contention should be sustained. To say that one *attempted* to commit a crime, carries with it the idea that there was intent to commit the crime.

In the case of *Prince v. State*, 35 Ala. 367, it is held: "Under an indictment for rape, a verdict finding the prisoner guilty of assault with *attempt* to commit a rape, is equivalent in substance and legal effect to a verdict of guilty of an assault with intent to commit a rape." To the like effect, see *Johnson v. State*, 14 Ga. 55; *Rookey v. State*, 70 Conn. 104, 38 Atl. 911; *Felker v. State*, 54 Ark. 489, 16 S. W. 663, and authorities cited in these cases; 1 McClain's Criminal Law, sec. 222.

The judgment of the court below is affirmed.

Taylor and Parkhill, JJ., concur.

Whitfield, C. J., and Shackelford and Cockrell, JJ., concur in the opinion.

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*As to the Form and Sufficiency of the Verdict* in criminal cases, see *Ex parte Burden*, 92 Miss. 14, 131 Am. St. Rep. 511; *Aladin v. State*, 48 Tex. Cr. 1, 122 Am. St. Rep. 730; *State v. Bolden*, 107 La. 116, 90 Am. St. Rep. 280; *Herndon v. Commonwealth*, 105 Ky. 197, 88 Am. St. Rep. 303; *Colip v. State*, 153 Ind. 584, 74 Am. St. Rep. 322; *State v. Bellard*, 50 La. Ann. 594, 69 Am. St. Rep. 461; *State v. Lee*, 80 Iowa, 75, 20 Am. St. Rep. 401.

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## ENSON v. STATE.

[58 Fla. 37, 50 South. 948.]

**LARCENY—Money and Bank Bills—Description.**—By statute, bank notes and money are made the subject of larceny; and, where the required degree of certainty cannot be used in specifying the pieces or denominations of coins stolen or the number and denomination of bank bills, it will be enough to state that a better description than that given is unknown to the prosecuting solicitor or to the grand jury as the case may be. (pp. 96, 97.)

**LARCENY—Indictment—Description of Property.**—In a prosecution for larceny, under the plea of not guilty, the allegation in the information of the prosecuting solicitor's want of knowledge of a

better description of the property stolen is traversable and the subject of inquiry, and an information false in this respect will not support a conviction. (p. 95.)

**LARCENY—Indictment—Description of Property.**—In a prosecution for larceny under the plea of not guilty, where the information alleges the prosecuting solicitor's want of knowledge of a better description of the property stolen, the defendant may not be acquitted upon proof that the solicitor could easily have known a better description of the property stolen. The fact that the solicitor could easily have ascertained a better description of the property may be evidence that he knew the same, but it is not conclusive, and cannot be made an absolute test of the sufficiency of the allegation that he did not know. (p. 95.)

**LARCENY—Indictment—Description of Property.**—In a prosecution for larceny, where the information alleges that a more particular description of the property is unknown to the prosecuting solicitor, and there was no evidence that the solicitor knew a more particular description of the property alleged to have been stolen, the court properly refused to give an instruction predicating defendant's right to an acquittal on the fact that the solicitor could easily have known a better description of the property than that given in the information. (pp. 94, 98.)

**LARCENY—Indictment—Bill of Particulars.**—In a prosecution for larceny of bank bills and notes and silver specie, the information alleges that a more particular description than is given of the same is to the prosecuting solicitor unknown, the accused may upon a proper showing timely made move the court to order the solicitor to give such other or more particular description, in the nature of a specification or bill of particulars of the property as may have been acquired by the solicitor after filing the information, and the trial may be suspended until this can be done. (pp. 96, 98.)

**LARCENY.—An Information Found to be Sufficient** in its allegations of the time and place of the larceny alleged. (p. 97.)

**LARCENY.—Evidence Found to be Sufficient to Support a verdict** of guilty of grand larceny. (p. 97.)

**NEW TRIAL—Newly Discovered Evidence.**—A motion for new trial on the ground of newly discovered evidence is properly overruled where the accused fails to show that the evidence was discovered since the trial and that he could not have discovered it before the trial by the exercise of due diligence. (p. 97.)

**CRIMINAL LAW.—An Alternative Sentence is Erroneous** in providing that the defendant be imprisoned in the state penitentiary upon default in the payment of the fine and costs. Where the primary sentence imposed is a fine and costs of prosecution only, the court should fix a period of imprisonment in the county jail, instead of in the state penitentiary, for the nonpayment of such fine and costs. (p. 97.)

(Syllabi by the court.)

Mitchell D. Price, for the plaintiff in error.

Park Trammell, attorney general, for the state.

<sup>39</sup> PARKHILL, J.: The plaintiff in error was convicted of the crime of grand larceny and brings the judgment here by writ of error for review.

Omitting the caption, the information is as follows: "In the name and by the authority of the State of Florida: James T. Sanders, county solicitor for the county of Dade,

prosecuting for the State of Florida, in the said county, under oath, information makes that Charlie Enson, laborer, late of the county of Dade and State of Florida, on the 19th day of April in the year of our Lord one thousand nine hundred and nine, in the county and State aforesaid, then and there, certain bank bills and notes commonly known and denominated as lawful currency of the United States, of divers denominations, the number and denomination of which are to the prosecutor unknown, and certain silver specie, a more particular description of which is to the prosecutor unknown, amounting in the aggregate to the sum of \$100.00 lawful currency of the United States and of the value of \$100.00 which said currency and specie was then and there the property of one W. J. Cole, the said Charlie Enson then and there having found did steal, take and carry away, contrary to the statute," etc.

At the close of the evidence the defendant requested the judge to give the following instruction to the jury:  
40 "The defendant in this case is charged with stealing certain bank bills and notes known as lawful currency of the United States of divers denominations, the number and denomination of which are alleged to be unknown to the county solicitor, and also certain silver specie, a more particular description, it is alleged, is unknown to the county solicitor, said property being alleged to be of the aggregate value of \$100.00. It appears from the evidence that the county solicitor knew or could easily have known a better description at the time of the filing of the information than the description set forth in the said information, there is, therefore, a fatal variance and you will accordingly find a verdict of not guilty."

This instruction was properly refused, for the reason that there was no evidence that the county solicitor knew the number and denomination of the bank bills or a more particular description of the silver specie alleged to have been stolen, and the instruction erroneously predicated defendant's right to an acquittal on the fact that the county solicitor could easily have known a better description of the property than that given in the information. It asked too much. The question here is whether the allegation that a more particular description of the bank notes and specie was unknown to the county solicitor is sustained by the proof, not whether the county solicitor could easily have known a better description. In some jurisdictions the rule is stated to be that a variance results where it becomes apparent from the evidence that the matter alleged as unknown might have been discovered by the exercise of ordinary diligence, but these cases would seem to be properly placed upon lack of diligence or carelessness in making the accusation and not upon variance between the

allegation and proof. The better rule would seem to be that to create a variance, the fact of knowledge, not ability to acquire knowledge, must affirmatively <sup>41</sup> appear from the evidence. The information alleges that a more particular description of the property is unknown to the solicitor. It becomes a question, then, upon all the evidence, of accord or variance between this allegation and the proof, not of diligence or carelessness in making the accusation. It is doubtless true that, under the plea of not guilty, the allegation of want of knowledge of a better description of the property on the part of the county solicitor is traversable and the subject of inquiry, and that an information false in this respect would not support a conviction. But the defendant desires to go beyond the allegation of the information and raise the outside issue that the solicitor could easily have known a better description of the property. The fact that the county solicitor could easily have ascertained a better description of the property may be evidence that he knew the same, but it is not conclusive, and cannot be made an absolute test of the sufficiency of the allegation that he did not know: 22 Cyc. 465; Commonwealth v. Sherman, 13 Allen, 248; Commonwealth v. Hill, 11 Cush. 137; Commonwealth v. Hendrie, 2 Gray, 503; Commonwealth v. Thornton, 14 Gray, 41; Commonwealth v. Stoddard, 9 Allen, 280; Commonwealth v. Noble, 165 Mass. 13, 42 N. E. 328; Wells v. State, 88 Ala. 239, 7 South. 272; Duvall v. State, 63 Ala. 12; Terry v. State, 118 Ala. 79, 23 South. 776; Winter v. State, 90 Ala. 637, 8 South. 556; White v. People, 32 N. Y. 465; Noakes v. People, 25 N. Y. 380; People v. Noakes, 5 Park Cr. Rep. (N. Y.) 292; People v. Fleming, 14 N. Y. Supp. 200; State v. Carey, 15 Wash. 549, 46 Pac. 1050; Rex v. Walker, 3 Camp. 264. See, also, Guthrie v. State, 16 Neb. 667, 21 N. W. 455; Coffin v. United States, 156 U. S. 432, 15 Sup. Ct. Rep. 394, 39 L. ed. 481; Rex v. <sup>42</sup> Bush, Russ. & R. 372; Lang v. State, 42 Fla. 595, 28 South. 856; Commonwealth v. Gallagher, 126 Mass. 54.

In discussing this question, the supreme court of Massachusetts, in Commonwealth v. Sherman, 13 Allen, 248, said: "The origin of the statement in some books that, if a name alleged to be unknown might with reasonable diligence have been ascertained by the prosecutor, the defendant is entitled to an acquittal, is probably to be found in some imperfect reports of English nisi prius cases: 2 East's Pleas of the Crown, c. 16, par. 89; The King v. Keakin, 2 Leach, 4th ed.; Rex v. Walker, 3 Camp. 264; Rex v. Robinson, Holt N. P. 595. Upon such a case being cited Mr. Justice Littledale, an eminent common-law lawyer, said: 'The question is whether the person is known to the grand jury. It will be difficult to prove that he was so known, and unless he was known to the

grand jury, I should doubt about that case': *Rex v. Cordy*, 2 Russell on Crimes, 3d ed., 98, note by Greaves. The earliest case which we have seen in which a traverse jury were required to find that the grand jury could not by reasonable diligence have ascertained the name was one tried at nisi prius before Mr. Justice Thomas Erskine: *Regina v. Campbell*, 1 Car. & K. 82.

"By the much higher authority of the twelve judges of England, this matter has been put upon the right footing. In one case they held that an indictment against an accessory of a principal therein alleged to be unknown was good, although the same grand jury had returned another indictment against the principal by name: *Rex v. Bush*, Russ. & R. 372. And in another case, according to the fullest report, they stated the rule to be that 'in order to sustain a count for the murder of a child whose name is to the jurors unknown, there must be evidence showing that the name could not reasonably have been supposed to be known to the grand jury': *Regina v. Stroud*, 1 Car. & K. <sup>43</sup> 187. Another report of this case in 2 Moody C. C. 270, by abridging this statement to 'the want of description is only excused when the name cannot be known,' wholly changes its meaning; for what the grand jury may reasonably be supposed to have known is only what it may be rightly inferred they did know, which is a quite distinct thing from that which they could know, or, in other words, reasonably might, but did not, ascertain. The judgments of this court support the position which we now affirm: *Commonwealth v. Hill*, 11 Cush. 137; *Commonwealth v. Hendrie*, 2 Gray, 503; *Commonwealth v. Thornton*, 14 Gray, 41; *Commonwealth v. Stoddard*, 9 Allen, 282.

"It is always open to the defendant to move the judge before whom the trial is had to order the prosecuting attorney to give a more particular description, in the nature of a specification or bill of particulars, of the acts on which he intends to rely, and to suspend the trial until this can be done; and such an order will be made whenever it appears to be necessary to enable the defendant to meet the charge against him, or to avoid danger of injustice: *Commonwealth v. Giles*, 1 Gray, 466; *The King v. Curwood*, 3 Ad. & E. 815; Roscoe on Criminal Evidence, 6th ed., 178, 179, 420."

As sustaining the right of the defendant to a bill of particulars upon a proper showing in this state, see *Mathis v. State*, 45 Fla. 46, 34 South. 287; *Thalheim v. State*, 38 Fla. 169, 20 South. 938; *Eatman v. State*, 48 Fla. 21, 37 South. 576; *Brass v. State*, 45 Fla. 1, 34 South. 307.

Our statute makes bank notes and money the subject of larceny, and where the required degree of certainty cannot be used in specifying the pieces or denominations of coins stolen or the number and denomination of bank bills, it will



be enough to state that a better description than that<sup>44</sup> given is unknown to the county solicitor or to the grand jury, as the case may be: 12 Ency. of Pl. & Pr. 990.

The information is sufficient in its allegations of the time and place of the larceny alleged: Baldwin v. State, 46 Fla. 115, 35 South. 220.

The evidence is sufficient to support the verdict.

The motion for new trial on the ground of newly discovered evidence was properly overruled because the defendant failed to show that the evidence offered was discovered since the trial, and that he could not have discovered it before the trial by the exercise of due diligence. A new trial will not be granted on a mere showing that new evidence has been discovered, but the defendant is required to rebut the presumptions that the verdict is correct and that he exercised due diligence in preparing for the trial: See Mitchell v. State, 43 Fla. 584, 31 South. 242; Howard v. State, 36 Fla. 21, 17 South. 84; Williams v. State, 53 Fla. 89, 43 South. 428.

What we have said disposes of all the points presented and argued.

The errors assigned are all overruled, but the judgment must be reversed for a proper sentence. The alternative sentence is erroneous in providing that the defendant be imprisoned in the state penitentiary upon default in the payment of the fine and costs. Where the primary sentence imposed is a fine and costs of prosecution only, the court should fix a period of imprisonment in the county jail instead of in the state penitentiary for the nonpayment of such fine and costs: Gen. Stats. 1906, sec. 4011. Thompson v. State, 52 Fla. 113, 41 South. 899.

The judgment of the court below is reversed and remanded for proper sentence, at the cost of the county of Dade.

Whitfield, C. J., and Shackleford and Cockrell, JJ., concur.

Hocker, J., absent, concurred in the opinion as prepared.

<sup>45</sup> WHITFIELD, C. J., Concurring. One of the material allegations in this information charging larceny of currency of the United States is the one that "the number and denomination of which are to the prosecutor unknown." A description of the property stolen is not an essential element of the offense, but such description should be alleged in an information charging larceny when it is known; and it is the duty of the prosecution to exercise reasonable diligence in ascertaining and giving a proper description of the property alleged to have been stolen, so that the court and jury may be informed of the subject matter of the charge, and that the accused may not be embarrassed in the preparation of his defense or subjected to a second prosecution for the

same offense. A description of the property not being an element of the offense of larceny, where the description is not known to the prosecutor, the law, in lieu of an allegation of the description permits as a matter of necessity, to prevent the failure of justice, an allegation that the description was unknown to the prosecutor. When there is an allegation that the description was unknown to the prosecutor, there should be some evidence that the description was in fact unknown to the prosecutor; though, in the absence of a material allegation requiring proof of due diligence, it may be presumed that the prosecutor, an officer of the law, exercised due diligence to ascertain and allege the description. A failure to exercise due diligence may be remedied without injury to the accused by a bill <sup>46</sup> of particulars or by appropriate judicial action upon proper and timely application to the court. There is no allegation in the information that the prosecutor could not, by the exercise of due diligence, have been informed of the number and denomination of the currency alleged to have been stolen. The "prosecutor" referred to is the prosecuting attorney who made and filed the information under his oath, and not the prosecuting witness. From the evidence it may properly be inferred that the prosecuting attorney did not know, and there is no positive evidence that he did know, the number and denomination of the currency. This being so, there is no fatal variance between the allegation and the proofs: *Lang v. State*, 42 Fla. 595, 28 South. 856. There is no allegation express or implied that the prosecuting attorney used due diligence to get a description of the property. Whether the prosecuting attorney by the exercise of due diligence could have known of the number and denomination of the currency is not included in the allegation that he had no such knowledge, and the lack of effort to acquire the information was not made an issue at the trial. Any inference that may be drawn from the evidence that the prosecuting attorney could easily have informed himself of the number and denomination of the currency is immaterial as to the issue of actual knowledge by the prosecuting attorney of the number and denomination of the currency made by the plea of not guilty. The requested charge for an acquittal on the ground of fatal variance was not in this case the proper remedy for the defendant. By a timely and proper application therefor, the defendant would have been entitled to a bill of particulars giving information, acquired by the prosecuting attorney after filing the information, as to the number and denomination of the currency alleged in the information as having been stolen. If there had been any attempt by act or <sup>47</sup> omission on the part of the prosecuting attorney to embarrass the accused in the preparation or presentation of his defense, the court had ample power to secure to him his rights.



Justice Taylor Dissented and said in part: "The proofs show that he [the defendant], either knew of a much more accurate and definite description of the stolen property than that given thereof in the information, or that he could have easily procured such accurate and definite description thereof by simply applying therefor to the main witness for the prosecution who was the party from whom the property was stolen. Under these circumstances, according to my view of the law, there was a fatal variance between the allegation and the proofs, that entitled the defendant to his discharge. The true rule in such cases, according to my view, the one supported both by reason and the overwhelming weight of authority is that it is only permissible upon the ground of necessity to allege in an indictment that the name of a person or fact necessary to be stated is unknown; and the defendant is entitled to be discharged when it appears on the trial that the name or the fact either was known or could by the exercise of ordinary diligence have become known, to the grand jury or prosecuting attorney exhibiting the information: *State v. Stowe*, 132 Mo. 199, 33 S. W. 799; *State v. Thompson*, 137 Mo. 620, 39 S. W. 83. The allegation in an indictment that the name of a person, or a fact, is unknown to the grand jurors, or to the prosecuting officer exhibiting an information, is a material one, is traversed by the plea of not guilty, and must be sustained, and may be rebutted by proof: *Cameron v. State*, 13 Ark. 712; *Blodget v. State*, 3 Ind. 403; *Cheek v. State*, 38 Ala. 227; *Rex v. Robinson*, 1 Holt N. P. 595, 3 Eng. Com. L. 233; *Regina v. Campbell*, 1 Car. & K. 82, 47 Eng. Com. L. 80; *Rex v. Walker*, 3 Camp. N. P. 265; *Regina v. Stroud*, 2 Moody C. C. 270; *Winter v. State*, 90 Ala. 637, 8 South. 556; *United States v. Riley*, 74 Fed. 210; *Sault v. People*, 3 Colo. App. 502, 34 Pac. 263; 1 Chitty's Criminal Law, 213; *Presley v. State*, 24 Tex. App. 494, 6 S. W. 540, 7 Am. Cr. Rep. 243."

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*The Crime of Larceny* is the subject of a note to *People v. Miller*, 88 Am. St. Rep. 559.

An Indictment for Larceny Charging That the Accused "Feloniously took and carried away" a certain sum of "money of the United States, the further description of which is to the grand jury unknown, the personal property of" a person named, is sufficient and not open to demurrer: *Verberg v. State*, 137 Ala. 73, 97 Am. St. Rep. 17. See further, on the description of money in an indictment for larceny, the note to *Lord v. State*, 51 Am. Dec. 232.

**TILLMAN v. STATE.**

[58 Fla. 113, 50 South. 675.]

**JURISDICTION OF JUDGE—Waiver by Accused.**—Assuming that the defendant in a prosecution against him for crime could by appropriate action in the trial court in the way of pleas, objections or otherwise have raised the question as to the authority and jurisdiction of the judge of the criminal court of record for another county to preside over the court in the trial of such case, where such judge is acting under an order of the governor, based upon section 3871 of the General Statutes of 1906, where no objections to the authority or jurisdiction of such judge were made in the trial court and no action of any kind taken by the defendant toward raising such question, he will be deemed to have waived by his silence any such privilege or right he may have had, and will not be permitted to raise such question for the first time in the appellate court. (p. 102.)

**BRIBERY OF JUDGE—Sufficiency of Indictment.**—No error is made to appear in overruling a motion to quash certain counts in an information, based upon section 3476 of the General Statutes of 1906, charging the defendant with the crime of bribery of a judicial officer, when such information substantially complied with the requirements of such statute. Such information is not fatally defective when it distinctly alleges that the defendant offered the bribe to the judge of a designated court for the purpose of and in order to influence him "to modify and reduce the sentence" imposed upon a certain named defendant on a prior day of the same term of court, because it does not affirmatively allege that the prosecution against such convicted defendant was still pending in such court at the time such bribe was offered. (p. 103.)

**NEW TRIAL—Motion After Sentence Imposed.**—The right of a defendant to make a motion for a new trial within the time provided by law is not forfeited by the fact that sentence had been pronounced upon the defendant prior to the making of such motion. (p. 103.)

**CRIMINAL LAW—Modification of Sentence.**—During the same term of court at which the sentence is imposed, before the defendant had begun serving such sentence the trial judge has the power to modify such sentence. (p. 103.)

**INDICTMENT—Substantial Compliance With Statutes.**—It is the declared policy of the legislature, as well as of this court, to uphold indictments and informations whenever there has been a substantial compliance therein with the statutory requirements. (p. 103.)

**APPEAL—Assignment of Errors.**—It is not sufficient merely to repeat an assignment of error and submit that error was committed by the trial court. Unless the error complained of is so glaring or patent that no argument is needed to demonstrate it, counsel must call the attention of the appellate court to the specific points upon which he relies to show error, otherwise such assignment will be treated as abandoned. (p. 104.)

(Syllabi by the court.)

J. N. Stripling and T. W. Butler, for the plaintiff in error.

Park Trammell, attorney general, for the state.

<sup>115</sup> SHACKLEFORD, J. An information, based upon section 3476 of the General Statutes of Florida, was filed

against the plaintiff in error, upon which he was tried, convicted and sentenced to confinement at hard labor in the state prison for a term of four years. A review of this judgment and sentence is sought here by writ of error. The information contained three counts, but only the last two are before us for consideration, the first having been quashed on motion of the defendant. In substance, the crime charged against the defendant was that, during a term of the criminal court of record for Suwannee county, at which one Margarete Stanley had been tried and convicted of the unlawful sale of liquors, the defendant, "then and there well knowing the official capacity of him the said H. E. Carter and with the purpose and intent of fraudulently influencing the act, opinion, decision and judgment of the said H. E. Carter, a judicial officer, and then and there the judge of said criminal court of record, on a certain matter and question, to wit, the matter and question of modifying and reducing the sentence theretofore imposed upon the said Margarete Stanley as aforesaid, and with the intent to fraudulently induce the said H. E. Carter in his official capacity as judge of said court to reconsider and modify and reduce the sentence and judgment theretofore imposed upon the said Margarete Stanley as aforesaid, he the said G. H. Tillman, did then and there, on the said 16th day of February, 1909, aforesaid corruptly offer to the said H. E. Carter as judge of said court as aforesaid a gift and gratuity, to wit, a bank check of the value of ten dollars, which said <sup>116</sup> bank check was and is in the words and figures following, to wit:

" 'No. \_\_\_\_\_ Live Oak, Fla. 2-16, 1909.  
" 'The Citizens Bank of Live Oak,  
" 'Pay to the order of \_\_\_\_\_ Cash \_\_\_\_\_\$10.00  
\_\_\_\_\_ Ten & 00-100 \_\_\_\_\_ Dollars.  
" 'G. H. TILLMAN,  
" 'BAKER.'

Contrary to the form of the Statute, in such cases made and provided, and against the peace and dignity of the State of Florida."

The Honorable H. E. Carter, judge of such court, filed with the clerk a suggestion of his disqualification in such cause, under section 3871 of the General Statutes of Florida, reciting therein that he was a witness in such cause on behalf of the state. The clerk notified the governor, in accordance with the provisions of such statute, who issued an order assigning the Honorable John S. Maxwell, judge of the criminal court of record for Duval county, to try such cause. All of such proceedings affirmatively appear in the transcript.

The first two assignments are as follows:

"First Assignment of Error: It does not appear from: the suggestion of disqualification filed by Honorable H. E.

Carter, judge of the criminal court of record for Suwannee county, Florida, that he as judge of said court, was disqualified from presiding at the trial of said cause.

“Second Assignment of Error: The Honorable John S. Maxwell, judge of the criminal court of record of Duval county, Florida, was without jurisdiction to preside in said cause.”

Even if we assume that the defendant could by appropriate action in the trial court in the way of pleas, objections <sup>117</sup> or otherwise have raised the question as to the authority and jurisdiction of Judge Maxwell to preside over the court in the trial of such cause, no such action was taken; consequently we are not called upon to decide that question: See *Coyle v. Commonwealth*, 104 Pa. 117; *Walcott v. Wells*, 21 Nev. 47, 37 Am. St. Rep. 478, 24 Pac. 367, 9 L. R. A. 59, and authorities therein cited; *State v. Lewis*, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247, 11 L. R. A. 105; *Orme v. Commonwealth*, 21 Ky. Law Rep. 1412, 55 S. W. 195; *Butler v. Phillips*, 38 Colo. 378, 88 Pac. 480, 12 Ann. Cas. 204. The decided weight of authority is to the effect that where no objection to the authority or jurisdiction of the judge is made in the trial court and no action of any kind taken by the defendant toward raising such question, he will be deemed to have waived such privilege or right by his silence, and will not be permitted to raise such question for the first time in the appellate court: See *State v. Holmes*, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887; *State v. Anone*, 2 Nott & McC. (S. C.) 27; *State v. Lowe*, 21 W. Va. 783, 45 Am. Rep. 570; *Schlunger v. State*, 113 Ind. 295, 15 N. E. 269; *People v. Mellon*, 40 Cal. 648; *State v. Gilmore*, 110 Mo. 1, 19 S. W. 218; *Roberts v. State*, 126 Ala. 74, 28 South. 741, 30 South. 554; *Slone v. Slone*, 2 Met. (Ky.) 339; *Ripley v. Mutual Home & Savings Assn.*, 154 Ind. 155, 56 N. E. 89; *Crawford v. Lawrence*, 154 Ind. 288, 56 N. E. 673; *Hunter's Admr. v. Ferguson's Admr.*, 13 Kan. 462; *Missouri Pac. Ry. Co. v. Preston*, 63 Kan. 819, 66 Pac. 1050; *Perry v. Pernet*, 165 Ind. 67, 74 N. E. 609, 6 Ann. Cas. 533. Also, see 23 Cyc. 616-618, and authorities cited in notes, and 11 Ency. of Pl. & Pr. 793. We see no occasion for any extended discussion of the matter or pointing out the distinctions which exist in the cited cases. We have no intention of committing ourselves to all that is said therein, but they <sup>118</sup> will be found to throw light upon the point under consideration. We would also refer to *Finley v. Chamberlin*, 46 Fla. 581, 35 South. 1, for a discussion of the distinction between a direct and collateral attack and a review of the earlier Florida cases upon the subject. These two assignments, which are the principal ones relied upon, need not longer detain us. It is sufficient to say that they have not been sustained.

The third assignment is based upon the overruling of the motion to quash the information as to the second and third counts. It is earnestly contended that such counts are fatally defective because it does not affirmatively appear therein that the prosecution against Margarete Stanley was still pending in such court at the time of the alleged commission of the crime charged herein. It is urged that inasmuch as it is alleged therein that sentence had already been pronounced upon such defendant, this constituted a final judgment and divested the trial judge of any further jurisdiction therein. The contention is not borne out by the information and is untenable for several reasons. The statute under which the defendant was informed against is very comprehensive and sweeping in its scope, as an inspection thereof will disclose. It is also distinctly alleged in the information that the defendant offered the alleged bribe to the judge of such court for the purpose of and in order to induce him "to modify and reduce the sentence" theretofore imposed upon such defendant. The authorities cited by the defendant are not in point, and do not sustain his contention. This court has decided that the right of a defendant to make a motion for a new trial, within the time provided by law, is not forfeited by the fact that sentence had been passed upon the defendant prior to his making such motion: *Massey v. State*, 50 Fla. 109, 39 South. 790. So, too, during the same term of court <sup>119</sup> at which the sentence is imposed, before the defendant has begun serving such sentence, the trial judge has the power to modify such sentence. In this case it does not affirmatively appear that such defendant had begun serving her sentence. If the defendant in the instant case conceived that the information did not sufficiently apprise him of the crime with which he was charged, he should have moved the court for a bill of particulars: See *Mathis v. State*, 45 Fla. 46, 34 South. 287. It is the declared policy of the legislature as well as of this court to uphold indictments and informations whenever there has been a substantial compliance with the statutory requirements therein: See Gen. Stats., secs. 3961, 3962; *Barber v. State*, 52 Fla. 5, 42 South. 86; *Douglass v. State*, 53 Fla. 27, 43 South. 424; *Lewis v. State*, 55 Fla. 54, 45 South. 998. We have given the two counts of the information a careful reading, and are of the opinion that they are not "so vague, indistinct and indefinite as to mislead the accused and embarrass him in the preparation of his defense or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense." This assignment must fail.

The fourth assignment is based upon the admitting in evidence, over the objections of the defendant, an envelope and check. This assignment can hardly be said to be argued be-

fore us and might be treated as abandoned. As we have repeatedly held, it is not sufficient merely to repeat the error assigned and submit that error was committed by the trial court. Unless the error complained of is so glaring or patent that no argument is needed to demonstrate it, counsel must call the attention of the court to the specific points upon which he relies to show error; otherwise the court will feel warranted in treating such assignment as abandoned: See *Hoodless v. Jernigan*, 46 <sup>120</sup> Fla. 231, 35 South. 656, and authorities there cited, and *Phoenix Ins. Co. v. Bryan*, 58 Fla. 341, 50 South. 576. We have examined the bill of exceptions with reference to this assignment, and are clear that no error was committed in overruling the grounds of objection urged. What we have said in disposing of this assignment applies with about equal force to the sixth, seventh, tenth, twelfth and fourteenth assignments, the only other assignments even mentioned in the brief, the other assignments being tacitly abandoned. We do not feel called upon to discuss these assignments, nor do we see any useful purpose to be accomplished in so doing. Suffice it to say that we have examined them all and no reversible error is made to appear to us.

It follows that the judgment must be affirmed.

Whitfield, C. J., and Cockrell, J., concur.

Taylor, Hocker and Parkhill, JJ., concur in the opinion.

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*The Right to Question the Title or Authority of a Judge* or other officer in a collateral proceeding is discussed in *In re Corum*, 62 Kan. 271, 84 Am. St. Rep. 382; *State v. Barnard*, 67 N. H. 222, 68 Am. St. Rep. 648; *Walcott v. Wells*, 21 Nev. 47, 37 Am. St. Rep. 478; note to *Koepke v. Hill*, 87 Am. St. Rep. 177, 178.

*As to Whether the Want of Authority or Qualification of a Judge* may be waived by a party to a proceeding, see the note to *Moses v. Julian*, 84 Am. Dec. 130; *Ex parte Hilton*, 64 S. C. 201, 92 Am. St. Rep. 800; *Ogle v. State*, 43 Tex. Cr. 219, 96 Am. St. Rep. 860; *Whitesell v. Strickler*, 167 Ind. 602, 119 Am. St. Rep. 524. The objection that the judge pro tempore who tried the case was not sworn cannot be urged on appeal when not seasonably raised in the trial court: *First Nat. Bank of Snohomish v. Parker*, 28 Wash. 234, 92 Am. St. Rep. 828.



## BASS v. RAMOS.

[58 Fla. 161, 50 South. 945.]

**TRIAL.—A Charge Directing a Verdict** for the defendant should never be given unless it is clear that there is no evidence whatever adduced that could in law support a verdict for the plaintiff. If the evidence is conflicting, or will admit of different reasonable inferences, or if there is evidence tending to prove the issue presented by the plaintiff, it should be submitted to the jury as a question of fact, and not taken from them and passed upon by the judge as a question of law. (pp. 106, 107.)

**TRIAL.—Directing Verdict for Defendant.**—Where it is apparent that no evidence has been submitted upon which the jury could lawfully find for the plaintiff, the judge may direct a verdict for the defendant. (p. 107.)

**TRIAL.—Directing Verdict for Defendant.**—If upon the evidence adduced a verdict for the plaintiff could lawfully have been rendered, a charge of the court to find for the defendant is error that necessarily injures the plaintiff. (p. 107.)

**EJECTMENT—Possessory Rights—Sufficiency of Possession.**—The general rule in actions of ejectment that the claimant must recover upon the strength of his own title does not operate to prohibit the acquisition of possessory rights which may be enforced in actions of ejectment between parties in cases where the true owner does not intervene; but a prior possession, to be effective as against a mere squatter or intruder in actual possession, must be an actual unabandoned possession. (p. 107.)

**EJECTMENT—Title Founded on Prior Possession.**—A plaintiff may recover possession of realty by virtue of a proper prior possession, for then he recovers as much upon the strength of his own title as if he shows a good title to the premises. (pp. 107, 108.)

**EJECTMENT—Intruder—Plaintiff Without Title.**—A plaintiff in ejectment without title cannot recover as against a mere intruder without title, if such plaintiff has not himself had a prior actual possession of the land. (p. 108.)

**EJECTMENT—Right Based on Prior Possession.**—A recovery in ejectment may be had by one without title but who was in prior actual and proper possession of the land, and such prior possession need not have been for the statutory period necessary to mature into a perfect title by adverse possession. (p. 108.)

**EJECTMENT—Title or Possession Sufficient to Maintain.**—In order to recover the possession of lands by the means of an action of ejectment, the plaintiff must have either a title to the lands with a present right of continued possession, or must have had actual bona fide possession of the lands with a right to maintain a continued possession when ousted by defendant and a present right to the possession when the action was begun. (p. 108.)

**POSSESSION—Right Founded upon Prior Possession.**—In an action of ejectment, if the character of the land is such that continued, actual possession is apparently not allowed by law, or if the prior possession was not actual or was unlawful, or was a mere pretense or was that of an intruder or trespasser, there should be a showing of title or right of possession in order to recover possession in ejectment. (p. 108.)

**EJECTMENT—Presumption as to Lawfulness of Possession.**—While ordinarily the possession of land may be presumed to be lawful, yet the character of the land, the time and manner of possession, and other apparent circumstances may rebut a presumption



of lawful possession and put the party claiming such possession to the proof of the lawfulness of the asserted possession. (p. 109.)

**EJECTMENT—Land Under Navigable Waters.**—Private parties cannot by ejectment recover possession of lands under navigable waters when such parties have no legal title to or right to use the land; and even when the title is in private parties, a recovery of possession is subject to the rights of the public in the waters. (p. 109.)

**EJECTMENT—Land Under Navigable Waters.**—Where a plaintiff in ejectment shows no title, but only that he had some time previously put a one-wire fence around land in the waters of a navigable bay including the land in controversy, and employed some one to keep up the fence, the direction of a verdict for the defendant in actual possession will not be held to be error. (pp. 107, 109.)

(Syllabi by the court.)

Avery & Avery, for the plaintiff in error.

Sullivan & Sullivan, for the defendant in error.

<sup>163</sup> **WHITFIELD, C. J.** An action of ejectment in the statutory form was brought in the circuit court for Escambia county, Florida, by O. L. Bass to recover from John Ramos certain described lands with mesne profits. A plea of not guilty was filed. At the trial the judge instructed the jury to return a verdict for the defendant, whereupon the plaintiff noted an exception and before the jury retired the plaintiff took a nonsuit with a bill of exceptions as authorized by the statutes: Gen. Stats. 1906, secs. 1490, 1697.

The testimony tended to show that before the defendant took possession the plaintiff had posts with one wire between them put on two sides of the space then unoccupied in the waters of the bay several feet deep and opposite to and extending several hundred feet from a designated lot in the city of Pensacola, within which space several hundred feet out in the water is the land in controversy; that the south side of the space was open to the bay; that boats passed through or under the wire on the posts erected by the plaintiff; that a person was employed by the plaintiff "to look after premises which he had inclosed and claimed in the waterfront of the city of Pensacola"; that the land was located "as being a part of the waterfront property of the city of Pensacola"; that the wire was broken by the storm, but had been repaired several times by the man who attended to it for four or five months for the plaintiff; that the one-wire fence was <sup>164</sup> there in a somewhat dilapidated condition when the defendant built a house on the land.

On writ of error taken by the plaintiff to a final judgment for the defendant it is contended that the trial court erred in directing a verdict for the defendant.

A charge directing a verdict for the defendant should never be given unless it is clear that there is no evidence

whatever adduced that could in law support a verdict for the plaintiff. If the evidence is conflicting, or will admit of different reasonable inferences, or if there is evidence tending to prove the issue presented by the plaintiff, it should be submitted to the jury as a question of fact, and not taken from them and passed upon by the judge as a question of law: *German-American Lumber Co. v. Brock*, 55 Fla. 577, 46 South. 740, and authorities cited; *Starks v. Sawyer*, 56 Fla. 596, 47 South. 513; *McKinnon v. Johnson*, 57 Fla. 120, 48 South. 910; 46 Am. Dig. 1232.

Where it is apparent that no evidence has been submitted upon which the jury could lawfully find for the plaintiff, the judge may direct a verdict for the defendant: *Gen. Stats. 1906, sec. 1496*; *Wade v. Louisville etc. R. Co.*, 54 Fla. 277, 45 South. 472; *Painter Fertilizer Co. v. DuPont*, 54 Fla. 288, 45 South. 507; *American Process Co. v. Florida White Press Brick Co.*, 56 Fla. 116, 47 South. 942, 16 Ann. Cas. 1054. See, also, *Tedder v. Fraleigh-Line-Smith Co.*, 55 Fla. 496, 46 South. 419; *Town of Flora v. American Express Co.*, 92 Miss. 66, 45 South. 149; 46 Am. Dig. 1239.

If upon the evidence adduced a verdict for the plaintiff could lawfully have been rendered, the charge of the court to find for the defendant is error that necessarily injures the plaintiff.

The material evidence in support of the plaintiff's right to recover possession of the land sued for is that he had <sup>166</sup> one wire strung upon posts on two sides of the space covering the land in controversy; that he employed a person to look after the premises for him; and that the defendant had subsequently built a boathouse on the land.

In connection with this testimony it appears that the land is covered by the waters of Pensacola Bay, a navigable waterway, and that the land was located as being a part of the waterfront property of the city of Pensacola. Even if the facts stated shows a prior actual possession, yet if the circumstances disclosed by the testimony are such as to repel any presumption that might otherwise exist that the prior possession of the plaintiff was lawful, the plaintiff cannot recover, since he has shown no title to the land and no right of possession other than the meager acts of prior possession already stated.

The general rule in actions of ejectment that the claimant must recover upon the strength of his own title does not operate to prohibit the acquisition of possessory rights which may be enforced in actions of ejectment between parties in cases where the true owner does not intervene; but a prior possession, to be effective as against a mere squatter or intruder in actual possession, must be an actual unabandoned possession. A plaintiff may recover possession of realty by

virtue of a proper prior possession, for then he recovers as much upon the strength of his own title as if he shows a good title to the premises. A plaintiff in ejectment without title cannot recover as against a mere intruder without title, if such plaintiff has not himself had a prior actual possession of the land: *Seymour v. Creswell*, 18 Fla. 29.

While a recovery in ejectment may be had by one without title, but who was in prior actual and proper possession of the land, the prior possession need not have been for the statutory period necessary to mature into a perfect <sup>166</sup> title by adverse possession: *Jackson v. Haisley*, 35 Fla. 587, 17 South. 631.

“There are circumstances under which a prior simple occupant without legal title and his grantees in possession have a right to eject a subsequent occupant or his grantees. . . . The prior possession here contemplated must have been an actual possession. Some of the authorities say ‘an open, notorious and actual possession’: *Seymour v. Creswell*, 18 Fla. 29, and cases there cited. The rule is that a wrongful ouster gives no title against an actual occupant without title”: *Simmons v. Spratt*, 20 Fla. 495.

In order to recover the possession of lands by the means of an action of ejectment, the plaintiff must have either a title to the lands with a present right of continued possession, or must have had actual bona fide possession of the lands with a right to maintain a continued possession when ousted by defendant and a present right to the possession when the action was begun: *Jones v. Lofton*, 16 Fla. 189; *Hartley v. Ferrell*, 9 Fla. 374; *Winn v. Coggins*, 53 Fla. 327, 42 South. 897; *Harris v. Butler*, 52 Fla. 253, 42 South. 186, and authorities cited; *Skinner Mfg. Co. v. Wright*, 56 Fla. 561, 47 South. 931; *L’Engle v. Reed*, 27 Fla. 345, 9 South. 213; *Barco v. Fennell*, 24 Fla. 378, 5 South. 9; *Carn v. Haisley*, 22 Fla. 317.

If the character of the land is such that continued, actual possession is apparently not allowed by law, or if the prior possession was not actual or was unlawful or was a mere pretense, or was that of an intruder or trespasser, there should be a showing of title or right of possession in order to recover possession in ejectment.

Under the statute the plea of not guilty admitted the possession of the defendant and put the title to the lands in issue as between the plaintiff and the defendant. If neither party has title to the land and the prior possession <sup>167</sup> of the plaintiff was not actual but was a mere desultory possession without any legal right, the plaintiff cannot recover as against the actual possession of the defendant unless he shows some right to the possession besides the acts of prior possession as disclosed here.

The lands in controversy appear to be covered by the navigable waters of Pensacola Bay, and the plaintiff is not shown to be a riparian owner opposite the lands sued for or to have any title to or right to the possession of the lands.

The mere possession of public land, without title, will not enable the party to maintain a suit against anyone who enters on it: *Burgess v. Gray*, 16 How. (U. S.) 48, 14 L. ed. 839. If this is so as to public land that may be granted or conveyed to private ownership, for a greater reason is it so in case of lands held in trust for public easements such as land under navigable waters.

While ordinarily the possession of land may be presumed to be lawful, yet the character of the land, the time and manner of possession, and other apparent circumstances may rebut a presumption of lawful possession and put the party claiming such possession, either present or prior to an ouster, to the proof of the lawfulness of the asserted possession.

The lands under the navigable waters belong to the state in its sovereign capacity in trust for all the people of the state for the uses and purposes allowed by law. Even if the state by the legislative act of 1899, chapter 4802, Laws of Florida, or by the riparian act of 1856, or otherwise, has granted or conveyed the title to the lands in controversy to the city of Pensacola or to riparian or other owners, the plaintiff does not appear to be a riparian owner, and he shows no title from the state or from the city or its grantees.

Even if the lands are subject to private ownership or <sup>168</sup> use, that ownership or use is subordinate to the public rights of navigation, etc., in the waters as allowed by law. Private parties cannot by ejectment recover possession of lands under navigable waters, when such parties have no legal title to, or right to, use the land; and even when the title is in private parties, a recovery of the possession is subject to the rights of the public in the waters: See *Bork v. United New Jersey R. & Canal Co.*, 70 N. J. L. 268, 103 Am. St. Rep. 808, 57 Atl. 412, 64 L. R. A. 836, 1 Ann. Cas. 861. See *State v. Black River Phos. Co.*, 27 Fla. 276, 9 South. 205; *Sullivan v. Richardson*, 33 Fla. 1, 14 South. 692; *State v. Gerbing*, 56 Fla. 603, 47 South. 353, 22 L. R. A., N. S., 237; *State v. Black River Phos. Co.*, 32 Fla. 82, 13 South. 640, 21 L. R. A. 189; *Ferry Pass etc. v. White River etc.*, 57 Fla. 399, 48 South. 643, 22 L. R. A., N. S., 345; *Broward v. Mabry*, 58 Fla. 398, 50 South. 826; *Illinois v. Illinois Cent. R. Co.*, 146 U. S. 387, 13 Sup. Ct. Rep. 110.

At most the plaintiff shows only the erection of a single strand wire fence on two sides of the land under and through which fence boats passed; and the plaintiff makes no showing or title or right to exclusive use of the land for any purpose.

If the defendant is invading the rights of riparian owners under the statutes of this state, such owners have the remedies afforded by law; and for any obstruction of the public rights of navigation, etc., the proper authorities have their remedies in behalf of the public.

The plaintiff has not shown title to the lands, nor that he was legally in prior actual possession and was ousted; the prior possession shown, taken in connection with the character of the land, rebut any presumption that such prior possession was lawful. As there is no testimony upon which the plaintiff could recover, the court did not err in directing a verdict for the defendant. The judgment <sup>169</sup> entered on the verdict for the defendant is affirmed.

All concur, except Hocker, J., absent.

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*As to What Property or Invasion of Possession Ejectment is Maintainable*, see the note to *Butler v. Frontier Tel. Co.*, 116 Am. St. Rep. 568. Ejectment to recover tide lands is discussed on page 576 of that note.

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## COUNTY COMMISSIONERS OF HILLSBOROUGH COUNTY v. JACKSON.

[58 Fla. 210, 50 South. 423.]

**STATUTES—Repugnant Provisions in Compilation.**—The commissioners who compiled the General Statutes under the act of 1903 were authorized "to revise, simplify, arrange and consolidate all the public statutes of the state of Florida, which are general and permanent in their nature, and which shall be in force in this state at the time such commissioners shall make their final report." Under this authority if repugnant provisions of prior statutes are compiled and adopted in the General Statutes, it must be presumed that the repugnancy was overlooked, and that it was the intention of the compilers and of the legislature to bring forward the latest expression of the legislative will. (p. 112.)

**STATUTES—Conflicting Provisions in Compilation.**—Where there are two conflicting sections of a general compilation or code of statute laws, that section should prevail which is derived from a source that can be considered as the last expression of the law-making power in enacting separate statutes upon the same subject. (p. 112.)

**STATUTES—Conflicting Provisions in Compilation.**—Sections 976 and 4108 of the General Statutes of the state of Florida are conflicting, and as section 976 was the latest expression of the legislature in enacting separate laws upon the same subject, such section 976 must prevail even though section 4108 appears in the General Statutes subsequent in place and numerical order. (p. 112.)

(Syllabi by the court.)

H. C. Gordon, Victor Knight and D. A. De Vane, for the plaintiffs in error.

F. M. Simonton and C. C. Whitaker, for the defendant in error.

**211** WHITFIELD, C. J. An alternative writ of mandamus was issued from the circuit court for Hillsborough county commanding the sheriff to allow C. F. Woolweaver to enter the jail of the county and feed the prisoners according **212** to a contract made under section 4108 of the General Statutes and existing between the said C. F. Woolweaver and the county of Hillsborough for feeding the prisoners, or to show cause for not doing so. A demurrer to the alternative writ was sustained and the proceeding dismissed. On writ of error it is urged that the court erred in sustaining the demurrer and dismissing the writ.

The question to be determined is whether the following provisions of sections 976 and 4108 of the General Statutes are so conflicting that one must give way to the other, and if so which shall prevail:

“4108. (3031.) Fees for Keeping and Providing for Prisoners.—The fees of jailers shall be: For keeping and providing for prisoners, not more than thirty cents per day for each prisoner confined, but the county commissioners in counties having more than an average of ten prisoners may, if they shall deem it advisable, advertise for proposals for feeding prisoners and may contract for the feeding of the same to the lowest responsible bidder; for ironing and taking off irons from prisoners, fifty cents, except when prisoners are ironed or unironed in going to or returning from work performed or to be performed by direction of the county commissioners no charge shall be made; for medicines and medical service and attendance to prisoners, and amount of compensation allowed physicians' attendance on prisoners in jail such amount as may be allowed by the county commissioners; Provided, Such prisoners shall be acquitted and discharged, or shall be insolvent and unable to pay the same.

“976. Fees for Feeding Prisoners.—The sheriff shall make out and present to the board of county commissioners, at any regular meeting thereof, his bill for fees for feeding prisoners and the period for which the charge is made, which fees shall be as follows: For feeding ten **213** prisoners or less, forty cents per day each; and for feeding all over ten prisoners thirty cents per day each; and it shall be the duty of said board to properly audit the same, and order a warrant drawn against the fine and forfeiture fund of the county for the sum found to be due.”

Section 4108 was originally enacted in 1881. Section 976 was originally enacted in 1897. The commissioners who compiled the General Statutes under the act of 1903 were authorized “to revise, simplify, arrange and consolidate all the public statutes of the state of Florida, which are general and permanent in their nature, and which shall be in force



in this state at the time such commissioners shall make their final report.”

Under this authority if repugnant provisions of prior statutes are compiled and adopted in the General Statutes, it must be presumed that the repugnancy was overlooked, and that it was the intention of the compilers and of the legislature to bring forward the latest expression of the legislative will where irreconcilable inconsistency or repugnancy appears in different sections of the General Statutes, without reference to whether the latest statute appears first or last in the General Statutes: *Steele v. State*, 61 Ala. 213; *Mobile Savings Bank v. Patty*, 16 Fed. 751; *Haritwen v. The Louis Olsen*, 52 Fed. 652; *Olsen v. Haritwen*, 57 Fed. 845, 6 L. R. A. 608.

Where there are two conflicting sections of a general compilation or code of statute laws, that section should prevail which is derived from a source that can be considered as the last expression of the law-making power in enacting separate statutes upon the same subject: See *Lamar v. Allen*, 108 Ga. 158, 33 S. E. 958; 26 Am. & Eng. Ency. of Law, 2d ed., 735; Lewis' *Sutherland on Statutory Construction*, 2d ed., sec. 281. See, also, *Hall v. State*, 39 Fla. 637, 23 South. 119; *State v. Mulhern*, 74 Ohio St. 363, 78 N. E. 507, 6 Ann. Cas. 856.

<sup>214</sup> The two sections above quoted are conflicting, and as section 976 was the latest expression of the legislature in enacting separate laws upon the subject, it must prevail even though section 4108 appears in the General Statutes subsequent in place and numerical order. There is consequently no authority for making the contract, and the order dismissing the alternative writ is affirmed.

Shackleford and Cockrell, JJ., concur.

Taylor, Hocker and Parkhill, JJ., concur in the opinion.

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*The Rule That as Between Conflicting Sections in the Same Statute the last in order of arrangement controls is applicable only when there is an irreconcilable conflict between the different sections of the same act, and no reasonable construction will harmonize the parts: Calhoun Gold Min. Co. v. Ajax Gold Min. Co., 27 Colo. 1, 83 Am. St. Rep. 17. The rule that what appears last in a statute is the last expression of the legislative will should not be applied where the provision standing first in the act is more in harmony with other statutes in pari materia, and especially when it is in harmony with the unquestionable general purpose of the statute to be interpreted: State v. Bates, 96 Minn. 110, 113 Am. St. Rep. 612.*



## ETZLER v. BROWN.

[58 Fla. 221, 50 South. 416.]

**OFFICER—Validity of Removal.—Mandamus is the Proper Proceeding to test the validity of the action of a city council in expelling from office a member of the council. In such an action the court will consider the entire proceeding of the council, including the issues in effect made and the testimony taken before the council as shown by the alternative writ. If the proceedings were illegal or fatally defective, or if the testimony wholly fails to support the charges made, the court will order the officer restored. (p. 115.)**

**OFFICER—Proceedings for Removal Where None are Prescribed.—Where no particular procedure is prescribed by which a city council may exercise its power to expel an officer of the city, such proceedings should be had as will give the person charged an opportunity to be heard in defense of any charges made against him for which he may be expelled. If the charges made warrant expulsion, and there is legal evidence in support of the charges, and the person has had reasonable opportunity to defend, action taken by the requisite vote of the council in expelling a member of the council will not be disturbed by mandamus proceedings. (p. 115.)**

**OFFICER—Malconduct in Selling Influence.—One intrusted with official power, who violates his public obligation and betrays his official trust by selling his official influence or vote in a body of which he is a member, is guilty of malconduct in office. (p. 115.)**

**OFFICER.—Malconduct in Office, Like Misconduct in office, includes such acts as amount to a breach of the good faith and right action that are impliedly required of all officers. (p. 115.)**

**OFFICER—Removal—Rules of Procedure.—In expelling a member of its body a city council does not convict of a crime, and it is not essential that the strict rules of criminal procedure be observed. Where no injury appears to have been done an expelled officer, it is not necessarily illegal for the council, while in executive session considering the action to be taken, to receive and read reports of a detective used in the case, when the action taken was publicly done and duly recorded. (p. 116.)**

**OFFICER—Removal—Allegation of Charges of Malconduct.—A charge that in effect alleges that a member of a city council agreed for a consideration to aid in securing a valuable contract with the city through a constituted board of the city and to secure an increase in the appropriation for the purposes of the contract to unduly increase the profits, sufficiently sets forth conduct amounting to "disorderly behavior and malconduct in office" for which such officer may be expelled under the statute; and where there is evidence to sustain the charge and no illegality appears in the proceedings of expulsion, the courts will not interfere by mandamus. (p. 116.)**

(Syllabi by the court.)

Wall &amp; McKay, for the plaintiff in error;

W. R. Rowland and C. C. Whitaker, for the defendants in error.

<sup>223</sup> **WHITFIELD, C. J.** The plaintiff in error obtained from the circuit court for Hillsborough county an alterna-

tive writ of mandamus commanding the city council of the city of Tampa to restore relator to his office as councilman of the city of Tampa, from which he had been expelled by the council, or to show cause for not doing so. A motion to quash the alternative writ was granted and the proceeding dismissed. The relator took writ of error and urges that he was illegally expelled from his office and should be restored.

Briefly stated, the alternative writ in effect alleges that the relator was duly elected, qualified and acting as councilman, his term not expiring till June, 1910; that certain charges of alleged malconduct in office were made to the council against him; that the council unanimously adopted a resolution suspending relator "until after the hearing and investigation by this council of the charges now pending against him," and providing "for a hearing in a body of the said charges now pending against councilman James E. Etzler, with all the testimony bearing upon the same"; that another resolution setting forth designated specifications of the charges against relator was adopted by the council and served on the relator; that after striking a plea in abatement and also denying motion to strike <sup>224</sup> designated portions of the resolution adopted by the council and to quash certain of the specifications of malpractice in office, the council took testimony as set out in the alternative writ; that the controversy was by agreement submitted without argument; "that thereupon the council retired in executive session to consider what action they should take, and while in executive session, without knowledge of the said petitioner or his attorney, the council received the daily reports made by the detective North mentioned in the said proceedings, and that some of the members of the council read at least a portion of the said reports; and that afterward, to wit, on the same evening, the council returned in open session and reported their findings in the form of a resolution introduced by T. B. Smith, which said resolution is as follows, to wit:

"Whereas, certain charges have been preferred against J. E. Etzler, a member of the city council of Tampa, on the ninth day of October, 1908;

"And whereas, said J. E. Etzler has been given a hearing upon said charges;

"And whereas, upon said hearing testimony has been submitted both for and against said charges;

"And whereas, the city council of Tampa having found that said charges have been proven to be true, and it being the opinion of two-thirds of the members of the city council that said charges constitute malconduct in office on the part of the said J. E. Etzler, city councilman of the city of Tampa:

"Therefore, be it resolved that the said J. E. Etzler as aforesaid be and he is hereby expelled from and as a member of the city council of Tampa."

And that thereupon council for the petitioner demanded that the roll be called upon said resolution, whereupon Councilman Friend moved that said resolution be adopted, and the same having received a second, it was put to a <sup>225</sup> vote, and said resolution was adopted by a vote of eight yeas and two nays.

“That the expulsion of the said J. E. Etzler from the said city council was unlawful, illegal and in violation of law, and that the said respondents, in pursuance of said illegal and unlawful expulsion, are now withholding from him his said office of councilman from the fourth ward of the said city of Tampa, with its privileges, duties and emoluments.”

Mandamus is the proper proceeding to test the validity of the action of a city council in expelling from office a member of the council. In such an action the court will consider the entire proceeding of the council, including the issues in effect made and the testimony taken before the council as shown by the alternative writ. If the proceedings were illegal or fatally defective, or if the testimony wholly fails to support the charges made, the court will order the officer restored: See *State v. Teasdale*, 21 Fla. 652; *Scott v. State*, 43 Fla. 396, 31 South, 244.

Section 1012 of the General Statutes provides that “two-thirds of the council may expel a member of the same or other officer of the city or town for disorderly behavior or misconduct in office.”

No particular procedure is prescribed by which the council may exercise its power to expel an officer of the city, but such proceedings should be had as will give the person charged an opportunity to be heard in defense of any matters alleged against him for which he may be expelled. If the matters alleged warrant expulsion, and there is legal evidence in support of the charges, and the person has had reasonable opportunity to defend, action taken by the requisite vote of the council in expelling a member of the council will not be disturbed by mandamus proceedings.

<sup>226</sup> The court will determine whether the charges made and considered would, if proven, amount to “disorderly behavior or misconduct in office.”

“One who is intrusted with official power, violates his public obligation, betrays his official trust, and loses the public confidence by selling his official influence or vote in a body of which he is a member, is guilty of disorderly conduct” in office: *State v. Common Council of Jersey City*, 25 N. J. L. 536; *State v. Teasdale*, 21 Fla. 652.

Malconduct in office, like misconduct in office, includes such acts as amount to a breach of the good faith and right action that are tacitly required of all officers: See 3 Words and Phrases, 4296, 4532.

The charge here is in effect that the relator agreed for a consideration to aid in securing a valuable contract with the city of Tampa through a constituted board of the city, and to secure an increase in the appropriation for the purposes of the contract to unduly increase the profits. There is evidence to sustain the charge, and it is clear that such conduct was both "disorderly behavior and malconduct in office" within the meaning of the statute under which the expulsion was had.

In refusing to rescind or to strike out a resolution or parts of a resolution, and in striking a plea in abatement relating to the charge and the proceedings to be had thereon, no provision or principle of law was violated by the council, and no injury to the relator appears.

Even if, while in executive session considering what action to be taken, the council received the daily reports of a detective used in the case, and some of the members read at least a portion of said reports, such a course is not per se illegal or even reprehensible, and it does not appear that the result was thereby affected or the relator <sup>227</sup> injured. The action taken by the council was publicly done and so recorded.

The council was not trying the relator for the purpose of convicting him of a crime, and the strict rules of criminal procedure were not essential where no substantial rights of the relator were denied to him.

The mere fact that an ordinance of the city provides that members of the city council shall not be directly or indirectly interested in any contract with the city, and that they may be suspended from office for that cause, does not render that the only cause for which an expulsion may be had under the statute for "disorderly behavior or malconduct in office."

The adoption by a city council of different resolutions upon a subject for which a member of the council may be expelled is not twice placing of the person charged in jeopardy. Nor is a provision in a resolution that if the charges are proven the relator is guilty of disorderly behavior and malconduct in office, and should be expelled, a prejudgment of the charge referred to.

No illegality appears in the proceedings, and as the charge made warranted expulsion and is supported by competent evidence, the finding of the council upon the evidence should not be disturbed on this proceeding. No fundamental principle of law affecting the rights of the relator appears to have been violated in the action of the council expelling him from his office as a councilman, and the order of the court dismissing the mandamus proceeding is affirmed.

Shackleford and Cockrell, JJ., concur.

Taylor, Hocker and Parkhill, JJ., concur in the opinion.

## OWENS v. WILSON.

[58 Fla. 335, 50 South. 674.]

**APPEAL**—Upon Writ of Error to an Order Granting New Trial, the only questions to be considered are those involved in such order. (p. 117.)

**LANDLORD AND TENANT**—Distress.—New Trials may be granted in distress proceedings. (p. 117.)

**LANDLORD AND TENANT**—Distress.—The Cessation of the Relationship of landlord and tenant does not destroy the statutory remedy by distress as to rent theretofore accrued. (p. 118.)

(Syllabi by the court.)

Da Vant & Da Vant, for the plaintiff in error.

F. B. Cooglar, for the defendants in error.

<sup>335</sup> **COCKRELL, J.** This is a writ of error addressed to the grant of a new trial upon verdict for the defendant in a distress proceeding. Upon such a writ, unlike one directed <sup>336</sup> to a final judgment, the only questions to be considered are those involved in the order granting the new trial: *Jones v. Jacksonville Electric Co.*, 56 Fla. 452, 47 South. 1.

It is insisted that distress proceedings are entirely regulated by statute, and as the statute provides for appeals and is silent as to motions for new trials, such procedure is forbidden by implication. There may be authority for this position in some code states, but we see no occasion for adopting such construction here. Our statute provides merely the manner and time within which such motions are to be made, and does not prescribe or limit the class of actions where permitted. It is a wholesome and ancient method of correcting promptly and inexpensively errors that may creep into the rulings of the court or findings of the jury, and the silence of the statute does not inhibit its use.

A plea was interposed to the distress affidavit, which serves the office of a declaration, to the effect that the relation of landlord and tenant did not exist when the proceedings were commenced. Issue was joined upon this plea and was submitted to the jury, upon evidence in its support.

We think this plea tendered an immaterial issue, thus calling for a new trial: *Jones v. Shomaker*, 41 Fla. 232, 26 South. 191.

While at the common law it would seem that with the expiration of the landlord's title the right to distress ceased, yet in many respects writs of distress have been modified by statute, and in this respect the right has been enlarged. The statute, General Statutes, section 2240, gives the writ to "Any person to whom any rent or money for advances may be due." Again, a lien is given to "Every person to whom rent may be due . . . upon all property of the defendant": Gen. Stats.,

337 par. 2237. The question is whether the relation of landlord and tenant existed at the time the right of action accrued, not at the time the action began. It has been held under similar statutes in Georgia and Texas that the cessation of the relationship did not destroy the right to the writ: *Tyner v. Slappy*, 74 Ga. 364; *Meyer v. Oliver*, 61 Tex. 584.

It follows that the order be affirmed.

• Whitfield, C. J., and Shackelford, J., concur.

Taylor, Hocker and Parkhill, JJ., concur in the opinion.

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*Distress for Rent* is the subject of a note to *Lichtenhaler v. Thompson*, 15 Am. Dec. 584. Statutes which enlarge the common-law remedy by distress are strictly interpreted: *Kellogg Newspaper Co. v. Peterson*, 162 Ill. 158, 53 Am. St. Rep. 300. Where a tenant for a term certain has underlet a portion of the premises and surrendered his lease, the subtenant remaining in possession, his goods cannot be distrained for rent owing by a subsequent tenant, to whom the landlord has leased the whole premises after the surrender: *Hessel v. Johnson*, 129 Pa. 173, 15 Am. St. Rep. 716.

*Forcible Entry and Detainer* is the subject of a note to *Wilson v. Campbell*, 121 Am. St. Rep. 369.

*Unlawful Detainer* is the subject of a note to *Washington v. Moore*, 120 Am. St. Rep. 32.

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## HINSON v. STATE.

[59 Fla. 20, 52 South. 194.]

### EVIDENCE OF REPUTATION—Who may Give Testimony.—

While a witness is not competent to testify to the reputation of another person unless he can say he believes he knows the general reputation of such person in the community, yet one who has been personally acquainted with another for a considerable length of time, and who has been in a position where he probably would have heard that other's reputation talked about were it the subject of comment, and who has never heard it questioned, may testify to the good reputation of such person. Such a witness may testify to good reputation by saying that he has never heard anything said against the person. (p. 119.)

**EVIDENCE OF REPUTATION—Scope of Inquiry—Cross-examination.**—The inquiry should be whether the witness knows the general reputation of the person whose character is in issue in the given community and as to the trait or quality in question. When the witness answers that question in the affirmative, the foundation for proving what that reputation is has been sufficiently laid, and the witness thus laying such foundation should be permitted to go on and testify as to what the reputation is, without being interrupted by a cross-examination to test the extent and sources of his information as to such character. The proper practice in testing, by cross-examination, the extent and sources of the knowledge or information of such impeaching witness is to defer it until the witness has been turned over in regular order for cross-examination in general at the close of the examination in chief. (pp. 119, 120.)

(Syllabi by the court.)



Bryan & Bryan and I. L. Farris, for the plaintiff in error.

Park Trammell, attorney general, for the state.

<sup>21</sup> PARKHILL, J. The plaintiff in error was convicted in the criminal court of record for Duval county of grand larceny, and alleges error.

G. W. Russell testified that he had known the defendant about four years, E. N. Gasque had known him eight years, E. P. Douglass, city marshal, had known him in Jacksonville since 1889, W. S. Seward had known him there eight or nine years before his arrest. We think these witnesses ought to have been permitted to testify as to general reputation of the defendant for honesty and integrity in the community where he lived prior to his arrest upon this charge, even though they admitted that <sup>22</sup> they had never heard anyone discuss the defendant's reputation prior to that time.

A witness is not competent to testify to the reputation of another person unless he can say that he believes he knows the general reputation of such person in the community. While the knowledge of the witness must extend to the other's general reputation, one who has been personally acquainted with another for a considerable length of time, and who has been in a position where he probably would have heard that other's reputation talked about were it the subject of comment, as seems to be the case with the witnesses here, and who has never heard it questioned, may testify to the good reputation of such person. Such a witness may testify to good reputation by saying that he has never heard anything said against the person: 3 Ency. of Ev. 43; 2 Wigmore on Evidence, pars. 1612, 1614; People v. Van Gaasback, 189 N. Y. 408, 82 N. E. 718, 22 L. R. A., N. S., 650, 12 Ann. Cas. 745, where will be found a comprehensive note.

In Lemons v. State, 4 W. Va. 755, 6 Am. Rep. 293, the court points out that the absurdity of the rule against negative testimony becomes more apparent when it is remembered that the more unsullied and exalted the character, the less likely it is ever to be called in question, or spoken of, and consequently more difficult to sustain than characters of a far less worth, because the latter had been the subject of conversation and speculation in the community, while the former had not.

We observe that in several instances, after the witnesses had answered the preliminary question and before saying what the reputation of the defendant was, they were cross-examined as to the grounds for their belief that they had such knowledge. We notice also that sometimes the witnesses were asked if they knew the reputation, not the <sup>23</sup> general reputation, of the defendant in the community for honesty.

The inquiry should be whether the witness knows the general reputation of the person whose character is in issue



in the given community, and as to the trait or quality in question. When the witness answers that question in the affirmative, the foundation for proving what that reputation is has been sufficiently laid, and the witness thus laying such foundation should be permitted to go on and testify as to what the reputation is, without being interrupted by a cross-examination to test the extent and sources of his information as to such character. The proper practice in testing, by cross-examination, the extent and sources of the knowledge or information of such impeaching witness is to defer it until the witness has been turned over in regular order for cross-examination in general at the close of the examination in chief: *Nelson v. State*, 32 Fla. 244, 13 South. 361.

The judgment is reversed.

All concur, except Taylor, J., absent on account of illness.

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*Evidence of Good Character* for the purpose of creating a doubt of a defendant's guilt is the subject of a note to *People v. Bonier*, 103 Am. St. Rep. 888. According to *State v. Dickerson*, 77 Ohio St. 34, 122 Am. St. Rep. 479, the accused, under a charge of homicide, is entitled to introduce evidence of his character for peace and quietness, and is not limited to proving what people may have said of him, as to his being or not being a quiet and peaceable man, but is entitled to inquire as to his character from those acquainted with him, and they are authorized to speak from his general peaceable and quiet conduct, and from not having known or heard anything to the contrary; but in cross-examination of witnesses as to the good character of the accused, it is not permissible to prove that prior to the commission of the alleged crime, they had heard rumors in the community of his residence that he had committed certain other crimes. According to *State v. Lee*, 22 Minn. 407, 21 Am. Rep. 769, negative evidence of character is competent; for instance, the testimony of a witness who swears that he has been acquainted with an accused person for a considerable time, under such circumstances that he would be more or less likely to have heard what was said about him, and has never heard any remark about his character—the fact that a person's character is not talked about at all being excellent evidence that he gives no occasion for censure, or, in other words, that his character is good. But in *Holmes v. State*, 88 Ala. 26, 16 Am. St. Rep. 17, it is held that a witness is incompetent to testify, either affirmatively or negatively, as to character, who knows nothing of the reputation borne by the defendant in the neighborhood in which he lived, or where he was known, and who was not in such position, as to defendant's residence or acquaintances, that the fact of his not hearing anything against him would have any tendency to show that nothing had been said, and that therefore his character was good.

**ESCAMBIA LAND AND MANUFACTURING COMPANY  
v. FERRY PASS INSPECTORS AND SHIPPERS  
ASSOCIATION.**

[59 Fla. 239, 52 South. 715.]

**LEASE.—Two Separate Instruments Under Seal, Executed by** the parties at the same time, one an indenture of lease, the other in the nature of a defeasance which defeats the force or operation of the lease, must be read and construed together as one contract. (p. 122.)

**WORDS AND PHRASES.—The Word "Defeasance"** is "fetched from the French word 'defaire,' i. e., to defeat or undo, 'infectum reddere quod factum.' . . . . The true meaning of this language is to make void the principal deed." (By the editor.) (p. 123.)

**LEASE—Shore Between High and Low Water Mark.—A con-**tract whereby one party leases to another the shore or space between high and low water mark, a part of the bed of a navigable stream the title to which is in the state in trust for the public, and the riparian rights which are concurrent with the rights of other inhabitants of the state and must be exercised subject to the rights of others is void, as being illegal and contrary to public policy. (p. 124.)

**ILLEGAL CONTRACT.—Courts will Take Notice of Their Own Motion** of illegal contracts which come before them for adjudication, and will leave the parties where they have placed themselves. (p. 125.)

(Syllabi by the court except when stated to be by the editor.)

Reeves & Watson, for the plaintiff in error.

John C. Avery, for the defendant in error.

**240 PARKHILL, J.** On the twenty-second day of April, 1907, the plaintiff in error and the defendant in error entered into two agreements. The one was an indenture of lease under seal, whereby the Escambia Land and Manufacturing Company did let and rent to the Ferry Pass Inspectors and Shippers Association for a period of five years from the twelfth day of April, 1907, "the use of twenty (20) feet of the following portions of the river front of certain lands upon the Escambia river in said county of Escambia, and in township one (1) north, range thirty (30) west, to wit"; then follows a more particular description of the premises, for the yearly rental of five hundred and fifty (\$550) dollars per year, payable semi-annually in advance, on the first day of May and the first day of November of each year. It was further provided: "The term 'River Front' as used in this instrument means, and shall be construed to include, a strip of land twenty (20) feet wide and extending back from the high-water mark, as well as all the land below high-water mark, and all the riparian rights incident to the ownership of said land the waterfront of which is leased by this instrument."

<sup>241</sup> By means of the other instrument, likewise under seal, the said parties further agreed:

“This agreement, made this 22nd day of April, 1907, by and between the Escambia Land & Manufacturing Company, a corporation, and the Ferry Pass Inspectors' & Shippers' Association, a corporation, witnesseth: That, whereas, the parties have this day executed the contract of lease for twenty (20) feet of the water front of certain property situated on the Escambia River in said county of Escambia and in Township One (1) North, Range Thirty (30) West and Township One (1) South, Range Thirty (30) West, more particularly described in said indenture:

“Now, it is understood and agreed that the party of the second part is to institute suit against the White River Inspectors & Shippers Association, a corporation, to enjoin and restrain said last named corporation from the use of said property and the riparian rights incidental thereto, and that if said suit shall result adversely to the party of the second part, that is, if the court shall hold that the White River Inspectors & Shippers Association has the right to use said water front for the purposes against the use of which said injunction is sought, that then the aforesaid indenture of lease between the parties of the first and second part shall be cancelled and annulled and the parties thereto shall be released from any and all liability arising therefrom.”

A suit was instituted by the Ferry Pass Inspectors and Shippers Association against the White River Inspectors and Shippers Association and was brought here, and will be found reported in 57 Fla. 399, 48 South. 643, 22 L. R. A., N. S., 345. After that decision the suit was dismissed by the plaintiff. Thereupon the plaintiff in the instant case, the Escambia Land and Manufacturing Company, terminated the lease by re-entry on January 23, 1909, and seeks to recover the rental <sup>242</sup> alleged to be due up to that time, the lessee having paid no rental, claiming a release therefrom because the said suit instituted against the White River Inspectors and Shippers Association has resulted adversely to the Ferry Pass plaintiff; that is, that this court held that the White River Inspectors and Shippers Association has the right to use said waterfront for the purposes against the use of which said injunction was sought.

The court below held with the contention of the defendant herein, and we must construe the contract which is contained in the two separate instruments. These two instruments must be read and construed together. The second instrument providing for the institution of the suit against the White River Inspectors and Shippers Association is in the nature of a defeasance which defeats the force or operation of the other deed. Lord Coke has given a very correct definition of a

“defeasance” in stating its derivation. “It is,” says he (Coke on Littleton, 236b), “fetched from the French word ‘de-faire’; i. e., to defeat or undo, ‘infectum reddere quod factum.’” The true meaning of this language is to make void the principal deed: See *Flagg v. Mann*, 2 Sum. 486, Fed. Cas. No. 4847; 2 Words and Phrases, p. 1930; *Simmons v. West Virginia Ins. Co.*, 8 W. Va. 474 (citing Bouvier’s Law Dictionary).

The effect of the defeasance in the instant case is to defeat the force or operation of the contract of lease, to undo it, cancel and annul it, and to release the parties thereto “from any and all liability arising therefrom,” if the court shall hold that the White River association has the right to use said waterfront. If the effect of the defeasance is to release the parties from liability for the rental only after the decision of the court upon the rights of the White River association, then its language should have been “to release the parties thereto from any and all liability arising thereafter”; but the language of the contract is that <sup>243</sup> upon a decision adversely to the Ferry Pass association and in favor of the White River association the parties shall be released from any and all liability arising therefrom; that is, from the terms of the lease.

The release of liability provided for is in reference to the nature of the liability, that is, the liability arising from the lease, and does not have reference to the time when the liability shall cease, but covers any and all liability arising from the lease in clear and unambiguous language.

The language of the defeasance is clear. It provides that if said suit shall result in a certain way, “that then [in that event] the aforesaid indenture of lease between the parties of the first and second part shall be canceled and annulled and the parties thereto shall be released from any and all liability arising therefrom.” “Any and all liability arising therefrom” means any and all liability growing out of or having its origin, life and existence in the contract. “Any and all liability” does not mean some of the liability, as, for instance, liability for rental after the decision of the court upon the question mentioned, but any and all liability growing out of or having its existence in the contract, whether before or after the decision of the court upon the rights of the White River association. The provision that if the court shall hold the White River association has the right to use said waterfront, that then the indenture of lease shall be annulled, means that in the event mentioned and suit be brought on the lease, the court shall annul the lease or hold it void and of no effect. This the lower court did, and the action of the court was correct, as the demurrer to the plea setting up these

matters admitted that the court held the White River association had the right to use the said waterfront.

The defendant did not pay the rental. The plaintiff is suing to recover it. If the rental sued for did not arise from, grow out of or have its existence in the contract, the <sup>244</sup> plaintiff is not entitled to recover, for this suit is brought to recover under the express contract. If the rents sued for did arise from, grow out of or have their existence in the contract, the defendant is released therefrom by the very words of the contract by the court's holding that the White River association has the right to use said waterfront. But that is not all. The plaintiff must fail in this suit for another reason. Upon its face, the contract on which this suit is brought is void, as being illegal and contrary to public policy. By the terms of the contract the plaintiff undertook to lease to the defendant the river front and the riparian rights incident thereto to the exclusion of the use thereof by the White River association. This the lessor had no right to do. In the *Ferry Pass Inspectors etc. Assn. v. White River Inspectors etc. Assn.*, 57 Fla. 399, 48 South. 643, 22 L. R. A., N. S., 345, this court held that "the shore or space between high and low water mark is the part of the bed of navigable waters, the title to which is in the state in trust for the public. If the owner of the land has title to high-water mark, his land borders on the water, since the shore to high-water mark is a part of the bed of the waters, that if it is a navigable waterway he has, as incident to such title, the riparian rights accorded to the common law to such an owner. . . . A riparian owner may use the navigable waters and the lands thereunder opposite his land for purposes of navigation and of conducting commerce or business thereon, but such right is only concurrent with that of other inhabitants of the state, and must be exercised subject to the rights of others. . . . In the absence of a valid grant from the state, no riparian owner or other person has an exclusive right to do business upon public waters of the state, whether such waters are in front of the land of the riparian owner or not. . . . While the complainant and the defendant, in common with all other inhabitants of the <sup>245</sup> state, have a right to use the waters of the navigable streams and the lands thereunder, including the shore or space between high and low water mark, for purposes of navigation and the transportation of logs thereover, neither the complainant nor the defendant has such right to the exclusion of its lawful exercise by the other or by any other inhabitant of the state."

The contract here is to lease the shore or space between high and low water mark, a part of the bed of a navigable stream, the title to which is in the state in trust for the public, and to lease the exclusive use of riparian rights so

far as the White River association was concerned, when such riparian rights were concurrent with the rights of the White River association and other inhabitants of the state, and must be exercised subject to the rights of others. The contract, therefore, is an illegal contract. The plaintiff's right to a recovery is based upon the illegal contract, a breach of which is the very gist of the action. In *Shortall v. Fitzsimmons & Connell Co.*, 93 Ill. App. 231, the court held: "A contract to build a wall through the waters of Lake Michigan by driving piles into, and making a permanent structure upon lands under said waters, the title to which is in the state of Illinois in trust for the public, is an illegal contract, and the wall, when built, is a purpresture, and liable to abatement at the instance of the state." The court said: "We know of no well-considered case where a recovery has been allowed where the very basis of the action is an illegal contract or its breach."

In *Stewart v. Sterns & Culver L. Co.*, 56 Fla. 570, 48 South. 19, 24 L. R. A., N. S., 649, this court said: "The courts will not in general aid either party to enforce an illegal agreement, but will leave the parties where they place themselves with reference to such illegal agreement, except where the law or public policy requires action by the courts, or where the parties are not in *pari delicto*, and perhaps in other <sup>246</sup> cases not pertinent here." In that case the court said, further, that "when it appears from a contract and the circumstances under which it was made, and from its purposes, operation and results, that in its terms or in its full operation it is unlawful, or its operation accomplishes, or in reality tends to accomplish, an unlawful purpose, whether so intended by the parties thereto or not, the contract will not be enforced by the courts."

Courts will take notice of their own motion, too, of illegal contracts which come before them for adjudication, and will leave the parties where they have placed themselves: *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457.

The judgment is affirmed.

Taylor and Hocker, JJ., concur.

Whitfield, C. J., and Shackleford and Cockrell, JJ., concur only in the conclusion that the contract is illegal and unenforceable.

Petition for rehearing in this case denied.

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*The Title to Land Covered by Navigable Waters* is the subject of a note to *People v. Kirk*, 53 Am. St. Rep. 289. Riparian owners on a navigable stream have no title as owners to the water between low-water mark and the channel of the stream, nor to the soil beneath it, nor to what such soil contains. The ownership of such



water and soil and its contents is in the state: *Taylor v. Commonwealth*, 102 Va. 759, 102 Am. St. Rep. 865; *Mobile Transp. Co. v. City of Mobile*, 153 Ala. 409, 127 Am. St. Rep. 34. As to the qualified rights which a riparian owner may have in tide lands, see *San Francisco Sav. Union v. R. G. R. Petroleum etc. Co.*, 144 Cal. 134, 103 Am. St. Rep. 72; *Reyburn v. Sawyer*, 135 N. C. 328, 102 Am. St. Rep. 555; *Taylor v. Commonwealth*, 102 Va. 759, 102 Am. St. Rep. 865.

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## JOHNSON v. ATLANTIC COAST LINE RAILROAD COMPANY.

[59 Fla. 302, 51 South. 851.]

**RAILROADS—Crossing Track in Rear of Train.**—A declaration for negligent injuries averring that the railroad company unreasonably detained a freight train with its rear car across the principal street of a village, that the plaintiff was proceeding cautiously and prudently to pass around said car when the train without warning suddenly, swiftly and violently started backward upon her, is not ill because of failure to aver that the defendant's agents actually saw her in time to prevent the accident. (pp. 126, 127.)

**RAILROADS—Crossing Track in Rear of Train.**—One finding the highway blocked an unreasonable time by a train of cars is not a trespasser upon the railroad's property in passing prudently around the end of the train. (pp. 126, 127.)

(Syllabi by the court.)

H. S. Hampton and Dayton & Dayton, for the plaintiff in error.

Sparkman & Carter, for the defendant in error.

308 **COCKRELL, J.** The declaration, in an action for personal injuries, to which demurrer was sustained and judgment final for the defendant was entered, consisted of two counts. In the first count the plaintiff avers that near the station, in the town of Blanton, she was passing along the frequented highway which crossed defendant's track and found a car or caboose attached to a train which was negligently permitted to obstruct the highway, and that while cautiously and prudently proceeding around the rear of the car the defendant without warning caused the car to be suddenly, swiftly and violently started backward, striking her and causing injuries. The second count avers a necessity to cross the track and that the highway was blocked for an unreasonable length of time. From a ruling upon an offer to amend the declaration, it appears that the trial court proceeded upon the theory that the plaintiff was a trespasser, and that the company owed no duty to her, except to abstain



from willful injury; in other words, that it was not negligent unless its servants actually saw her in time to prevent the injury.

This court has never accepted the doctrine as to trespassers; on the contrary, it was seriously questioned in <sup>304</sup> *Morris v. Florida Cent. & P. R. Co.*, 43 Fla. 10, 29 South. 541. But have we here the case of a trespasser?

It was undoubtedly the common-law rule that a traveler finding a highway impassable was permitted to enter upon the abutting land in order to continue his journey, without becoming a trespasser, and we can discover no difference in favor of an abutting owner who by positive act effectively obstructs the highway. The plaintiff does not appear to have gone upon defendant's land more than the necessity demanded, and at most was but a few feet from the public right of way. Even though the plaintiff may have been guilty of some contributory negligence, she is not deprived of her right of action: *Florida Cent. & P. R. Co. v. Foxworth*, 41 Fla. 1, 79 Am. St. Rep. 149, 25 South. 338; and with the statutory presumption of negligence from injury we cannot say as matter of law that the declaration shows that the company exercised "all ordinary and reasonable care and diligence strictly commensurate with the exigencies of the occasion and demanded by the relationship that it bears for the time being to the party in question": *Morris v. Florida Cent. & P. R. Co.*, 43 Fla. 10, 29 South. 541. The declaration does not disclose that the railroad company was exercising that ordinary and reasonable care due to the plaintiff.

We get little or no aid from the cases cited from other jurisdictions; they are not exactly on the point. Some hold that it is negligent to attempt to pass over cars or couplings, though there is conflict as to this, and in the Georgia case—*Andrews v. Central Railroad etc. Co.*, 86 Ga. 192, 12 S. E. 213, 10 L. R. A. 58—Bleckley, C. J., speaking for the court, suggests that it was the plaintiff's duty to go around the car, as was attempted here.

We think the point practically controlled by the *Foxworth* <sup>305</sup> and *Morris* cases, and the judgment is reversed with directions to overrule the demurrer.

All concur except Taylor, J., absent on account of illness.

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*The Liability of a Railway Company to Persons* who, while attempting to cross a track in front or in the rear of a standing train, are injured by a sudden movement of the train backward or forward is discussed in *Atchison etc. Ry. Co. v. Wilkie*, 77 Kan. 791, 127 Am. St. Rep. 464, and cases cited in the cross-reference note thereto. Though a railway train improperly blocks a street, or remains standing therein for an unreasonable time, a person is not, for that reason, authorized to incur unnecessary risk in seeking to cross the street, but is still required to exercise such prudence as would ordinarily

be required of one seeking to pass between the cars of a standing train which is liable to move at any moment: *Studer v. Southern Pac. Co.*, 121 Cal. 400, 66 Am. St. Rep. 39. The risk of passing from one side of a spur railroad track, or switch, to the other, by going through freight-cars standing thereon, is apparent and should not be taken: *Bollinger v. Texas etc. Ry. Co.*, 47 La. Ann. 721, 49 Am. St. Rep. 379, and cases cited in the cross-reference note thereto. And the cutting of a train on a sidetrack so that some cars are on one side and some on the other of the highway is not an invitation to the public to cross the other tracks without exercising reasonable care: *Passman v. West Jersey etc. R. R. Co.*, 68 N. J. L. 719, 96 Am. St. Rep. 573.

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### ROBERTSON v. WILSON.

[59 Fla. 400, 51 South. 849.]

**REFEREE**—Power as a Judicial Officer.—Under our constitution and statutes, a referee is a judicial officer appointed by the circuit court; and, being substituted in the place and stead of the official judge, such referee has, over the case referred to him, all the powers of the court in which the cause is pending. (p. 130.)

**LACHES**—Delay Occasioned by Official Negligence.—Delay in the prosecution of a suit is sufficiently excused where it is occasioned solely by official negligence without the contributory negligence of the plaintiff, especially where no steps were taken by the defendant to expedite the case. (p. 129.)

(Syllabi by the court.)

Hocker & Duval, for the plaintiff in error.

H. L. Anderson and H. M. Hampton, for the defendant in error.

**401 PARKHILL, J.** On the fourth day of May, 1909, the judge of the circuit court for Marion county made an order and final judgment dismissing a cause then and therein pending, wherein the plaintiff in error was plaintiff and the defendant in error was defendant; and on the second day of June, 1909, the court overruled the plaintiff's motion to vacate and set aside the order of dismissal of May 4, 1909. Thereupon the plaintiff sued out a writ of error, and assigns as errors the order of dismissal and the denial of the motion to vacate the order of dismissal.

The declaration was filed October 4, 1902, the cause was dismissed for want of prosecution May 4, 1909, after the lapse of six years and seven months. But this long delay was not caused by the plaintiff, and may not be charged up to him. Thus, we see that although the plaintiff filed his declaration on the fourth day of October, 1902, the defendant did not file his pleas until the seventeenth day of June, 1903—a period of over eight months that ought to be charged up to

the defendant, thus reducing the time of delay from six years and seven months to five years and eleven months. The defendant ran the risk of a judgment by default for about eight months, and on the thirteenth day of August, 1903, the plaintiff filed an amended declaration with the permission of the court, and with the agreement that the pleas filed to the original declaration <sup>402</sup> should stand as pleas to the amended declaration. On the first day of December, 1903, the plaintiff joined issue, and, on the eighth day of January, 1904, the cause was sent to a referee. Thus far the defendant was as much responsible for delay in the prosecution of this cause as the plaintiff, and we may well call the account square up to this date.

The referee caused the parties to appear and enter upon a trial. After considerable testimony had been taken in behalf of the plaintiff further hearing was adjourned, April 23, 1904, "subject to notice from the referee." On the twenty-fifth day of August, 1904, the plaintiff propounded to the defendant certain interrogatories, serving copy of same on the defendant, who filed objections thereto on the same day. Although the hearing was adjourned April 23, 1904, subject to notice from the referee, nothing further was done by him in this matter until the twenty-fifth day of February, 1907, a period of two years and ten months, when the referee resigned. During this time the plaintiff made repeated efforts to speed the cause. It appears from the uncontradicted affidavit of R. McConathy, Esq., counsel for the plaintiff, "that immediately after the plaintiff testified before the referee in this cause in his own behalf, the objections filed by the defendant to interrogatories propounded to him in this cause came on for hearing before the then referee in this cause. . . . That upon the hearing of objections to said interrogatories it was agreed by all of the parties that counsel for the respective parties should be permitted to file brief in support of arguments upon said objections to said interrogatories, and that within a very short time after said argument counsel for the plaintiff filed such briefs, and that thereafter, beginning within a few weeks after the filing of such briefs, affiants applied to the referee in this cause . . . to make some disposition of said objections <sup>403</sup> and ruling upon the same, and thereafter affiant, from time to time, at intervals of a few weeks, called the matter to the attention of the said referee and requested a ruling thereon, which request affiant continued to make from time to time at short intervals until a short time prior to the resignation of the referee in this cause." During this time it does not appear that the defendant did anything to speed the cause. This delay will be excused, as it was occasioned solely by the official negligence without the contributory negligence of the plaintiff, especially

as no steps were taken by the defendant to expedite the case: *Warren v. Shaw*, 43 Me. 429; *In re McDevitt*, 95 Cal. 17, 30 Pac. 101; 6 Pl. & Pr. 917.

On the twenty-fifth day of February, 1907, by consent of parties, another practicing attorney of the court was appointed to try the cause. On the twenty-fifth day of May, 1907, upon motion of defendant the referee dismissed the cause for want of prosecution. On the twenty-fourth day of June, the plaintiff by counsel moved the referee to set aside this order of dismissal. After waiting a long time, until the 12th of December, 1907, the referee granted the motion in the following words: "Having examined the record and read the affidavits above mentioned, the referee is of the opinion that, under the circumstances, there has not been such failure to prosecute the action on the part of the plaintiff as would justify its dismissal for that reason." Clearly, the plaintiff may not be charged with the delay occasioned by the referee's holding this motion under advisement.

The defendant in error contends that when the referee dismissed this case for want of prosecution in May, 1907, he was powerless to reinstate the same, and had no right other than to entertain a motion for new trial or to settle a bill of exceptions, and that "there was nothing in fact to be dismissed by the court in May, 1909, when the order of dismissal was entered, because it stood dismissed at <sup>404</sup> the time," and "there could have been no error in dismissing the case by the court, in May, 1909, because in fact there was no case to be dismissed." We cannot agree with this contention.

Under our constitution and statutes, a referee is a judicial officer appointed by the circuit court; and, being substituted in the place and stead of the official judge, such referee has, over the case referred to him, all the powers of the court in which the cause is pending: *Rushing v. Thompson's Exrs.*, 20 Fla. 583; *State v. Call*, 36 Fla. 305, 18 South. 771. The referee, then, would have the same power to dismiss and reinstate a cause as the court appointing him would have.

And so we come on down toward the eleventh day of April, 1908, when this referee resigned. Prior to this resignation, according to the affidavit of Wm. Hocker, Esq., of counsel for the plaintiff, "within a very short time after the making of the said order by the said referee on the twelfth day of December, 1907, affiant consulted with said referee for the purpose of getting him to fix a date for the trial of said cause," but that the referee "informed affiant that he . . . did not care to try said cause, but gave affiant no reason for such statement, and did not inform affiant definitely that he did not intend to act as referee in said cause."

Five years, four months and seven days have now passed since the plaintiff filed his declaration.

The affidavit of L. W. Duval, Esq., of counsel for the plaintiff, represents that affiant called on the referee and requested him to set a date for trial, but that said referee informed affiant that he intended to resign as referee; that thereafter the said referee attempted to resign, and on the eleventh day of April, 1908, filed a paper purporting to be his resignation as such referee; that prior to the fall term of the circuit court in and for Marion county, <sup>405</sup> to wit, on or about the twenty-eighth day of November, A. D. 1908, affiant requested the clerk of the circuit court of Marion county to docket the above-styled cause for trial at the fall term of the circuit court for Marion county; that the said clerk through oversight failed to docket the said cause; that thereafter, to wit, on the nineteenth day of December, A. D. 1908, in open court, during the fall term of the circuit court for Marion county, affiant spread upon the motion docket a motion to docket for trial the said above-entitled cause; that thereafter, to wit, on the twelfth day of February, A. D. 1909, the motion of defendant to dismiss the said cause came on to be heard and the judge of the above-styled court on said date made an order reciting that the said cause was still before the referee, refusing to entertain the said motion, and that he had no jurisdiction of the matter; that affiant immediately after the adjournment of the said term of the court approached the referee . . . . and requested him to again fix a date for the trial of the said cause, but the said referee declined to serve, and at that time signed a paper purporting to be his resignation as referee; which paper is found among the records in this cause and was filed on the eighteenth day of March, A. D. 1909; that when the said last-named paper was presented by affiant to the judge of the above-styled court, the said judge made an order on that day, which order is found among the files in said cause, refusing to accept the resignation, and directed the referee to fix a day and speedily dispose of the case. Immediately affiant called upon the referee and insisted upon some date being fixed for the trial of said cause, but the said referee absolutely refused to act as such referee, and filed such refusal on the eighteenth day of March, A. D. 1909; that on the thirtieth day of April, A. D. 1909, affiant filed with the clerk of the circuit court of the above court praecipe for the docketing of the above-styled cause for trial at the <sup>406</sup> spring term of the Marion county circuit court for 1909, and that the said cause was docketed in accordance with said praecipe; that when the said cause was reached on peremptory call of the docket, plaintiffs announced ready for trial, and defendant's attorney stated that he would make

a motion to dismiss the said cause; and that said motion to dismiss was not called up or presented until the plaintiff had announced ready for trial at said term.

On the fifth day of February, 1909, the judge of the circuit court refused a motion to dismiss this cause, because the same was not before his court.

On the seventeenth day of March, 1909, the defendant moved the judge of the circuit court "to dismiss the said action for want of prosecution."

On the eighteenth day of March, 1909, the judge of the circuit court refused to accept the resignation of the referee, but directed him to proceed "to speedily dispose of this cause; and if not done, to show cause before this court on or before the first day of April, 1909, why he does not do so." On the same day the referee "declined to longer act as such referee."

On the thirtieth day of April, 1909, the plaintiff filed his praecipe: "The clerk of the circuit court of Marion county will please place upon the docket for trial at the spring term, 1909, of the circuit court for Marion county the case of John D. Robertson v. Thomas Wilson."

On the fourth day of May, 1909, during the term of the said court, upon the peremptory call of the docket, this case being reached, the plaintiff announced ready for trial. The defendant made a motion to dismiss said cause for want of prosecution, the motion was granted and the cause dismissed. On the twenty-ninth day of May, 1909, during the term of the court, the plaintiff moved the court to set aside and vacate the order dismissing this cause, but the court overruled the motion.

<sup>407</sup> We think the court erred in dismissing this cause on the fourth of May, 1909. At the very first term of court, after, it seems, the plaintiff had succeeded in restoring the case to the docket of the circuit court and announced ready for trial, the same was dismissed. It is little to be wondered that the court and all the parties should have become weary of the long delay, but we do not think, under the circumstances, the responsibility therefor should be visited upon the plaintiff.

The judgment is reversed.

Whitfield, C. J., and Shackleford and Cockrell, JJ., concur.

Taylor, J., absent on account of illness.

Hocker, J., takes no part.

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*On Laches as a Bar to Relief*, see the notes to *Smith v. Thompson*, 54 Am. Dec. 130; *Bell v. Hudson*, 2 Am. St. Rep. 799; *Neppach v. Jones*, 23 Am. St. Rep. 148. If one is prevented from exercising a legal remedy by some paramount authority, the time during which



he is thus forced to be inactive is not counted against him in determining whether the statute of limitations has barred his right: *St. Paul etc. Ry. Co. v. Olson*, 87 Minn. 117, 94 Am. St. Rep. 693. See, also, *Hunter v. Niagara Fire Ins. Co.*, 73 Ohio St. 110, 112 Am. St. Rep. 699; *Lagerman v. Casserly*, 107 Minn. 491, 131 Am. St. Rep. 506.

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### FLOYD v. SMITH.

[59 Fla. 485, 51 South. 537.]

**WILL—Words of Confidence not Creating a Trust.**—A testatrix devised and bequeathed all her estate of every kind to her grandson B, to have and to hold to him and to his heirs and assigns to his and their own proper use, benefit and behoof forever, and stated therein that it was her intention to make no provision for her daughter C, or her granddaughter D, as in her judgment they will be more amply provided for by her grandson B than they could be by her in her will. Held, that no trust in favor of C was created by the will which a court of equity could enforce. (pp. 134, 137.)

(Syllabus by the court.)

Stripling & Noble, for the appellant.

Geo. M. Robbins and Stewart & Bly, for the appellees.

<sup>486</sup> **HOCKER, J.** The appellant filed a bill in the circuit court of Duval county on August 12, 1907, against Augustus V. S. Smith, to which a demurrer for want of equity was opposed, and the demurrer sustained. Subsequently two amended bills were filed by leave of court, in the last of which Pearl Thorn Floyd Rowan and her husband Thomas G. Rowan were made parties defendant. A demurrer to the first of these amended bills was filed for want of equity, which was sustained. To the other amended bill was filed a demurrer for want of equity on October 5, 1908, and on December 9, 1908, a decree was entered dismissing the bill for failure to set down the demurrer for argument. An appeal was taken from this order.

The matter before us involves the construction of the will of Augusta Levi, mother of appellant Alvina Lewiza Floyd, and grandmother of appellees A. V. S. Smith and Pearl Thorn Floyd Rowan. The items of the will which are to be construed are as follows:

“2nd. I give, devise and bequeath to my grandson Augustus V. S. Smith, all the rest and residue of my estate, real, personal and mixed of every name and nature whatever and wherever situated and which I may hereafter and from time to time in any way acquire or to which I may be rightfully entitled, to have and to hold to him and to his heirs and assigns to his and their own proper use, benefit and behoof forever.



"3rd. It is my intention to make no provision in this my last will and testament for my daughter Alvina Lewiza<sup>487</sup> Floyd, widow of G. Wash Floyd, or my granddaughter Pearl Thorn Floyd, daughter of said Alvina Lewiza Floyd, as in my judgment they will be more amply provided for by my said grandson Augustus V. S. Smith, the son of my said daughter Alvina Lewiza Floyd, by her first husband, than they could be by me in this my last will and testament."

The will was probated in Volusia county, Florida, on the 22d of May, 1902, and Augustus V. S. Smith was named and qualified as executor. The bill alleges in substance that the property involved is of the value of about thirty thousand dollars; that the oratrix has no estate or income, and for many years prior to her mother's death she was dependent upon the latter to a large extent for maintenance and support; that oratrix is a widow, with no one upon whom she has any legal right to call for support except her son, the appellee, A. V. S. Smith, and that since her mother's death she has been in very straitened circumstances, and although she has made repeated demands upon her said son for aid and assistance, he has persistently refused to make any provision for her, either out of the ample estate of her late mother, or out of his own funds, and has left oratrix to earn a living by sewing, or such other employment as she has been able to obtain.

The bill alleges that by the third paragraph of her mother's will the defendant A. V. S. Smith is constituted a trustee of the whole estate of her deceased mother for the benefit of oratrix and her daughter Pearl, a moiety to each, and that she is entitled to an accounting, etc., to have him removed as such trustee, and a moiety of the property conveyed and turned over to her, or a new trustee should be appointed by the court. The bill prays for the appointment of a master to take an account; that A. V. S. Smith be compelled to convey to oratrix one-half of the real and personal estate; that he be compelled to execute<sup>488</sup> the terms and directions of said last will and testament of Augusta Levi, and to make suitable provision from said estate of Augusta Levi in such amount and in such manner as to the court shall seem meet and proper in the premises, and for general relief. We do not think it essential to set forth other allegations of the bill.

It is evident the circuit judge considered that by the terms of the will the appellant was given no interest in the estate of her mother which a court of equity could enforce. It is admitted that by the second paragraph of the will all the estate, real, personal and mixed, of the testator is devised and bequeathed to Augustus V. S. Smith and his heirs and

assigns in fee simple, but it is contended that the third paragraph fixes upon the said estate a trust in favor of appellant.

It is said in *Lines v. Darden*, 5 Fla. 51, that "in the construction of a will, the intention of a testator, as therein expressed, shall prevail over all other considerations, if consistent with the principles of law. To this first and great rule in the exposition of wills all others must bend. Courts allow of no rule of construction of mere words to control the intention, but the whole instrument is to be considered, and, if possible, effect given to every part of it. The relative situation of the parties, the ties and affection subsisting between them, besides the motives which would naturally influence the mind of the testator, are proper to be considered in expounding the import of doubtful words." It is further held that "to constitute a trust, three circumstances must concur: Sufficient words to raise it; a definite subject; and a certain and ascertained object. No commendatory terms of a will expressing a 'wish,' 'will,' or 'desire' are sufficient, unless there be certainty as to the parties who are to take and what they are to take. Whenever the subject to be administered as trust property, and the object for whose benefit it is to be administered, <sup>489</sup> are to be found in a will, not expressly creating a trust, the indefinite nature and quantum of the subject, as well as the indefinite character of the objects, are always used by courts as evidence that the mind of the testator was not to create a trust. The words 'will' and 'devise' are not necessarily mandatory. They would be sufficient to raise a trust, if not coupled with words inconsistent with such construction." In the opinion the history of the doctrine pertaining to recommendatory or precatory trusts is examined, and it is said: "The current of decisions of late years has been against converting the legatee into a trustee, and the English courts have manifested a strong disposition to retrace their steps and restrict the doctrine of recommendatory trusts by giving to the words of a will their ordinary sense, unless it is clear they were designed to be used as peremptory, in which case, though precatory in form, they become imperative in fact. There can be no doubt but that words of recommendation will create a trust, provided all the requisites are to be found in the will concurring for that purpose. They are held in many cases to import an imperative devise, and will so operate, if there is nothing in the will inconsistent with such a construction. The true question in every case is whether the intention of the testator is manifest and mandatory in favor of the object of the bounty, or as merely suggestive and advisory to the first taker. If the testator in this case designed to determine the specific amount which his daughter should loan to her children, why should he not have said so in his will?

Why leave a matter of such importance to speculation and inference, and that too of the most doubtful character?"

In this case a testator by one clause of his will gave and bequeathed to his beloved and only daughter all his estate during her natural life, and at her death directs the property <sup>490</sup> to be equally divided between the children of the tenant for life; and by another clause expresses his "will" and "desire" to be that should either of his grandsons arrive at the age of twenty-one, or any of his granddaughters marry previous to the time of final distribution, then that such grandson or such granddaughter shall receive a portion of the estate as a loan, to have the management and receive the benefit of the same, until the final distribution shall take place, when the property thus loaned shall return to the estate to be equally divided. It is held that the will did not create a trust for the benefit of the grandchildren, but merely vested a power in the daughter (the tenant for life) to be exercised at her discretion.

In *Colton v. Colton*, 127 U. S. 300, 8 Sup. Ct. Rep. 1164, 32 L. ed. 138, the words of a will were, "I give and bequeath to my said wife E. M. C. all of the estate, real and personal, of which I shall die seised, possessed or entitled to. I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best." These words were construed as giving the mother and sister of the testator a beneficial interest in the estate given to the wife to the extent of a permanent provision for them during their respective lives, suitable and sufficient for their care and protection, having regard to their condition and necessities, and the amount and value of the fund from which it must come. It is held it was the duty of the court to ascertain, determine and declare what provision would be suitable and best under the circumstances, and all particulars and details for securing and paying it. It is also held that "when property is given by will absolutely and without restriction a trust is not to be lightly imposed upon mere words of recommendation and confidence; but if the objects of the supposed trust are definite and the property clearly pointed out, if the relations between the testator <sup>491</sup> and supposed beneficiary are such as to indicate a motive on the part of the one to provide for the other, and if the precatory clause expressing a wish, entreaty or recommendation that the donee shall apply the property to the benefit of the supposed cestui que trust warrants the inference that it is peremptory, then it may be held that an obligatory trust is created, which may be enforced in a court of equity." It is further held that "no technical language is necessary for the creation of a trust in a will, and no general rule can be formulated for determining

whether a devise or bequest carries with it the whole beneficial interest, or whether it is to be construed as creating a trust." These cases seem to set forth the modern doctrine with reference to those trusts to which it applies. The cases on this subject are very numerous, and numbers of them have been examined, but we do not think it is necessary to encumber this opinion with a specific examination of them. The real question is, What was the intention of the testator—did he (or she) intend that the words expressing the wish, desire, recommendation or confidence, or the like, should govern the conduct of the party to whom they may be addressed, or whether they are an indication of that which he thinks would be a reasonable exercise of the discretion of the party, leaving it, however, to the party to exercise his own discretion? It does not seem to have been found possible to formulate any definite statement of principles which will apply to every case: See 22 Am. & Eng. Ency. of Law, 2d ed., 1163 et seq.; *Post v. Moore*, 181 N. Y. 15, 106 Am. St. Rep. 495, 73 N. E. 482, 2 Ann. Cas. 591, and note; 3 Pomeroy's Equity Jurisprudence, 3d ed., c. 1014 et seq.; Gardner on Wills, pp. 536–538. Also see *Robinson v. Randolph*, 21 Fla. 629, 58 Am. Rep. 692.

Applying these general principles to the third paragraph of the will of Mrs. Augusta Levi, can we say that she intended <sup>492</sup> thereby to create a trust in the estate which she had given in the previous paragraph to her grandson, in favor of her daughter? In the first line we are confronted with her expressed intention—an expressed intention to make no provision in her will for her daughter or granddaughter—as in her judgment they will be more amply provided for by her grandson than they could be in her will. It is true that the allegations of the bill assert conditions which, if true, it seems to us should have appealed strongly to her motherly feelings to make some provision for her daughter, but she did not do it, and gives her reasons for not doing so. She seems to have trusted entirely to the son to provide for his mother. The will contains no precatory words—it expresses no wish, desire, recommendation, entreaty, or the like, in regard to the use to be made of her estate. The testator simply expresses her judgment that her daughter and granddaughter will be more amply provided for than they could be by her in her will. It is not the function of the courts to make or reconstruct wills according to their notions of what testators should do. Words should be given their usual meaning unless some other meaning is intended.

The will in the instant case was not contested so far as the record shows. It was probated in 1902. Five years after its probate we are asked to construe it, and though we are not insensible to the ethical and sentimental considerations

presented by the record, we are constrained to hold that no such trust was created by the will in favor of the appellant as a court of equity can enforce.

The decree appealed from is affirmed.

All concur, except Taylor, J., absent on account of illness.

Petition for rehearing in this case denied.

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*Precatory Trusts* are discussed in the note to *Post v. Moore*, 106 Am. St. Rep. 499.

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### GRIFFITH v. GRIFFITH.

[59 Fla. 512, 52 South. 609.]

**WILL—Homestead not Subject to Testamentary Disposition.**—Where a person entitled to a homestead dies leaving children, the homestead is not subject to testamentary disposition. (p. 140.)

**PARTITION—Controversy as to Legal Title.**—Where the bona fide object of a suit is the partition of land between common owners thereof, some of whom are complainants and the others are defendants, and some of the parties to the suit are in possession, then all controversies as to the legal title and right of possession may and should be settled by the court, as authorized by the statute. But a suit for partition cannot be resorted to as a substitute for the action of ejectment, nor used for the sole purpose of testing a legal title or trying an issue as to it. (pp. 140, 141.)

(Syllabi by the court.)

Sparkman & Carter and Singletary & Reaves, for the appellants.

C. C. Whitaker, for the appellee.

**512** WHITFIELD, C. J. A decree of partition is appealed from. The amended bill alleges in substance that Walter R. Griffith, the sole complainant, and Rose S. Griffith are the only son and daughter of Robert S. Griffith, who died about April 10, 1898; that Robert S. Griffith by will gave all his property to Anna W. Griffith, his wife, and appointed her sole executrix, with full power to sell and convey all the property of the estate; that an attempt was made to <sup>513</sup> probate the will and it was recorded in the public records of Manatee county; that at his death Robert S. Griffith was the head of a family residing in Manatee county, Florida; that he had title to and was seised and possessed in fee simple of certain described real estate, and resided thereon at his death as his homestead; that said land was not subject to the will; that the widow having taken certain property of the decedent of greater value than the homestead under the will, she should

be barred of any right in the homestead, but in any event the widow is only entitled to dower in the homestead; that on February 23, 1899, the widow conveyed all her right, title and interest in the homestead to Henry L. Coe; that Coe, claiming by virtue of such conveyance some interest the nature of which is unknown to complainant, conveyed on August 2, 1899, his interest in a portion of the homestead purchased from the widow to Benjamin H. Yeoman; that complainant is seised and possessed of a fee simple title to an undivided one-half interest in the homestead; that complainant and the defendant Rose S. Griffith are tenants in common of the homestead; that Anna W. Griffith "claims some right, title and interest therein, the exact nature of which is unknown to" complainant; that Henry L. Coe claims to hold some interest in a portion of the homestead; that if Coe has any interest it is the dower interest of the widow conveyed to him by her; that Benjamin H. Yeoman claims some interest in a portion of the homestead, by his conveyance from Coe, who received conveyance from the widow, and such interest of Yeoman, if any, is the dower interest of the widow. Partition is prayed between the complainant and defendants "according to their respective rights, estates and interests therein." A demurrer to the bill interposed by Henry L. Coe was overruled. Henry L. Coe by answer called for strict proof as to the homestead right; avers that Anna W. Griffith, claiming <sup>514</sup> title under the will of Robert S. Griffith, "conveyed the said land to this defendant . . . . by deed . . . . on February 23, 1899, and this defendant, claiming and holding said land under and by virtue of said deed," on August 2, 1899, conveyed by warranty deed to Benjamin H. Yeoman a stated portion of the lands; that said Yeoman claiming title under such deed on August 2, 1899, entered upon and took possession of the land so conveyed "and by virtue of said deed has been in continued uninterrupted possession thereof for more than seven years prior to the filing of this suit, . . . . and now is in possession thereof and occupying the same as his home"; that defendant is the owner of the interest said Anna W. Griffith had in the land except the part he has sold to Yeoman; that no dower has been assigned to the widow; that Yeoman for more than seven years held adverse possession of the part sold by Coe to him, and is now in actual adverse possession thereof claiming to be the owner of it, and the real object of this suit is to determine the rights of Yeoman in the land. The answer of Yeoman claims title to a portion of the homestead by adverse possession for the statutory period under the conveyance to him from Coe. The answer of Rose S. Griffith admits the homestead rights and the dower rights of the widow; admits that she and the complainant are each entitled



to an undivided half interest in the homestead subject to the rights of the widow. A decree pro confesso was entered against the widow. Replications were filed to the answers of Rose S. Griffith and Henry L. Coe. The court decreed partition equally between Walter R. Griffith and Rose S. Griffith, subject to the dower rights of the widow Anna W. Griffith. The defendants appealed and contend that partition should not have been decreed; that if partition is made, the interests of all the parties should be decreed, and that the defendant Yeoman has title by adverse <sup>515</sup> possession to a portion of the homestead. There is testimony in support of the homestead rights and of the claims set up by the defendants Coe and Yeoman.

Under the constitution "a homestead to the extent of one hundred and sixty acres of land, or the half of one acre within the limits of any incorporated city or town, owned by the head of a family residing in this state, together with one thousand dollars' worth of personal property and the improvements on the real estate, shall be exempt from forced sale under process of any court, and the real estate shall not be alienable without the joint consent of the husband and wife, when that relation exists. . . . .

"The exemptions . . . . shall inure to the widow and heirs of the party entitled to such exemption. . . . . Nothing in this article shall be construed to prevent the holder of a homestead from alienating his or her homestead so exempted by deed or mortgage duly executed by himself or herself, and by husband and wife, if such relation exists; nor if the holder be without children to prevent him or her from disposing of his or her homestead by will in a manner to be prescribed by law": Const. 1885, secs. 1, 2, 4. Chapter 4730, Acts of 1899, forbids a testamentary disposition of the homestead real estate by one having a wife: *Saxon v. Rawls*, 51 Fla. 555, 41 South. 594; *Thomas v. Williamson*, 51 Fla. 332, 40 South. 831. See, also, *Thomas v. Craft*, 55 Fla. 842, 46 South. 594, 15 Ann. Cas. 1118.

Although the owner of the homestead died before the passage of chapter 4730, Acts of 1899, he had children living, and under the constitution the homestead was not subject to testamentary disposition. As to such homestead the husband died intestate, and the widow is given her statutory interest therein: *Palmer v. Palmer*, 47 Fla. 200, 35 South. 983.

<sup>516</sup> Where the bona fide object of a suit is the partition of land between common owners thereof, some of whom are complainants and the others are defendants, and some of the parties to the suit are in possession, then all controversies as to the legal title and right of possession may, and should be, settled by the court, as authorized by the statute. But a suit for partition cannot be resorted to as a substitute



for the action of ejectment, nor used for the sole purpose of testing a legal title or trying an issue as to it: *Rivas v. Summers*, 33 Fla. 539, 15 South. 319; *Koon v. Koon*, 55 Fla. 834, 46 South. 633; *Camp Phosphate Co. v. Anderson*, 48 Fla. 226, 111 Am. St. Rep. 77, 37 South. 722; *Dallam v. Sanchez*, 56 Fla. 799, 47 South. 871.

In this case neither of the two heirs nor the widow of the decedent is in possession of any of the lands, and there appears to be no controversy between the two heirs nor between the heirs and the widow. The grantee of the widow claims her right in a portion of the homestead land, and his grantee claims title by adverse possession to another portion of it to which he has a warranty deed from the widow's grantee. The proofs tend *prima facie* to support the adverse claims to a part at least of the lands, and such claims do not now clearly appear to be contrary to law as to the complainant. It is apparent that the only controversy is over the rights of the heirs as against those claiming adversely under the widow's conveyance. Under these circumstances partition is not the complainant's remedy.

The decree is reversed.

Shackleford and Cockrell, JJ., concur.

Taylor, Hocker and Parkhill, JJ., concur in the opinion.

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*Proceedings in Partition are No Longer Merely Possessory Actions*, but proceedings in which the quantity of the estate or title may be litigated. And where the quantity of estate held by each owner is litigated in partition, the judgment therein is an estoppel in a subsequent suit by one of the parties to have a deed corrected on the ground that by mistake of the draftsman in drawing it he conveyed to the other a larger interest in the common property than was intended: *Buchanan v. Harrington*, 152 N. C. 333, 136 Am. St. Rep. 828. But an action for partition cannot be used as a substitute for the action of ejectment, nor for the sole purpose of testing a legal title: *Camp Phosphate Co. v. Anderson*, 48 Fla. 226, 111 Am. St. Rep. 77.

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## HUDSON v. HUDSON.

[59 Fla. 529, 51 South. 857.]

**DIVORCE—Desertion—Driving Spouse from Home.**—In a suit for divorce upon the ground of willful, obstinate and continued desertion for the statutory period, it is immaterial which of the married parties leave the marital home; the one who intends bringing the cohabitation to an end commits the desertion. The party who drives the other away is the deserter, and a wife may drive her husband away. (pp. 142, 146.)

**DIVORCE—Desertion.—The Meaning of the Statutory Ground** for divorce, willful, obstinate and continued desertion for more than one year, considered and discussed. (p. 146.)

(Syllabi by the court.)

J. P. Stokes, for the appellant.

No appearance for the appellee.

<sup>530</sup> PARKHILL, J. The appellant filed his bill of complaint praying for a decree dissolving the bonds of matrimony then existing between him and his wife, the appellee, upon two grounds—willful, obstinate and continued desertion for more than one year, and for extreme cruelty.

A decree pro confesso was duly entered against the defendant for her failure to plead, answer or demur to the bill of complaint on the rule day succeeding that to which process of subpoena was returnable. The cause was referred to Honorable C. H. Laney, as special master, who made a report of the testimony with recommendation that the relief prayed be granted. Upon consideration of same, the chancellor dismissed the bill and complainant appealed.

There is no conflict in the testimony. The facts are not denied or disputed. It appears that ever since these parties were married the complaining husband was without fault, but, during the last few years of their married life, the defendant was very quarrelsome and would fuss and curse the complainant almost every day. Upon one occasion the defendant tried to induce one Jane Thompson, daughter by a former husband, to put poison in the bread intended for the complainant to eat. Jane refused to do so and told Moses Hudson about it. Upon another occasion the defendant tried to hire a man to kill the complainant, and again, about three months before the final separation of the parties, the defendant tried to get one C. C. Thompson to go hunting with complainant and shoot him, <sup>531</sup> pretending that the gun was discharged accidentally. Finally, one morning in May, 1905, the defendant "flew into a violent rage" at the complainant about a matter for which he was not to blame, publicly cursing and abusing him, much to his embarrassment, continuing this conduct all the morning until he left home to avoid her. Hoping that she would be friendly, Hudson returned to his home in the afternoon of that day, but Mrs. Hudson was just as bad as when he left her in the morning, cursing and abusing him shamefully. The complainant testified: "She ordered me out of the house and told me to leave and never come back, that she never intended to live with me again, and that she did not want to have anything to do with me. I argued the question with her and tried to show her where she was mistaken, but she would not hear me. She ordered me out again, and again told me never to come back and that she would never live with me again. There being nothing else for me to do, I left. I went down to my boat and lived there the best I could." He was asked, "What was the last thing she said to you?" "Moses Hud-

son, you God damn son of a bitch, you can't call me wife any more, and I will never live with you another day," was her answer. According to the testimony of one of the witnesses, "She quit him. She called him a God damn son of a bitch. She told him he could never call her wife again. She told him he had to go. He went off in the morning and came back in the evening. She cursed him out again and told him that she didn't want him around the place. He went down to the boat and lived there." The parties have not lived together since that time, a period much longer than the one year prescribed by the statute.

We think the testimony sustains the ground of a willful, obstinate and continued desertion for more than one year.

First, as to desertion. Mr. Bishop, in the second volume <sup>532</sup> of his work on Marriage and Divorce, page 597, says: "It is immaterial which of the married parties leave the marital home, the one who intends bringing the cohabitation to an end commits the desertion. Thus, to drive away the wife from the house is to desert her." The party who drives the other away is the deserter, and a wife may drive her husband away: 5 Am. & Eng. Ency. of Law, 803. See Gray v. Gray, 15 Ala. 779; Skean v. Skean, 33 N. J. Eq. 148.

The testimony shows that the defendant was the one who intended to bring the cohabitation to an end. After years of cursing and abusing her husband, endeavoring to take even his life, and with violent language and epithet most opprobrious, she drove this patient, nonoffending man from the marital home. There is no doubt about the meaning of her declaration: "Moses Hudson, you God damn son of a bitch, you can't call me wife any more, and I will never live with you another day." The wife was the deserter.

Was the desertion willful? Willful means on purpose, intentional. As we have seen, the defendant intentionally and on purpose and willfully brought the cohabitation to an end: Crawford v. Crawford, 17 Fla. 180.

Was the desertion obstinate? Obstinate means determined, fixed, persistent. During all the years of the separation, the deserting wife was determined, fixed and persistent in putting an end to the cohabitation, in her desertion, although her husband lived near by in his boat, "the best he could." All that time she made no effort to bring about a reconciliation or a restoration of the marital relations, which she had terminated.

In New Jersey, where the desertion must be, like here, "willful, continued and obstinate," in Jerolaman v. Jerolaman (N. J. Eq.), 54 Atl. 166, where the husband being in fault was the deserter, the court said: "The question in the case is whether the separation was continued <sup>533</sup> and obstinate on his part for two years after that time. The sepa-

ration in this case was, as I have stated, legally chargeable to the husband, and under the rule applied in cases of this character it was the duty of the husband to reform his habits, and after such reformation, and within the two years, seek out his wife, and apply to return, giving her reasonable assurances of the sincerity of his reformation and of her probable safety in resuming marital relations." In *McVickar v. McVickar*, 46 N. J. Eq. 490, 19 Am. St. Rep. 422, 19 Atl. 249, the court said: "If, however, the husband's cruelty was not of such intensity as to amount to desertion, still it was such as to justify the wife in temporarily separating herself from him, and it was his duty to seek a return. This he did not do, but for many years remained entirely passive, manifesting no interest in her welfare or desire to resume marital relations. This, under the circumstances, constituted desertion and entitles the wife to a decree."

We are not unmindful that the marital relation is recognized, both legally and morally, as imposing obligations pre-eminently on the husband. As the husband generally does the courting before marriage, he may well continue it afterward. As pointed out in *Sargent v. Sargent*, 36 N. J. Eq. 644, society, so far at least, has regarded his duty in maintaining and preserving those relations as of the superior order. "Not that the tie is more sacred or less binding on the part of the wife, but where the act of desertion occurs without reason on his part and without fault on her side, the same efforts to restore harmonious relations are not expected from her as would be from him, if the case were reversed." The principle that the integrity of the matrimonial tie requires this of the husband is stated by the chancellor in *Schanck v. Schanck*, 33 N. J. Eq. 363. That was a case where a wife in anger told her husband that he <sup>534</sup> "might go his way and she would go hers," and gave other evidence of her desire that they should live separate, but immediately retracted and besought him not to go, and he, notwithstanding her entreaties, left her, in a passion, and without any attempt at reconciliation and without contributing anything toward her support, or even communicating with her in any way, remained away from her for three years, living all the time in the same county with her; and the court held that she was entitled to a divorce for desertion. "Under the circumstances of the case," said the court, "the husband owed a duty to his wife—a duty to society—to avoid, as he well might have done, the consequences which his punctilious resentment (so exacting that he would not even condescend to propose the terms on which it might be appeased) has inflicted upon his wife. . . . It is clear that she never intended to desert him. Her letters offered in evidence by him contain the very strongest expressions of affection, and

were undoubtedly sincere. Were he before the court asking a divorce from her on the ground of desertion, his application would be denied for the reason that he has been derelict in his duty toward her under the circumstances." And so would we say, in the instant case, upon similar facts. In view of the facts stated in *Wilson v. Wilson*, 66 N. J. Eq. 237, 57 Atl. 552, the court said: "An injured wife, under such circumstances, is not bound to invite her husband back—to invite him to return and resume a career of brutality, drunkenness or other misconduct which has made her life miserable. It is the duty of the husband to repent and signify his repentance to his wife."

In *Trall v. Trall*, 32 N. J. Eq. 231, this rule is correctly stated: "Even if a wife deserts without cause, and afterward realizes that she has acted hastily or foolishly, and would return if the way was opened for her, but the husband <sup>535</sup> refrains from doing anything to induce her to return, for the purpose of making her absence a ground for divorce, her desertion is not obstinate, and not, therefore, a ground for divorce. . . . In such a case she remains away, not of her own will, but because she cannot get back without danger of being repulsed or subjected to the pain of humiliation that no husband has the right to inflict upon his wife." As peculiarly applicable to the instant case, the court went on to say: "But a careful study of the temper and disposition of this woman, as portrayed in the evidence, has satisfied me that any effort on the part of her husband to induce her to return would most probably have resulted in strengthening her determination to remain away." And the court held that a husband is not bound to attempt to induce his wife to return when it is clear any effort in that direction would be unavailing. Continuing, the court said: "The case is a very sad one. The parties are both well advanced in years. Their married life covers a period of more than thirty years. The ties that once bound them together were strengthened by the birth of a child, who is now a man. I think most husbands and wives would regard death as a much more preferable termination of thirty years of married life than a divorce. But the question presented for judgment is one of blended law and fact, and not of sentiment or feeling, and must be decided by the law and facts." The appellate court, in this case, sustained the decree of the court below granting the husband a divorce.

And so, as decided in *Lammertz v. Lammertz*, 59 N. J. Eq. 649, 45 Atl. 271: "Where the wife absented herself from her husband's home for more than two years, and such absence is not justified by her husband's <sup>536</sup> conduct toward her, and the wife's conduct is such that little hope was left of a permanent reconciliation, it will be considered that the desertion

is obstinate and divorce will be decreed, though no proof was offered that the husband sought her and urged her return."

Recognizing the general rule that the husband, being the head of the household, is bound to do what he may, as a just man, to bring about his wife's return or a restoration of the marital relations, even where the original separation was wrongful on her part, yet we think, under the peculiar circumstances of the instant case, the wife's conduct was such as to make clear to anyone that any further effort by the complainant to induce his wife to return to him would have been unavailing; and that his right to a decree is not dependent upon his having done any more than was done by him in that direction. Indeed, as was said in *Trall v. Trall*, 32 N. J. Eq. 231, "any effort on the part of her husband to induce her to return would most probably have resulted in strengthening her determination to remain away." And the evidence justifies us in adding that, perhaps, any further effort on his part to have continued the marriage relation would have caused her to end it by taking his life.

Was the desertion continued for one year? Yes; for nearly four years prior to the filing of this bill the wife's desertion continued, as we have seen. From the time the defendant put an end to the cohabitation, she did not live with her husband another day, as she declared would be the case when she drove him away.

We think the defendant's desertion was willful, obstinate and continued by the wife for more than one year, and that under the facts of this case, as we gather them from the record, we are constrained to hold that the complainant <sup>537</sup> is entitled to his decree, and that the chancellor erred in dismissing the bill.

The decree is reversed.

All concur except Taylor, J., absent on account of illness.

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## WHAT CONSTITUTES DESERTION AS A GROUND FOR DIVORCE.

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**I. Separation or Desertion in General.**

**a. Definition of Desertion.**—What constitutes desertion as a ground for divorce varies somewhat according to the variations in the statutory provisions of the different states. Generally speaking, however, desertion may be defined as a separation by one spouse from the other, without the latter's consent, with an intent not to return, and persisted in without cause for the period prescribed by statute. In Pennsylvania, it has been decided that "separation is not desertion. Desertion is an actual abandonment of matrimonial cohabitation, with an intent to desert, willfully and maliciously persisted in, without cause, for two years": *Ingersoll v. Ingersoll*, 49 Pa. 249, 88 Am. Dec. 500; *Middleton v. Middleton*, 187 Pa. 612, 619, 41 Atl. 291. "That term, as used in the law of divorce, contemplates a voluntary separation of one party from the other, without justification, with the intention of not returning": *Williams v. Williams*, 130 N. Y. 193, 27 Am. St. Rep. 517, 29 N. E. 98, 14 L. R. A. 220. Some courts say that "desertion is a breach of matrimonial duty, and is composed, first, of the actual breaking off of the matrimonial cohabitation, and, secondly, an intent to desert in the mind of the offender": *Bailey v. Bailey*, 21 Gratt. 43; *Crounse v. Crounse*, 108 Va. 108, 60 S. E. 627; *Washington v. Washington (Va.)*, 60 S. E. 322; *Burk v. Burk*, 21 W. Va. 445; *Tillis v. Tillis*, 55 W. Va. 198, 46 S. E. 926. Other courts say that "desertion consists in the cessation of matrimonial cohabitation, and the intent to desert": *Morrison v. Morrison*, 20 Cal. 431; *Stein v. Stein*, 5 Colo. 55; *Bennett v. Bennett*, 43 Conn. 313.

Some decisions affirm that three things must be proved to establish desertion: First, an intention in the mind of the defendant to desert; second, cessation of cohabitation; and third, the desertion must be against the will of the complaining party: *Barnett v. Barnett*, 27 Ind. App. 466, 61 N. E. 737; *Porritt v. Porritt*, 18 Mich. 420; *Rose v. Rose*, 50 Mich. 92, 14 N. W. 711; *Warner v. Warner*, 54 Mich. 492, 20 N. W. 557; *Sergent v. Sergent*, 33 N. J. Eq. (6 Stew.) 204; *Moak v. Moak (N. J. Ch.)*, 48 Atl. 394.

In *Hall v. Hall*, 77 Mo. App. 600, Mr. Justice Bond says: "To prove desertion in the statutory sense as affording a ground for divorce, it is essential to show that the absence of the defendant was not justified by the conduct of the plaintiff; that it was continued for the space of one year without any intention on the part of the absentee during the period to resume the marital relation, and that plaintiff neither consented nor acquiesced in the separation." See, also, *Ulrey v. Ulrey*, 80 Mo. App. 48.



**b. Duration of Separation or Desertion.**

1. **When Separation Commences.**—Most of the statutes provide what period must intervene before one spouse can institute suit for divorce on the ground of desertion by the other. The decisions uniformly hold that the desertion commences when the intent to desert is, either by some action or declaration, made manifest: *Trimble v. Trimble*, 65 Ark. 87, 44 S. W. 1040; *Fishli v. Fishli*, 12 Ky. 337; *Harman v. McLeland*, 16 La. 26; *Ricker v. Ricker*, 29 Me. 281; *Stocking v. Stocking*, 76 Minn. 292, 79 N. W. 172, 668; *Sarlogne v. Sarlogne*, 6 Mo. App. 603; *Tracey v. Tracey* (N. J. Ch.), 43 Atl. 713; *Bailey v. Bailey*, 2 Gratt. 43; *Burk v. Burk*, 21 W. Va. 445.

In *Conger v. Conger*, 13 N. J. Eq. 286, it appeared that the wife left on a visit to relatives at a distant place. Sometime afterward the husband followed her and urged her to return. It was held that the desertion commenced at the time of her refusal to return, and not when she departed from her own home.

In *Pinkard v. Pinkard*, 14 Tex. 356, 65 Am. Dec. 129, it is held that, in order to constitute desertion, separation and intention to abandon must concur. They need not, however, be identical in their commencement; desertion will commence from the time intention to abandon is formed.

In *Brand v. Brand* (N. J. Ch.), 59 Atl. 570, it is held that a divorce cannot be granted to a man in New Jersey on the ground of a desertion by his wife which occurred in another state, unless the desertion continues during the statutory period commencing from the time when he removes to New Jersey.

2. **Whether Separation must be Continuous.**—In order that desertion may constitute a ground for divorce, it must continue for the full statutory period, and it must continue without any considerable interruption. The desertion must not only be for the period prescribed by law, but it must also generally be continuous and unbroken: *Reed v. Reed*, 62 Ark. 611, 37 S. W. 230; *Albee v. Albee*, 141 Ill. 550, 31 N. E. 153; *Prather v. Prather*, 26 Kan. 273; *Fishli v. Fishli*, 12 Ky. (2 Litt.) 337; *Woolfolk v. Woolfolk*, 96 Ky. 657, 29 S. W. 742; *Harman v. McLeland*, 16 La. 26; *Small v. Small*, 31 Me. 393; *Wagner v. Wagner*, 39 Minn. 394, 40 N. W. 360; *Stocking v. Stocking*, 76 Minn. 292, 79 N. W. 172, 668; *Gaillard v. Gaillard*, 23 Miss. 152; *Ulrey v. Ulrey*, 80 Mo. App. 48; *Moak v. Moak* (N. J. Ch.), 48 Atl. 394; *Ogilvie v. Ogilvie*, 37 Or. 171-180, 61 Pac. 627; *Luper v. Luper* (Or.), 96 Pac. 1099; *Middleton v. Middleton*, 187 Pa. 612, 41 Atl. 291; *Hannig v. Hannig* (Tex. Civ. App.), 24 S. W. 695; *Bailey v. Bailey*, 21 Gratt. 43; *Burk v. Burk*, 21 W. Va. 445.

In *Danforth v. Danforth*, 88 Me. 120, 51 Am. St. Rep. 380, 33 Atl. 781, 31 L. R. A. 608, it appears that during the statutory period necessary to establish desertion, the plaintiff went to the house occupied by his wife and there lodged with her, occupying the same bed as husband and wife two or three nights, she still refusing, however, to return to his house and live with him as his wife, and all the time refused to do so, without justification. It is declared that "such a visit is not illegal or improper. On the contrary, it has often been held to be the duty of the husband to visit his absent wife, and to endeavor by all proper means to effect a reconciliation. If he succeeds, and his wife returns to her home, and to her duties as his wife, undoubtedly her prior desertion will be interrupted or re-

garded as condoned, and cannot be added to a subsequent desertion for the purpose of completing the three years necessary to entitle her husband to a divorce. But if, in spite of his efforts, his wife persistently and unreasonably refuses to return, and continuously remains away from him for three consecutive years, we think her husband's right to a divorce is complete; that the mere fact that on one occasion he visited her, and for two or three nights occupied the same bed with her, does not interrupt the continuity of her desertion."

In *Kennedy v. Kennedy*, 87 Ill. 250, the fact that the husband and wife occupied the same bed for one night, was held not to interrupt the continuity of the statutory period of desertion.

In *Phelan v. Phelan*, 135 Ill. 445, 25 N. E. 751, the court says: "There is, however, another complete defense to the case made by the complainant. The bill in this case was filed on the twenty-sixth day of November, 1886, and under section 1, chapter 40, of our statute, before complainant could obtain a divorce on the ground of desertion, he was required to prove that the defendant willfully deserted and absented herself from the complainant, without any reasonable cause, for the space of two years before the filing of the bill. This he failed to do. On the other hand, the evidence shows that the complainant cohabited with the defendant on several occasions during the two years next before the filing of the bill. The complainant, in his evidence, denied cohabitation after the bill was filed, but testified that 'in December, 1885, he stopped with the defendant a week.' The defendant testified that complainant remained with her at the time he referred to in his evidence two weeks, and that they cohabited as husband and wife. She also testified, and her evidence was not impeached, that the complainant came to her home in La Salle and cohabited with her on several different occasions after the filing of the bill. Under this evidence the complainant utterly failed to establish desertion for two years, which is required by the statute before a court would be authorized to render a decree for divorce. In *Thomas v. Thomas*, 51 Ill. 163, the statute in question was considered, and it was held that the statute requires desertion shall continue without cause for the space of two years before a divorce can be obtained in this state for that cause; and courts have no power to prescribe a shorter period. In *Embree v. Embree*, 53 Ill. 394, it was again held that desertion, to be a cause of divorce, must be willful and continued for two years. Here the complainant, from time to time during the two years, relied upon, returned to and cohabited with his wife. If the evidence had established willful desertion on behalf of defendant in the first instance, the subsequent return of complainant, and cohabitation with his wife, would be a condonation of the desertion and a complete bar to a decree on that ground."

**3. Separation Pending Suit for Divorce.**—If an action for divorce is instituted and prosecuted in good faith by one spouse against the other, the time during which the action is pending to the time of final adjudication is not regarded as an obstinate or willful desertion; hence, in reckoning the statutory period on which an action for desertion is based, the time of separation while another action between the parties has been pending, must be excluded: *Palmer v. Palmer*, 36 Fla. 385, 18 South. 720; *Haltenhof v. Haltenhof*, 44 Ill. App. 135; *Porritt v. Porritt*, 18 Mich. 420; *Doyle v. Doyle*, 26 Mo.

545; *Johnson v. Johnson*, 65 N. J. Eq. 606, 56 Atl. 708; *Weigel v. Weigel*, 65 N. J. Eq. 398, 54 Atl. 1125.

But in order to have this effect, the action must be brought in good faith: *Kusel v. Kusel*, 147 Cal. 52, 81 Pac. 297. Said the court in this case: "It may be admitted, for the purposes of the case only, that where a wife in good faith begins an action for a divorce against the husband, and immediately separates herself from him, for the reason that it would not be proper for her to live with him while she was prosecuting an action for divorce against him, such separation will not constitute desertion within the meaning of the law, although in fact the suit was unfounded. But, on the other hand, it will not be contended that a wife who intends to desert her husband can, with that intent, leave his residence and live separate from him, and at the same time destroy the effect of the desertion by immediately beginning an unfounded action for divorce against him. The action must be begun in good faith in order to have the effect contended for. . . . In the absence of good faith, it is clear that the beginning of the action cannot transform a causeless abandonment of the marital domicile into an innocent absence or into a separation brought about through the fault of the husband. The subsequent action for maintenance could have no effect whatever upon the running of the statutory period of one year necessary to make the wife's desertion a cause of divorce."

And an action for divorce, in order that its pendency may have the effect referred to, must be instituted before the full statutory period of desertion has elapsed: *Graeff v. Graeff* (N. J.), 25 Atl. 704. In that case it appears that the defendant (wife) had previously brought an action for divorce on the ground of adultery against the plaintiff after the lapse of the statutory period for which a divorce on the ground of desertion could be granted. The court said that "while the time which is occupied in the prosecution of a suit for adultery cannot be counted as part of the time alleged as an obstinate desertion (*Chipchase v. Chipchase* (N. J. Ch.), 22 Atl. 588). the prosecution of such a suit cannot deprive a party of a cause of action which has ripened."

Parties to divorce proceedings should live separately pending the litigation. Separation under such circumstances cannot be wrongful, and a charge of desertion cannot be based on it. That part of the period of separation which is the legitimate, actual and direct result of the proceedings in divorce cannot be reckoned as any portion of the statutory period which must fully expire before an action for divorce on the ground of desertion can be commenced: *Hurning v. Hurning*, 80 Minn. 373, 83 N. W. 342.

c. *Intention of Parties.*—In determining what constitutes desertion as a ground for divorce, one of the first matters for consideration is the intent of the offending party. Mere separation or withdrawal from cohabitation, though for an extended period, is not in itself desertion. There must, in addition thereto, be an intent on the part of the withdrawing or separating party not to return or resume cohabitation. There is no desertion without an intent to desert: *Franklin v. Franklin*, 53 Kan. 143, 35 Pac. 1118; *Stevens v. Stevens*, 29 Ky. Law Rep. 953, 96 S. W. 811; *Klein v. Klein*, 29 Ky. Law Rep. 1042, 96 S. W. 848; *Boos v. Boos*, 88 Mo. App. 530; *Swan v. Swan*, 15 Neb. 453, 19 N. W. 639; *Rogers v. Rogers*, 18 N. J. Eq. 445; *Ruck-*

man v. Ruckman, 58 How. Pr. 278; Dignan v. Dignan, 17 Misc. Rep. 268, 40 N. Y. Supp. 320; Middleton v. Middleton, 187 Pa. 612, 619, 41 Atl. 291; Bailey v. Bailey, 21 Gratt. 43.

But it is not necessary, to begin desertion, that the deserter intended to desert at the time he leaves home. If the proof establishes that he at any time, while absent from home, determined from thenceforth he would desert his wife, and that determination is persisted in for the statutory period, this will constitute desertion: Carroll v. Carroll, 68 N. J. Eq. 724, 61 Atl. 383. And an intent once formed is presumed to continue: Bailey v. Bailey, 21 Gratt. 43.

The abandonment must be the deliberate act of the party against whom complaint is made, done with the intent that the marriage relation shall no longer exist: Stein v. Stein, 5 Colo. 55; Lynch v. Lynch, 33 Md. 328. There must be an actual abandonment during the statutory period with a fixed intent in the mind of the deserting party not to return: Moak v. Moak (N. J. Ch.), 48 Atl. 394.

The word "abandonment" in the New York statute, as used in the law of divorce, contemplates a voluntary separation of one party from the other without justification, and with the intention of not returning: Williams v. Williams, 130 N. Y. 193, 27 Am. St. Rep. 517, 29 N. E. 98, 14 L. R. A. 220; Heyman v. Heyman, 119 App. Div. 182, 104 N. Y. Supp. 227.

Guilty intent to desert and abandon is manifested when, without cause or consent, either party withdraws from the other. But mere separation is not desertion: Fulton v. Fulton, 36 Miss. 517; Boos v. Boos, 88 Mo. App. 530; Rogers v. Rogers, 18 N. J. Eq. 445; Ojserkis v. Ojserkis (N. J. Ch.), 62 Atl. 113; Ingersoll v. Ingersoll, 49 Pa. 249, 38 Am. Dec. 500.

In New Hampshire, under the laws in force in 1858, it was held, where the alleged cause of divorce is willing absence, without making provision for the libelant's support for the period of three years, that it must be shown that the libelee left the libelant with the intention of not rejoining her again; or, having left with the intention of returning, that he afterward determined to abandon her, and that this intention or determination was persevered in for three successive years, and continued to the time of filing the libel. It must also be shown that the libelee had some pecuniary ability wherewith to provide for his wife: Davis v. Davis, 37 N. H. 191.

d. **Willfulness of Desertion.**—Desertion, to constitute ground for a divorce, must be willful: Word v. Word, 29 Ga. 281; Trimmer v. Trimmer, 117 Ill. App. 64, affirmed in 215 Ill. 121, 74 N. E. 96; Chatterton v. Chatterton, 231 Ill. 449, 121 Am. St. Rep. 339, 83 N. E. 161; Atkinson v. Atkinson, 67 Iowa, 364, 25 N. W. 284; Franklin v. Franklin, 53 Kan. 143, 35 Pac. 1118; Fulton v. Fulton, 36 Miss. 517; Bowlby v. Bowlby, 25 N. J. Eq. 406; Thorpe v. Thorpe, 9 R. I. 57. The word "willful," as used by the statutes in this connection, means "intentional." It does not imply any malice or wrong toward the other party: Benkert v. Benkert, 32 Cal. 467. In some statutes the word "malicious" is used in describing desertion. But malice may be implied from a desertion which is willful and without cause: McClurg's Appeal, 66 Pa. 366. In McBride v. McBride, 111 Tenn. 616, 69 S. W. 781, it is held that under Shannon's Code, "willful or malicious desertion of either party without reasonable cause, for two whole years," is a ground for a divorce a vinculo. And that a willful

desertion, without reasonable cause, for the time provided by the statute, is a sufficient ground, although there is no malice in fact.

In *Besch v. Besch*, 27 Tex. 390, decided in 1864, Mr. Justice Moore said: "The fact that a husband shall have left his wife for three years with the intention of abandonment is made by the statute a specific cause for divorce. It is immaterial what were the circumstances attending the separation, if the wife is in no manner chargeable with it, either by act or consent. That the separation was not accompanied by wanton acts of outrage or cruelty on the part of the husband toward her, is of no importance. It is the fact solely of his separation from her for the requisite length of time, with the continuing intention on his part during such time not to perform his matrimonial obligations, which entitles her to a rescission of the matrimonial contract."

In *Kupka v. Kupka*, 132 Iowa, 191, 109 N. W. 610, Mr. Justice Ladd says: "To constitute desertion there must be not only a separation, but an intent to cease to live together as husband and wife, and abnegation of all the duties of the marriage relation. While this must be wrongful—that is, in disregard of the marital obligations—it is not essential that it be with any purpose of working an injury. Thus in *Benkert v. Benkert*, 32 Cal. 467, wherein, the court in defining 'willful desertion,' said that it 'ordinarily signifies intentional, and that, we think, is its signification here. It does not imply any malice or wrong toward the other party.' The word does not seem to have limited the meaning of the term 'desertion,' as construed in the cases and employed by text-writers. . . . There may be a malicious intent in the desertion, but its presence is accidental. It does not form a necessary ingredient."

e. **Consent of Parties to Separation.**—Nothing is more fatal to the successful prosecution of an action for divorce on the ground of desertion than the mutual consent of the parties to the separation or withdrawal. Desertion implies a want of consent, an unwillingness, on the part of the complaining spouse. If it appears on the trial that the plaintiff has consented to or acquiesced in the separation or withdrawal, or that there is collusion, a decree will generally be denied. Some of the statutes are expressly against granting a divorce when the separation is by mutual consent of the parties, and courts are strongly inclined to deny a decree when the evidence discloses such consent: *Jones v. Jones*, 13 Ala. 145; *Benkert v. Benkert*, 32 Cal. 467; *Woolard v. Woolard*, App. Cas. 18 D. C. 326; *Barnett v. Barnett*, 27 Ind. App. 466, 61 N. E. 737; *Masterson v. Masterson*, 20 Ky. Law Rep. 631, 46 S. W. 20; *Lea v. Lea*, 90 Mass. (8 Allen) 418; *Rose v. Rose*, 50 Mich. 92, 14 N. W. 711; *Campbell v. Campbell*, 73 Mo. App. 579; *McGean v. McGean*, 63 N. J. Eq. 285, 49 Atl. 1083; *Wilson v. Wilson*, 66 N. J. Eq. 237, 56 Atl. 552; *Rutledge v. Rutledge*, 37 Tenn. (5 Sneed) 554; *McGowen v. McGowen*, 52 Tex. 657.

Where the parties have separated by mutual agreement, or by expressed or implied consent, a request to return and resume matrimonial relations is necessary before one of them can successfully prosecute an action for divorce: *Milowitsch v. Milowitsch*, 44 Ill. App. 357; *Franklin v. Franklin*, 53 Kan. 143, 35 Pac. 1118; *Bradley v. Bradley*, 160 Mass. 258, 35 N. E. 482; *Dwyer v. Dwyer*, 16 Mo. App. 422; *Scott v. Scott*, 44 Mo. App. 600; *Swan v. Swan*, 15 Neb.

453, 19 N. W. 639; *Hankinson v. Hankinson*, 33 N. J. Eq. 66; *Broom v. Broom*, 47 N. J. Eq. 215, 20 Atl. 377; affirmed in 49 N. J. Eq. 347, 25 Atl. 963; *Chipchase v. Chipchase*, 48 N. J. Eq. 549, 22 Atl. 588, affirmed in 49 N. J. Eq. 594, 26 Atl. 468.

In *Grant v. Grant*, 64 Minn. 234, 66 N. W. 983, the parties did not mutually agree to live apart, but the evidence strongly supported a finding that they mutually refused to live together, and that the reason given by each was a mere pretext. It is held that in such case neither party is entitled to a divorce, as neither party is guilty of the kind of desertion contemplated by statute.

In *Gates v. Gates*, 59 N. J. Eq. 100, 43 Atl. 436, it appeared that the plaintiff (husband) was much attached to the defendant. The defendant, on the other hand, who was of a quarrelsome temperament, imbued with a groundless belief that her husband was unfaithful, appears to have been lacking in attachment to him. There was no doubt from the evidence introduced by both plaintiff and defendant that for years before the separation she had made his life miserable by her groundless charges. In order to get a little rest he left the home, and boarded in a neighboring village for about ten days. Then he returned. Before his return, his wife, without consulting him, left and went to the house of a brother in another state. She started on the journey on the afternoon of the day he returned. Plaintiff testified that the defendant said she was going to live with her brother, and was not coming back. Defendant denied that she made such declaration. While the defendant was absent, plaintiff wrote to her that his one wish was that they might again live happy together. The defendant told two persons she would never live with her husband any more. She insulted him, and all the servants; and, in spite of her actions, the husband was always willing to live with her peaceably. Finally, they agreed to separate, plaintiff being convinced that a permanent separation was inevitable. Defendant introduced a letter written by plaintiff in which he wrote, "Now that I have cut loose to save myself, and am providing for you"; and upon this point the defense maintained that there was consent to the separation, and the plaintiff not entitled to a divorce on the ground of desertion. It was held that the evidence conclusively showed desertion by the defendant, and the declaration of the plaintiff did not indicate a consent to live separate.

In *Smithson v. Smithson*, 18 D. C. 227, the evidence showed that for some months previous to the time when the wife left home she had been threatening to leave, or telling her husband that she intended to do so, and he never objected. On the contrary, whenever she said anything on the subject, he would tell her to go as soon as she pleased. It was held that the plaintiff (the husband) was not entitled to a decree of divorce on the ground of willful desertion and abandonment, as the wife left with his consent. The fact that they lived apart and separate for six years was regarded as immaterial.

## II. Attempt at Reconciliation.

a. **Duty to Seek Reconciliation.**—When one spouse is responsible for the absence or desertion of the other, the former must, in prosecuting an action for divorce on that ground, show that he or she has made faithful overtures to the other to return and resume the matrimonial union; otherwise a decree will not be granted: *Reed v. Reed*,



62 Ark. 611, 37 S. W. 230; *Smithson v. Smithson*, 18 D. C. 227; *Woolard v. Woolard*, 18 D. C. App. 326; *Stoneburner v. Stoneburner*, 11 Idaho, 603, 83 Pac. 938; *Paul v. Paul*, 75 Ill. App. 383; *McElhaney v. McElhaney*, 125 Iowa, 333, 101 N. W. 93; *Seeds v. Seeds*, 139 Iowa, 717, 117 N. W. 1069; *Van Horn v. Arantes*, 116 La. 130, 40 South. 592; *Messenger v. Messenger*, 56 Mo. 329; *Trall v. Trall*, 32 N. J. Eq. 231; *Newing v. Newing*, 45 N. J. Eq. 498, 18 Atl. 166; *Wood v. Wood*, 63 N. J. Eq. 688, 53 Atl. 51; *Rutledge v. Rutledge*, 37 Tenn. (5 Sneed) 554; *McGowen v. McGowen*, 52 Tex. 657; *Stay v. Stay*, 53 Wash. 534, 102 Pac. 420.

The party not at fault need not solicit the return of the other, who has left the home without good cause. It is sufficient if it appears that such party has not refused an unconditional offer to return: *Seeds v. Seeds*, 139 Iowa, 717, 117 N. W. 1069.

When both parties are responsible for the separation, neither has a right to complain of the absence of the other. Therefore, in a suit for divorce in such a case, the plaintiff must show that he or she has sought reconciliation, and has met with refusal from the defendant. In the absence of such a showing a decree will be denied: *Jones v. Jones*, 13 Ala. 145; *Benkert v. Benkert*, 32 Cal. 467; *Masterson v. Masterson*, 20 Ky. Law Rep. 631, 46 S. W. 20; *Lea v. Lea*, 90 Mass. (8 Allen) 418; *Cox v. Cox*, 35 Mich. 461; *Rose v. Rose*, 50 Mich. 92, 14 N. W. 711; *Fulton v. Fulton*, 36 Miss. 517; *Droege v. Droege*, 55 Mo. App. 481; *Campbell v. Campbell*, 73 Mo. App. 579; *Sarfaty v. Sarfaty*, 59 N. J. Eq. 193, 45 Atl. 261; *McGean v. McGean*, 63 N. J. Eq. 285, 49 Atl. 1083; *Foote v. Foote* (N. J. Ch.), 61 Atl. 90.

**b. Refusal of Reconciliation.**—Whether the separation has originated through the fault of one party, or of both parties, it is necessary that the guilty party in the one case, or one of the parties in the other, seek a reconciliation, and make faithful overtures tending to resume the matrimonial relation. And if after such overtures have been made the other party refuses to become reconciled and resume the matrimonial relation, he or she is guilty of desertion, provided the reconciliation has been sought during the statutory period: *Carey v. Carey*, 73 Cal. 630, 15 Pac. 313; *Prather v. Prather*, 26 Kan. 273; *Fishli v. Fishli*, 12 Ky. (2 Litt.) 337; *Evans v. Evans*, 44 Ky. (5 B. Mon.) 278; *Small v. Small*, 31 Me. 493; *Stocking v. Stocking*, 76 Minn. 292, 79 N. W. 172, 668; *Hurning v. Hurning*, 80 Minn. 373, 83 N. W. 342; *Fulton v. Fulton*, 36 Miss. 517; *McDermott's Appeal* (Pa.), 8 Watts & S. 251; *Grover's Appeal*, 37 Pa. 443; *Sisemore v. Sisemore*, 17 Or. 542, 21 Pac. 820.

In *Smith v. Smith*, 55 N. J. Eq. 222, 37 Atl. 49, it is held that a wife's suit for divorce on the ground of desertion by the husband will not be barred because she in fact did not desire to resume matrimonial relations during the statutory period, where it appears that her feelings were due to her husband's misconduct and gross behavior.

In *Loux v. Loux*, 57 N. J. Eq. 561, 41 Atl. 358, the husband was deserted by his wife, and he gave her two weeks' time to reconsider and return. When the two weeks expired he withdrew the offer. After the offer was withdrawn, and within two years, she wrote him several letters in which she expressed her willingness to return, to which he failed to reply. She also called on him



personally and asked to be taken back, but he refused all entreaties. He did not dispute her offer to return, but introduced a witness who testified that the wife said she would not again live with her husband. It was held that a continuous obstinate desertion for two years had not been shown.

c. **Good Faith in Seeking Reconciliation.**—Where the plaintiff suing for a divorce on the ground of desertion is under the duty of seeking a reconciliation, because he or she is responsible, solely or in conjunction with the defendant, for the separation or desertion, he is required to show not only an ineffectual attempt at reconciliation, but also that he made the attempt in good faith and before the statutory period of desertion had elapsed: *Walker v. Walker* (Cal. App.), 112 Pac. 479; *Jenkins v. Jenkins*, 104 Ill. 134; *Prather v. Prather*, 26 Kan. 273; *Messenger v. Messenger*, 56 Mo. 329; *Grant v. Grant*, 36 N. J. Eq. 502; *Elliott v. Elliott*, 48 N. J. Eq. 231, 21 Atl. 381; *Sisemore v. Sisemore*, 17 Or. 542, 21 Pac. 820.

In *Paul v. Paul*, 75 Ill. App. 383, the husband deserted his wife without cause, and subsequently charged her with desertion. He proved that he requested her to resume the matrimonial relation and to come to him at a certain place. He however, failed to show that he offered her a home in good faith. It was held that he was not entitled to a divorce.

In *Crickler v. Crickler*, 58 N. J. Eq. 427, 43 Atl. 1064, it is held that it is a husband's duty to show that he is sincerely willing and desirous that his wife should return to him, before he can secure a decree of divorce on the ground of desertion.

In *McMullin v. McMullin*, 140 Cal. 112, 73 Pac. 808, the husband and wife lived apart for eighteen years. Under the statutes of California separation by consent is a revocable act, and if one of the parties in good faith seeks a reconciliation, but the other refuses, such refusal is desertion. The wife had at no time sought a reconciliation, nor instituted suit for divorce. It was held that, even though the husband deserted her without cause and without consent, such lapse of time warranted a finding that the desertion was with her consent; and her refusal to resume marital relations when he in good faith requested her to do so constituted desertion on her part, and he was entitled to a decree.

In *Roby v. Roby*, 10 Idaho, 139, 77 Pac. 213, the husband established a home, and he requested his wife to come and share it with him; he also sent her money to defray expenses. The wife, however, declined to go to his home. It was held that he was not guilty of desertion so as to entitle her to a decree.

In *Beller v. Beller*, 50 Mich. 49, 14 N. W. 696, it was held where a husband failed to influence his wife to remain with him, but, on the contrary, rejoiced when she left for another locality to engage in business, that he was not entitled to a divorce on the ground of desertion.

In *Ashburn v. Ashburn*, 101 Mo. App. 365, 74 S. W. 394, the husband was able to perform some work about the farm, although partially paralyzed. The wife, however, insisted on leaving the home to seek employment, to which the husband demurred. He tried to influence her to remain and attend to the domestic duties, and take care of their child. When she left him he said she should not try to return, as he would not receive her. While she

was gone, in spite of the threat that she could not return to him, he tried by means of letters and third parties to persuade her to return, and all efforts on his part were unavailing. It was held that her departure was unjustifiable, and, in view of the fact that the separation had continued for the statutory period, that he was entitled to a divorce.

In *Jerolaman v. Jerolaman* (N. J. Ch.), 54 Atl. 166, a separation between husband and wife occurred on account of his drunkenness. He claimed that he had reformed; but he failed to seek his wife during the statutory period, or to ask her to return; and gave her no assurance of the sincerity of his reformation. It was held that the wife was entitled to a divorce on the ground of desertion.

### III. Separation Caused by Misconduct or Cruelty.

a. **In General.**—Usually the party who withdraws from cohabitation or absents himself from the other spouse is the one chargeable with desertion. But this is not necessarily the case, for it may safely be said that where either spouse, by misconduct or cruelty, drives the other away, the former, not the latter, is the deserter, or, in other words, is guilty of desertion: *Jones v. Jones*, 95 Ala. 443, 11 South. 11, 18 L. R. A. 95; *Hudson v. Hudson*, 59 Fla. 529, ante, p. 141, 51 South. 857, 29 L. R. A., N. S., 614; *Hall v. Hall*, 25 Ky. Law Rep. 1304, 77 S. W. 668; *Levering v. Levering*, 16 Md. 213; *Harding v. Harding*, 22 Md. 337; *Lea v. Lea*, 99 Mass. 493, 96 Am. Dec. 772 (but see *Padelford v. Padelford*, 159 Mass. 281, 34 N. E. 336); *Marker v. Marker*, 11 N. J. Eq. 256; *Starkey v. Starkey*, 21 N. J. Eq. 135; *McVickar v. McVickar*, 46 N. J. Eq. 490, 19 Am. St. Rep. 422, 19 Atl. 249; *Waltermire v. Waltermire*, 110 N. Y. 183, 17 N. E. 739; *Appeal of McDermott* (Pa.), 8 Watts & S. 251; *Appeal of Groves*, 37 Pa. 443.

The departing spouse must, however, be justified in leaving the other: *Reed v. Reed*, 62 Ark. 611, 37 S. W. 230; *Craig v. Craig*, 90 Ark. 40, 117 S. W. 765; *Hitchcock v. Hitchcock*, 15 D. C. App. 81; *Walton v. Walton*, 114 Ill. App. 116; *Alderson v. Alderson*, 24 Ky. Law. Rep. 595, 113 Ky. 830, 69 S. W. 700; *Grover v. Grover*, 79 Mo. App. 142; *Laing v. Laing*, 21 N. J. Eq. 248; *Eshbach v. Eshbach*, 23 Pa. 343.

b. **Facts Justifying Separation.**—In *Curlett v. Curlett*, 106 Ill. App. 81, it was held that a wife was justified in leaving her husband, and entitled to a divorce for desertion, where he allowed an officer to put her out of the house and provided no home for her, having the ability to do so, and persisting in such failure for two or more years.

In *Weigand v. Weigand*, 41 N. J. Eq. 202, 3 Atl. 699, affirmed in 42 N. J. Eq. 699, 11 Atl. 113, it was held that a wife was justified in leaving her husband on the ground that he kept a prostitute in the same house where she resided; also that whenever a husband or wife, as the case may be, commits an offense which entitles the other to a divorce, either does that which justifies leaving.

Articles of separation were executed by husband and wife, and the former knew of the latter's opposition to the separation. The husband, however, was determined to continue the separation, and

it continued during the statutory period. It was held that the wife was entitled to a divorce on the ground of willful desertion: *Power v. Power*, 66 N. J. Eq. 320, 105 Am. St. Rep. 653, 58 Atl. 192.

In an action for divorce on the ground of desertion, brought by the wife, it appeared that the husband left her to seek employment elsewhere, but on account of dissipated habits he was unsuccessful, and he failed to take care of her in any way. It was held that even though he wrote her affectionate letters, his conduct was that of a deserter, and the character of willfulness became attached to the desertion: *Coe v. Coe*, 68 N. J. Eq. 157, 59 Atl. 1059.

Shortly before a husband returned from a trip to a foreign country, the wife left his home and went to live with her relatives, and at no time did she disclose her intention to any of the members of her husband's family, nor did she leave any word for him. Some three months after her departure, the husband met her and she gave him, as a reason for leaving, that she feared bloodshed on account of a man whose intimacy with her he objected to. It was held that the husband was entitled to a divorce on the ground of desertion, at the expiration of one year from the time she left him. The wife's conduct amounted to willful and intentional desertion: *Ogilvie v. Ogilvie*, 37 Or. 171, 61 Pac. 627.

In *Wells v. Johnson*, 122 La. 385, 47 South. 690, it was held that a husband was entitled to a decree of separation where the wife abandoned his home, giving as a reason that he objected to some of her friends, and that she had to go to her mother's to receive them. Subsequently, accompanied by her mother and with a whip concealed about her person, she waited for his appearance near his house, and without provocation struck him and followed him with abusive language. She wrote untruthful letters to his employer to the effect that he "had not been supporting her and the children"; also, a letter to her husband well calculated to irritate him.

In *Whelan v. Whelan*, 183 Pa. 293, 38 Atl. 625, it is decided that where a wife leaves her husband on account of a quarrel, and for more than two years refuses his appeals to return to him, she is guilty of willful and malicious desertion, and he is entitled to a decree of divorce.

**c. Facts not Justifying Separation.**—It has been affirmed that the misconduct must ordinarily be such as would itself be a ground for divorce: *Warfield v. Warfield* (Ark.), 133 S. W. 606; *Pierce v. Pierce*, 33 Iowa, 238; *Van Dyke v. Van Dyke*, 135 Pa. 459, 19 Atl. 1061; *Martin v. Martin*, 33 W. Va. 695. In *Plimley v. Plimley*, 35 N. J. Eq. 18, it is decided that a wife who refuses to live with her husband on account of his intemperance and improvidence is not entitled to a divorce on the ground of obstinate and willful desertion.

In *Embley v. Embley* (N. J. Ch.), 37 Atl. 46, the husband left town on account of being heavily in debt. He was attacked by the newspapers and could not meet his obligations. The parting from his wife was friendly, and he wrote several letters indicating his desire to continue the marital relation, and to send for her as soon as he was able. She demanded money to go to him when he was in no position to send her any; but subsequently, when he

became able, he wrote her of his ability to send for her, and requested a reunion. The wife, however, did not comply with his request nor answer his letters. It was decided that she was not entitled to a divorce on the ground of willful and continued desertion.

In *Grover v. Grover*, 63 N. J. Eq. 771, 50 Atl. 1051, it appears that husband and wife lived in Massachusetts, but on account of intemperate habits he lost his position, in consequence of which he could not support his wife. He went to Vermont to better his condition, and left her in the former state. At the trial she testified that she thought his move to Vermont was the best thing for him, and if he had reformed she would have lived with him. She failed, however, to ascertain whether or not he had reformed; she also failed to inform him as to her movements and whereabouts. It was decided that the evidence was insufficient to establish a willful, continuous and obstinate desertion on his part, to entitle her to decree of divorce.

The refusal of a man to permit his wife's sister to live with them seems not such misconduct as to justify the wife in abandoning him: *Packard v. Packard*, 90 Iowa, 765, 58 N. W. 903.

In *Provost v. Provost* (N. J. Ch.), 63 Atl. 619, it is held that a wife is not entitled to a decree on the ground of desertion by testimony that he refused to comply with her demands relating to his habits and methods of supporting her. She is in duty bound to accept the situation her husband is capable of maintaining.

In *Wheeler v. Wheeler*, 101 Md. 427, 61 Atl. 216, the husband was put out of the house of his wife's father for drunkenness, and the former asked how long it was going to last. The husband wrote her numerous letters, and she answered them and made engagements for meeting outside of her father's house. It was held there was not such desertion as entitled the wife to a decree.

In *Taylor v. Taylor*, 72 N. H. 597, 57 Atl. 654, the wife was living separate from her husband by virtue of a foreign decree adjudging that she was justified in living apart from him. He made an effort to have the decree revoked, but was unsuccessful. It was decided that his unsuccessful effort to have the decree revoked established that the cause still existed, and that the wife could not be guilty either of willful absence from him within three years, or of abandonment and refusal to cohabit, as required by the statute, in order to entitle him to a divorce.

In *Midleton v. Midleton*, 187 Pa. 612, 41 Atl. 291, the parties had frequent quarrels, and finally the husband suggested they should live apart. When they parted the husband gave his wife all the furniture in the house; he also hired the expressman to haul the furniture, of which he made an inventory. Following the separation, they had occasional personal interviews, and also corresponded. It was held that the facts did not show a willful and malicious desertion by the wife, so as to entitle the husband to a decree of divorce.

d. **The Adultery of One Spouse** is usually regarded as such misconduct as justifies the innocent spouse in leaving: *Morris v. Morris*, 20 Ala. 168; *Davis v. Davis*, 60 Mo. App. 545; *Weigand v. Weigand*, 41 N. J. Eq. 202, 3 Atl. 699. See, also, *Warfield v. Warfield* (Ark.), 133 S. W. 606. In *Day v. Day*, 71 Kan. 385, 80 Pac. 974, 6 Ann.

Cas. 169, Chief Justice Johnston says: "Divorce is a remedy for the innocent and injured party, and one who invokes the aid of a court must come into it with a clear conscience and clean hands." Following the dictum in this case, it is held, in *Bovaird v. Bovaird*, 78 Kan. 315, 96 Pac. 666, that a husband who deserted his wife and afterward holds adulterous relations with a number of women is not in a position to ask for a divorce. It is also held that while courts are inclined to encourage reconciliation and the resumption of the marital relation between spouses who are estranged, they cannot require that a wife, who declines to live with a husband guilty of adultery, shall herself be regarded as guilty of desertion.

In *Holston v. Holston*, 23 Ala. 777, it appeared that the plaintiff (wife) had just apprehension in believing that the defendant, at the time of her marriage to him, was the husband of another woman. She separated herself from him, and he consented to it by promising to produce proofs which would remove the suspicion. The separation continued during the statutory period, and not only did the husband fail to produce the proofs that he was not the husband of another woman, but he committed adultery with different women. It was held, that the abandonment was sufficiently shown by the failure on the part of the defendant to use any exertions to remove the suspicions which first induced the separation on the part of the complainant, united with gross and repeated violations of the marriage obligations as shown by the evidence.

But in *Lake v. Lake*, 65 N. J. Eq. 544, 56 Atl. 296, the court says: "It is true that when a husband brings his mistress into his house, and so makes it impossible for a wife to live there, he practically drives his wife from his home, and his act may be characterized as desertion; but in the case of an adulterous act or acts by her husband with a woman at places other than the dwelling place of the parties, such an inference does not arise. While such an adulterous act might justify a wife in separating from her husband, it is not ground for inferring a constructive desertion by him."

#### IV. Involuntary Separation.

a. **In Case of Confinement in Prison.**—In *Hews v. Hews*, 73 Mass. (7 Gray) 279, it is decided that a divorce may be decreed for willful desertion for five years, although the guilty party has been in the house of correction during the greater part of that period, under successive sentences, beginning a few months after the desertion, and with very short intervals between the terms of imprisonment. Where husband and wife have been living apart on account of his imprisonment for life, it has been affirmed that this entitles her to a divorce: *Davis v. Davis*, 102 Ky. 440, 43 S. W. 168, 39 L. R. A. 403. But where a wife has been held for trial for a year at the instance of her husband, under a charge preferred by him of which she is acquitted, her absence from him during that year does not constitute desertion: *Porritt v. Porritt*, 18 Mich. 420. In *Hyland v. Hyland*, 55 N. J. Eq. 35, 36 Atl. 270, it is decided that the time during which a husband is in prison for a nonpolitical crime should be excluded in determining the time during which a willful desertion has continued.

b. **In Case of Confinement in Insane Asylum.**—A wife who is confined in a lunatic asylum cannot be said to have abandoned her

husband: *Baker v. Baker*, 82 Ind. 146; *Pile v. Pile*, 94 Ky. 308, 22 S. W. 215; *Blandy v. Blandy*, 20 App. Cas. (D. C.), 535. Where a wife abandons her husband without just cause and thereafter becomes insane, a cause of action for divorce does not accrue to him, in Nebraska, until the lapse of two years exclusive of the time that she is insane: *Kirkpatrick v. Kirkpatrick*, 81 Neb. 627, 129 Am. St. Rep. 708, 116 N. W. 499, 16 L. R. A., N. S., 1071.

In *Douglass v. Douglass*, 31 Iowa, 421, husband and wife lived together happily for many years, and the defendant (husband) became insane. He was confined in an asylum for some time and discharged as cured. On the day of his discharge (September 14, 1867) he returned to his friends and relatives, but refused to live with his wife. In February, 1868, there was a judicial examination as to his condition, and he was pronounced sane, and then settled with his guardian, who was discharged. During this judicial examination the defendant asserted that he never intended to live with plaintiff again, but gave no reason, and refused to do so when asked. In April, 1868, he was again sent to an asylum. During his second confinement in the asylum he corresponded with his friends, but refused to write to his wife, although she urged him to answer. Plaintiff brought suit in March, 1870. It was held (one justice dissenting) that the evidence satisfactorily established the fact that the defendant willfully deserted his wife without a reasonable cause, and that he absented himself for two years. Also, "that the absence of the defendant must be excused by the fault of the plaintiff, and not by the fault or misfortune of the defendant." Again, "how much soever we may sympathize with the defendant in his misfortune and would be ready to commend the self-sacrifice and devotion that would lead the plaintiff to cling closer to him, even though his affection, like his reason, may be permanently clouded, yet the statute is the measure of the plaintiff's rights, and it is our duty to enforce it."

In *Wray v. Wray*, 33 Ala. 187, it is held, that a wife is entitled to alimony for a sum sufficient to support her suitably to her condition and circumstance, even though she is separated from her husband without her fault and confined in a lunatic asylum.

c. **In Case of Separation by Judicial Decree.**—In *Kyle v. Kyle*, 52 N. J. Eq. 710, 29 Atl. 316, a woman obtained a decree of divorce a mensa et thoro in New York and subsequently moved to New Jersey, where, after the statutory period elapsed, she brought an action a vinculo matrimonii on the ground of desertion. It was decided that she was not entitled to a divorce, because the former decree effected a legal separation.

#### V. Separation Through Change of Domicile.

The husband, being the one who must provide a home for the family, has the right, acting reasonably, to choose the place where the family shall reside; and the wife, if she refuses without good reason therefor to follow him and take up her abode at the domicile he selects and provides, may be guilty of desertion through such refusal: *Hanberry v. Hanberry*, 29 Ala. 719; *Hardenbergh v. Hardenbergh*, 14 Cal. 654; *Davis v. Davis*, 30 Ill. 180; *Babbitt v. Babbitt*, 69 Ill. 277; *Kennedy v. Kennedy*, 87 Ill. 250; *Roby v. Roby*, 10 Idaho, 139, 77 Pac. 213; *Gahn v. Darby*, 36 La. Ann. 70;



Franklin v. Franklin, 190 Mass. 349, 77 N. E. 48, 4 L. R. A., N. S., 145, 5 Ann. Cas. 851; Schuman v. Schuman, 93 Mo. App. 99; Buell v. Buell, 42 Wash. 277, 84 Pac. 821; Burk v. Burk, 21 W. Va. 445.

In Haymond v. Haymond, 74 Tex. 414, 12 S. W. 90, it is held that the wife cannot be regarded as guilty of desertion because she refused to emigrate to South America.

In Vosburg v. Vosburg, 136 Cal. 195, 68 Pac. 694, the court said: "Nice questions may arise as to the extent of the duty of the wife (to live elsewhere with her husband than at her present home), and as to the extent of the right of the husband, without adequate reason, to force the wife to leave the place where she has long resided, where her friends are gathered about her, and where, near to her aged father and mother, she is living in her own house and home, suitable to her station and condition in life. There must certainly be a limit to the husband's right of exaction in this regard, and the answer to the question in this case, if answer were needed, might be a justification, under all the circumstances shown, for the wife's refusal . . . she was not guilty of desertion until he had made a choice, offered it to her, and she, without sufficient cause, had refused to comply with his selection."

In Franklin v. Franklin, 190 Mass. 349, 77 N. E. 48, 4 L. R. A., N. S., 145, 5 Ann. Cas. 851, the husband emigrated to America to better his condition, and the wife refused to follow, offering no other excuse than that she was disinclined to leave her native land. It was held she was guilty of desertion, and he entitled to a divorce.

In King v. King, 122 La. 582, 47 South. 909, the husband had neither means to support his wife nor had he provided a home for her at the place where he urged her to reside with him. It was held that her refusal did not constitute desertion entitling him to a divorce. He should have alleged and proved that he had complied with his own obligation, namely, that he had provided the home.

In Kenniston v. Kenniston, 6 Cal. App. 657, 92 Pac. 1037, the plaintiff (husband) left his wife in Massachusetts and removed to California. Subsequently, he brought suit for divorce on the ground of desertion. The trial court granted the plaintiff a decree consistent with the prayer of his complaint. The judgment was reversed by the appellate court for the following reason: "Conceding that there is sufficient evidence as to the offer of a home, and defendant's refusal to accept it, there is no evidence whatever as to the character of the home to which plaintiff invited defendant. He must show that he has chosen a reasonable place or mode of living before he can insist that his wife is in default. No presumption can be indulged in that behalf in favor of plaintiff. . . . One of the important facts tending to show good faith is that he has urged his wife to come across the continent to a home reasonably suitable to their station in life. It would be, in our opinion, an arbitrary exercise of power to hold that this material element in plaintiff's case need not be proven, or that it may rest upon presumption."

A husband who, without providing his wife with a domicile and the necessary means of support, leaves the state for an indefinite period, has no right to complain when his wife institutes suit for a separation from bed and board on the ground of abandon-



ment. She is entitled to a decree: *Wilcox v. Nixon*, 115 La. 47, 112 Am. St. Rep. 266, 38 South. 890. In order, however, to entitle a party to a divorce from bed and board on the ground of abandonment in Louisiana, both parties must reside in the state: *Muller v. Hilton*, 13 La. Ann. 1, 71 Am. Dec. 504; *Heath v. Heath*, 42 La. Ann. 437, 7 South. 540.

Another requirement of the Louisiana statutes in force in 1853 and 1876, respectively, is that the abandonment must be made to appear by three reiterated summonses from month to month, directing the deserting spouse to return to the place of the matrimonial domicile, and followed by judgment which has sentenced him or her to comply with such request, together with a notification of such judgment given to him or her, from month to month for three times successively, and that the notification shall be made to him or her, at the place of his or her usual residence if living within the state, and, if absent, at the place of the attorney who shall be appointed to represent the absent party: *Perkins v. Potts*, 8 La. Ann. 14; *Merrill v. Flint*, 28 La. Ann. 194.

#### VI. Refusal to Live Near or With Relatives.

As to the right of a wife to refuse to reside near or with relatives, we believe we can do no better than quote the words of the learned Chief Justice Redfield in the case of *Powell v. Powell*, 29 Vt. 148. He said: "While we recognize fully the right of the husband to direct the affairs of his own house, and to determine the place of the abode of the family, and it is in general the duty of the wife to submit to such determinations, it is still not an arbitrary power which the husband exercises in these matters. He must exercise reason and discretion in regard to them. If there is any ground to conjecture that the husband requires the wife to reside where her health or her comfort will be jeopardized, or even where she seriously believes such results will follow which will almost of necessity produce the effect, and it is only upon that ground that she separates from him, the court cannot regard her desertion as continued from mere willfulness. Any man who has proper tenderness and affection for his wife would certainly not require her to reside near his relatives if her peace of mind were thereby seriously disturbed."

In *Garrison v. Garrison*, 31 Ky. Law Rep. 1209, 104 S. W. 980, husband and wife were living with his parents for many years, during which time she felt unhappy. She finally separated herself from him for the reason that she did not wish to continue to live with his parents. She agreed to live with him anywhere except in the home of his parents, and he refused to leave them. He rejected her overtures for a reconciliation in a home of their own, away from his parents, but was willing she should return to his parents' home. It was held that he was not entitled to a divorce on the ground of desertion because his wife refused to return to such home.

#### VII. Cessation of Matrimonial Intercourse.

Some courts have taken the view that the refusal of one spouse to have reasonable matrimonial or sexual intercourse with the other, when health and physical conditions do not make such re

fusal necessary, manifests desertion. In some states, such as California, the express terms of the statute justify this conclusion: *Fink v. Fink*, 137 Cal. 559, 70 Pac. 628; *Stein v. Stein*, 5 Colo. 55; *Whitfield v. Whitfield*, 89 Ga. 471, 15 S. E. 543; *Evans v. Evans*, 93 Ky. 510, 20 S. W. 605; *Graves v. Graves*, 88 Miss. 677, 41 South. 384.

In *Rie v. Rie*, 34 Ark. 87, it appeared the defendant (wife) performed every other marital duty, but she refused to have sexual intercourse with plaintiff as husband and wife during the statutory period. It is held that refusal of sexual intercourse for one year, without just cause, intentional on part of wife, entitles the husband to a divorce.

The majority of decisions, however, hold that refusal of sexual intercourse, although not justified by considerations of health, is not such abnegation of marital duties as to constitute desertion—it is not desertion as contemplated by the laws of divorce. And the fact that the refusal has continued for, and longer than, the statutory period is immaterial. The courts will not imply “willful” or “obstinate” or “utter” desertion from the mere fact that one party refuses to have sexual intercourse with the other: *Prall v. Prall* (Fla.), 50 South. 867, 26 L. R. A., N. S., 577; *Fritz v. Fritz*, 138 Ill. 436, 32 Am. St. Rep. 156, 28 N. E. 1058, 14 L. R. A. 685; *Stewart v. Stewart*, 78 Me. 548, 57 Am. Rep. 822, 7 Atl. 473; *Southwick v. Southwick*, 97 Mass. 327, 93 Am. Dec. 95; *Segelbaum v. Segelbaum*, 39 Minn. 258, 39 N. W. 492; anonymous (*Watson v. Watson*), 52 N. J. Eq. 349, 28 Atl. 467; *Pratt v. Pratt*, 75 Vt. 432, 56 Atl. 86; *Schoessow v. Schoessow*, 83 Wis. 553, 53 N. W. 856; *Reynolds v. Reynolds* (W. Va.), 69 S. E. 381; *Steele v. Steele*, 1 McArthur (D. C.), 505.

In *Pfannebecker v. Pfannebecker*, 133 Iowa, 425, 119 Am. St. Rep. 608, 110 N. W. 618, 12 Ann. Cas. 543, the parties continued to live in the same house and slept in adjoining rooms up to the time the action was begun. The plaintiff (husband), testified that cessation of intercourse began in April, 1903, while the defendant testified that cessation of intercourse began in April, 1905. The action was begun in September, 1905. By the court: “The situation illustrates the difficulties involved in such proof were denial of sexual indulgence alone to be regarded as a ground on divorce. The language of our statute precludes us from so holding, were we inclined, and we are not, for a divorce is authorized on this ground only ‘when he willfully deserts the wife and absents himself without reasonable cause for the space of two years’: Code, sec. 3174. This statute is equally applicable where the wife deserts the husband. It is not sufficient that one duty or that all save one shall be neglected. There must be a complete separation of the parties by the one absenting himself or herself from the other. The ecclesiastical courts which formerly exercised jurisdiction in matrimonial cases in England did not sever the ties of marriage on the ground of desertion, but undertook the restoration of conjugal rights only. In so doing distinction was made between marital cohabitation and sexual intercourse; the courts going no further than to restore the former. The remedy for desertion in this country is divorce, but to constitute desertion it would seem that that must be lost which the ecclesiastical courts were able by their decrees to restore, namely, marital cohabitation, and such is the voice of the great weight of authority: *Fritz v. Fritz*, 138 Ill. 436, 32 Am.

St. Rep. 156, 28 N. E. 1058, 14 L. R. A. 685; Segelbaum v. Segelbaum, 39 Minn. 258, 39 N. W. 492; Schoessow v. Schoessow, 83 Wis. 553, 53 N. W. 856; Throckmorton v. Throckmorton, 86 Va. 768, 11 S. E. 289; Steele v. Steele, 1 McArthur (D. C.), 505; Anonymous (Watson v. Watson), 52 N. J. Eq. 349, 28 Atl. 467. See, also, Stewart v. Stewart, 78 Me. 548, 57 Am. Rep. 822, 7 Atl. 473, and Southwick v. Southwick, 97 Mass. 327, 93 Am. Dec. 95, where it is held not to constitute 'utter desertion': 11 Cyc. 612. There are respectable authorities to the contrary, but construing statutes essentially differing from that of this state: See Fink v. Fink, 137 Cal. 559, 70 Pac. 628; Whitfield v. Whitfield, 89 Ga. 471, 15 S. E. 543; Evans v. Evans, 93 Ky. 510, 20 S. W. 605. These decisions seem to have been unduly influenced by the opinion expressed by Mr. Bishop in his work on Marriage and Divorce, paragraphs 778 and 779, and which has not been followed by the better considered cases. In none had a statute expressly making the absenting of the spouse essential to constitute desertion been so construed, and which, as we think, leaves no escape from the conclusion that cohabitation as well as marital intercourse must be abandoned to constitute such desertion as will entitle the unoffending spouse to a decree."

In Snouffer v. Snouffer (Iowa), 129 N. W. 326, it is decided that the refusal of a wife, living in the same house with her husband, to have sexual intercourse with him for many years does not constitute desertion.

In Hayes v. Hayes, 144 Cal. 625, 78 Pac. 19, it is held, under the Civil Code, section 96, declaring "persistent refusal to have reasonable matrimonial intercourse" manifests desertion justifying a divorce "when health and physical condition does not make such refusal reasonably necessary," that there must be evidence as to the health and physical condition of the plaintiff's wife during the time of refusal, in order to entitle plaintiff to a divorce on the ground of desertion for such cause.

#### VIII. Neglect or Refusal to Furnish Support.

In Magrath v. Magrath, 103 Mass. 577, 4 Am. Rep. 579, the court said: "There is no more important right of the wife than that which secures to her in the marriage relation the companionship of her husband and the protection of his home. His willful denial of this right, with the intentional and permanent abandonment of all matrimonial intercourse, against her consent, is desertion within the meaning of our statute. And such conduct is not relieved by the fact that he has from time to time contributed to her support and the support of the children. A man may do as much as this, from motives of charity, of deference to the opinions of others, or in order to discharge in part, a legal responsibility for the means of living furnished her; although he may all the time have a fixed intention permanently to abandon all personal relation with her."

It is obvious, therefore, that even though a husband support his wife, she may yet be entitled to a divorce on the ground of desertion: Elzas v. Elzas, 171 Ill. 632, 49 N. E. 717; Gates v. Gates, 60 N. J. Eq. 486, 46 Atl. 1100; Power v. Power, 66 N. J. Eq. 320, 105 Am. St. Rep. 653, 58 Atl. 192; Brokaw v. Brokaw, 66 Misc. Rep. 307, 123 N. Y. Supp. 17.

A wife, however, may not separate herself from her husband solely because of his inability to support her: Bennett v. Bennett, 43 Conn.

313; *Skean v. Skean*, 33 N. J. Eq. 148; *Costill v. Costill*, 47 N. J. Eq. 346, 21 Atl. 35; *Farrier v. Farrier* (N. J. Ch.), 58 Atl. 1079; *Ingersoll v. Ingersoll*, 49 Pa. 249, 88 Am. Dec. 500.

In *Bell v. Bell*, 15 Idaho, 7, 86 Pac. 196, the husband (plaintiff) failed to furnish his wife a suitable home and reasonable support, in consequence of which the necessity to support herself and child compelled her to leave her husband and seek employment in another place. She was held not guilty of desertion entitling the husband to a divorce.

### IX. Adopting Different Religious Belief.

In New Hampshire it has been affirmed that where a husband joins "the Shakers," the members of which society profess that it is not lawful for man and wife to cohabit, and he refuses to cohabit with his wife for the time provided by statute, this constitutes desertion on his part and she is entitled to a divorce: *Dyer v. Dyer*, 5 N. H. 271. It has also been affirmed in that state that where a man and wife join a society or religious sect whose members profess that it is unlawful to maintain the relation of husband and wife, and he afterward withdraws from the society and requests his wife to do so and cohabit with him, which she refuses to do, he is entitled to a divorce: *Fitts v. Fitts*, 46 N. H. 184.

In *Prall v. Prall* (Fla.), 50 South. 867, 26 L. R. A., N. S., 577, the husband alleged in his petition for divorce that the wife became a devotee of a strange religion, that from the time of her conversion thereto she was estranged from him because of his inability to adopt the tenets of that religion, that one of the peculiar beliefs of the sect was that its members are not properly married to anyone, and that she withdrew herself from all marital relations with him, abjuring him in every way, and telling him that his approaches were obnoxious to her. It was held that the mere refusal of a wife to accord to the husband the marital privileges lawful only to the husband is not of itself such a desertion of the husband as to authorize him to secure a divorce on the statutory ground of willful, obstinate and continued desertion.

### X. Discretion of Court in Certain Cases.

In some jurisdictions the statutes provide that, in addition to the causes particularly provided for, the court shall have full power to hear and determine whether or not a party is entitled to a divorce on the facts disclosed by the evidence which do not come within any of the grounds provided for by the statute; and in its discretion grant, or refuse to grant, a decree. In *Shrock v. Shrock*, 67 Ky. (4 Bush) 682, it was held that a trial court is authorized to decree a separation from bed and board on the ground that the plaintiff deserted her husband after he "in a fit of anger drove her away, and told her to take her things and leave, which she did."

In a case reported under the title of *Anonymous*, 27 Me. 563, it was decided that, under the Statute of 1847, chapter 13, which authorized the justices of the supreme judicial court to grant divorces "in cases not now provided by law," a divorce cannot be granted by the court for desertion by one of the parties for a period less than five years. And in *Birkby v. Birkby*, 15 Ill. 120, it is affirmed that the statutes declaring that, "in addition to the causes therein pro-

vided for, the court of chancery shall have full power to hear and determine all causes for divorce not provided for by the statute," does not confer unlimited discretion on courts to grant a decree of divorce in every case wherein they may deem it advisable; and hence that a decree granted partly on the ground of desertion for a period less than that prescribed by statute and partly on other grounds should be reversed.

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### LAFAYETTE LAND COMPANY v. CASWELL.

[59 Fla. 544, 52 South. 140.]

**EQUITY.**—A General Demurrer to an Entire Bill for want of equity should be overruled where the case made by the bill entitles the complainant to any substantial relief in a court of equity. (p. 166.)

**PARTNERSHIP.**—A Deed Made to a Firm by the Firm Name instead of the individual members of the firm is not for that reason void. It is a latent ambiguity that may be explained and supplied by parol testimony. (p. 167.)

(Syllabi by the court.)

Hendry & McKinnon, for the appellant.

Hardee & Butler, for the appellees.

**545 TAYLOR, J.** The appellees filed their bill in equity in the circuit court of Taylor county against the appellant for the removal of clouds upon their title to the standing timber growing upon divers lands in said county, and to enjoin the appellant from trespassing thereon, and from harassing the complainants with divers alleged vexatious suits at law in which it is alleged the appellant has undertaken to seize the timber cut from said lands by the appellees. To the bill the defendant below interposed a demurrer on the following grounds:

1. There is no equity in the bill.
2. The bill shows that complainant has an adequate remedy at law.
3. The bill shows that the question of title to said property is being litigated in an action at law.
4. The bill states conclusions and does not set out the facts showing that a reasonable time has expired.
5. The bill alleges facts that tend to vary and contradict the terms of a written instrument under seal.
6. The bill sets up a contract in relation to said timber made prior to and contemporaneously with the said written instrument under seal and in terms contrary thereto.

This demurrer was overruled by the chancellor, and from this order the defendant below appeals to this court assigning said order as error. There was no error in this ruling.

It is well settled here that a general demurrer to an entire bill for want of equity should be overruled where the case made by the bill entitles complainant to any substantial relief in a court of equity: Louisville etc. <sup>546</sup> R. Co. v. Gibson, 43 Fla. 315, 31 South. 230. We think the bill sets up a good ground for equitable relief in its effort to remove clouds from the complainants' title, as well also as in its prayer for injunction. It is contended here that the conveyance under which the complainants claim title is void because no grantees are named therein. This contention is based upon the fact that the deed under which the complainants claim, attached as exhibit to their bill, is made to Caswell and Knight of Taylor county, Florida, as grantees, without giving either of their Christian names. This does not render said deed void.

A deed made to a firm by the firm name, instead of the individual members of the firm, is not for that reason void. It is a latent ambiguity that may be explained and supplied by parol: Murray v. Blackledge, 71 N. C. 492; Walker v. Miller, 139 N. C. 448, 111 Am. St. Rep. 805, 52 S. E. 125, 1 L. R. A., N. S., 157, 4 Ann. Cas. 601; Morse v. Carpenter, 19 Vt. 613; 1 Jones on Law of Real Property in Conveyancing, par. 244, and cases there cited.

The order of the court below in said cause is hereby affirmed at the cost of the appellant.

Hocker and Parkhill, JJ., concur.

Whitfield, C. J., and Shackelford and Cockrell, JJ., concur in the opinion.

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*If the Members of a Partnership have died, but the firm name has been perpetuated and the business continued by others, a deed which names such partnership as grantee is open to explanation by parol evidence and may be given effect: Walker v. Miller, 139 N. C. 448, 111 Am. St. Rep. 805, and see cases cited in the cross-reference note thereto.*

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## MORGAN v. EATON.

[59 Fla. 562, 52 South. 305.]

**VENDOR AND VENDEE—Conflict of Laws.**—Where a person residing in one place makes a proposal to purchase property by letter to a person residing in another place, and such proposal is there accepted, the place of acceptance, and not the place of the proposal, is the place of the contract. (p. 169.)

**SPECIFIC PERFORMANCE—Land in Another County—Venue.**—A suit to enforce specific performance of an agreement to convey land need not be brought in the county where the land lies. (p. 169.)



**SPECIFIC PERFORMANCE—Suit by Vendor of Land.**—It is the settled rule that the remedy by specific performance is mutual as between vendor and vendee, and where the remedy is sought by the vendor, it makes no difference that the relief he seeks thereby is only to enforce the payment of a specific sum of money. And a suit by a vendor for specific performance of a contract for the sale of land cannot be defeated on the ground that there is a remedy at law. (p. 169.)

**PLEADING—Discretion in Allowing Amendments.**—It is the settled rule here that our trial courts are vested with a broad discretion in the matter of allowing amendments of the pleadings in a cause, and unless there is a gross and flagrant abuse of this discretion, the appellate court will not interfere with its exercise. (p. 170.)

**VENDOR AND VENDEE—Defective Title of Vendor.**—The rule is that where it appears from the contract, or the circumstances accompanying it, that the parties had in view merely such a conveyance as will pass all the title which the vendor had, whether defective or not, that is all the vendee can insist upon. (p. 170.)

(Syllabi by the court.)

C. C. Morgan, in pro. per.

George M. Powell and C. E. Pelot, for the appellee.

<sup>563</sup> TAYLOR, J. The appellees filed their bill in equity in the circuit court of Duval county for the specific performance of a contract for the purchase from them by the appellant of divers tracts of land situated in De Soto county, Florida. The bill alleges that the contract of purchase made by the defendant Morgan stipulated only for a quitclaim deed to all of the interests of the complainants in and to said land, which deed was to be executed and delivered upon the payment by the defendant of the sum of five hundred dollars. That the deed as stipulated for was executed and tendered to the defendant, but he failed and refused to comply with his contract of purchase. The bill also alleges that the said contract was made in the city of Jacksonville in Duval county. The defendant filed a plea in abatement of said suit on the ground that he, the defendant, was not a resident of Duval county, where said suit was instituted, but resided in De Soto county, and that said cause of action did not accrue in Duval county; and that the lands in controversy are not in Duval county, but in De Soto county. This plea was overruled on argument, and the defendant then demurred to the bill on the grounds that there was no equity in said bill; that the complainant had an adequate remedy at law, and that it does not appear from said bill that complainant will suffer irreparable injury by reason of the failure of the defendant to perform the contract sued upon. This demurrer was <sup>564</sup> overruled, and the defendant then answered the bill alleging that the complainant had no title to said lands that he could convey; that all of his estate in said lands had been forfeited by tax sales thereof and tax titles. A vol-



uminous amount of testimony was taken and reported to the court, and at the final hearing a decree was rendered in favor of the complainants ordering the defendant to specifically perform his said contract by accepting the quitclaim deed tendered to him by complainants and by paying the contract sum of five hundred dollars therefor. From this decree the defendant below appeals to this court. The order of the court overruling the defendant's plea in abatement is assigned as error. There was no error in this ruling.

Section 1383 of our General Statutes of 1906 provides that: "Suits shall be begun only in the county . . . where the defendant resides, or where the cause of action accrued, or where the property in litigation is."

Was Duval county, under the circumstances of this case, the place where the complainants' cause of action accrued? We think that it was. The facts were that the defendant, residing in De Soto county, by letter addressed to the agent and attorney of complainants, who resided in Jacksonville, in said Duval county, proposed to purchase the property at the stipulated sum, and said agent and attorney at said Jacksonville accepted the proposition. It seems to be well-settled law that where a person residing in one place makes a proposal to purchase property by letter to a person residing in another place, and such proposal is there accepted, the place of acceptance, and not the place of the proposal, is the place of the contract: 22 Am. & Eng. Ency. of Law, 2d ed., p. 1324, and numerous cases there cited.

A suit to enforce the specific performance of an agreement to convey land need not be brought in the county <sup>565</sup> where the land lies: 20 Ency. of Pl. & Pr., p. 407, and authorities there cited.

The order overruling the defendant's demurrer to the bill is assigned as error. There was no error here. It is the settled rule that the remedy by specific performance is mutual as between vendor and vendee, and where the remedy is sought by the vendor, it makes no difference that the relief he seeks thereby is only to enforce the payment of a specific sum of money: Fry on Specific Performance of Contracts, p. 32; Yulee v. Canova, 11 Fla. 9.

A suit by a vendor for specific performance of a contract for the sale of land cannot be defeated on the ground that there is a remedy at law: Hodges v. Kowing, 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87; Pomeroy on Contracts, 2d ed., p. 6; Story's Equity Jurisprudence, 11th ed., par. 723.

The defendant after replication to his original answer made two applications to file a supplemental answer, which proposed answer set up other and divers tax titles that it was claimed divested the complainant of all interest in the lands, but both of these applications were denied by the chancellor,

and such rulings are assigned as error. There was no error here. It is the settled rule here that our trial courts are vested with a broad discretion in the matter of allowing amendments of the pleadings in a cause, and unless there is a gross and flagrant abuse of the discretion, this court will not interfere with its exercise: *Smith v. Westcott*, 84 Fla. 430, 16 South. 332. The proposed amendments to the defendant's answer urged nothing more than an accumulation of encumbrances on the title of the complainants to said lands, some of which had already been set up in the original answer, but none of which were available to the defendant as a defense to the suit. The contract of the defendant was for a quitclaim deed to such interest, and only such interest, as the complainant had in <sup>506</sup> said land, and to take such quitclaim cum onere of such outstanding tax titles as existed against them. The rule is that where it appears from the contract, or the circumstances accompanying it, that the parties had in view merely such a conveyance as will pass all the title which the vendor had, whether defective or not, that is all the vendee can insist upon: *Thompson v. Hawley*, 14 Or. 199, 12 Pac. 276; *Newark Savings Inst. v. Jones' Exrs.*, 37 N. J. Eq. 449; *Pomeroy on Contracts*, p. 450.

We think the decree of the court below was fully justified by the evidence in the cause, and the said decree is, therefore, hereby affirmed at the cost of the appellant.

Hocker and Parkhill, JJ., concur.

Whitfield, C. J., and Shackelford and Cockrell, J., concur in the opinion.

Petition for rehearing in this case denied.

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*The Granting or Denial of Equitable Relief for the Specific Performance of a contract rests within the sound discretion of the court, and such discretion is controlled by the established principles of equity applicable to the facts of each case: Taylor v. Florida East Coast Ry. Co., 54 Fla. 635, 127 Am. St. Rep. 155; Banaghan v. Malaney, 200 Mass. 46, 128 Am. St. Rep. 378.*

*The Doctrine That There must be Mutuality in a Contract of Which Specific Performance is demanded, and that it must be susceptible of enforcement at the suit of either party at the time it was entered into, is subject to so many exceptions and such important qualifications, that it is doubtful whether a court would ever be warranted in declaring the law so broadly: Turley v. Thomas, 31 Nev. 181, 135 Am. St. Rep. 667.*

*That the Vendor of Land may have Specific Performance against the vendee, see Freeman v. Paulson, 107 Minn. 64, 131 Am. St. Rep. 438, and cases cited in the cross-reference note thereto.*

## PHENIX INSURANCE COMPANY v. HILLIARD.

[59 Fla. 590, 52 South. 799.]

**FIRE INSURANCE—Reformation of Policy to Show Intention.** Where by inadvertence or otherwise a policy of fire insurance is issued contrary to the intention of the parties thereto, a court of equity may in a proper case reform the policy so as to make it express the real agreement and intention of the parties, and as so reformed to enforce the policy in order to do complete justice in the controversy. (p. 173.)

**REFORMATION OF INSTRUMENT.—The Right to the Reformation** of an instrument is not absolute, but depends on an equitable showing. (p. 173.)

**FIRE INSURANCE—Sole and Unconditional Ownership.—The** interest of a purchaser of property, which he has unqualifiedly agreed to buy and which the former owner has absolutely contracted to sell to him upon definite terms, is the sole and unconditional ownership within the true meaning of the ordinary clause upon that subject in insurance policies, because the vendor may compel the vendee to pay for the property and to suffer any loss that occurs. (p. 174.)

**FIRE INSURANCE—Sole and Unconditional Ownership.—The** just and reasonable purpose of insurance policies in requiring the insured to have the "unconditional and sole ownership" of the property insured is to give protection to only those upon whom the loss insured against would inevitably fall but for the insurance, and to avoid taking risks for those whose lack of interest or whose contingent interest in the property insured might tend to encourage carelessness or wrongdoing in the use or preservation of the property. Wager policies are not approved, and should be avoided. (p. 174.)

**CONDITIONAL SALE—Rights and Liabilities of Parties.—A** conditional sale of personal property by which the vendee takes possession of the property with an unconditional promise to pay for it, but the vendor retains the title till payment in full of the purchase price is made, confers upon the vendor the absolute right of the purchase price, and imposes upon the vendee the unconditional obligation to pay the purchase price, and also casts upon the vendee all the risks of loss incident to the full and complete ownership of the property, unless otherwise specially provided by contract. (p. 174.)

**FIRE INSURANCE.—To be "Unconditional and Sole," the In-**terest or "ownership" of the insured must be completely vested, not contingent or conditional, nor in common or jointly with others, but of such nature that the insured must alone sustain the entire loss if the property is destroyed; and this is so whether the title is legal or equitable. (p. 175.)

**FIRE INSURANCE—Sole and Unconditional Ownership.—By** fair construction and intendment the "unconditional and sole ownership" of property for the purposes of insurance is in those upon whom the loss insured against would certainly fall, not as a matter of mere contract obligation, but as the result of real bona fide rights in the property insured. (p. 175.)

**FIRE INSURANCE—Reformation of Policy to Show Interest** of Parties.—Where the insured and the insurer agree that a policy of insurance shall be issued to protect the insured "according to their respective interests," and the policy is not so issued, it may be reformed so as to show the real interest of the parties in all the property insured, and as reformed the policy may be enforced. (p. 175.)

(Syllabi by the court.)

Geo. M. Robbins, for the appellant.

F. L. Hemmings and John E. Hartridge, for the appellees.

<sup>592</sup> **WHITFIELD, C. J.** This appeal is from an order overruling a demurrer to a bill in equity brought to reform and enforce a fire insurance policy.

The amended bill of complaint in substance alleges that Charlotte Hilliard was the owner of a certain building used as a sawmill, and also a stock of lumber as her separate statutory property; that she agreed to purchase from the Malsby Company certain sawmill machinery; that in pursuance of such agreement she took possession of the machinery and placed it in said building; that she paid one hundred and fifty dollars and ninety cents in cash on the purchase and gave four notes for the balance; that by agreement between Charlotte Hilliard and the Malsby Company the title to said machinery was reserved in the Malsby Company until fully paid for; that the agreements were made by Charlotte Hilliard for the benefit of her separate statutory property; that Charlotte Hilliard agreed to keep said machinery insured for the benefit of the Malsby Company, and she became the agent of the Malsby Company for that purpose; that she made application to the <sup>593</sup> agent of the Phenix Insurance Company for a policy of insurance to protect her and the Malsby Company against loss by fire of said building, lumber and machinery; that she informed said agent that she owned the building and lumber and was buying the machinery from the Malsby Company; that it was not paid for, and the title to the machinery would remain in the Malsby Company until fully paid for; that though the agent was fully advised of the facts, he, by inadvertence, accident or mistake, issued the policy to Charlotte Hilliard alone and omitted the name of the Malsby Company as the owner of the said engine, boiler and sawmill machinery; "and also the fact that the insurance on said boiler and engine and sawmill machinery was for the benefit of the said Malsby Company"; that the premium was paid; that she received the policy from the agent believing it to have been properly prepared and written in accordance with the instructions; that it was the will, intention and understanding of both Charlotte Hilliard and the agent to enter into a contract that would protect the interests of both Charlotte Hilliard and the Malsby Company "according to their respective interests"; that the Malsby Company was not informed of the mistake until after the property was destroyed by fire; that the property was burned without the fault of complainants and the defendant, and the policy has not been paid. The prayer is that the policy be reformed in accordance with the alleged intention of the parties and enforced as such, for attorneys' fees, and for general relief.



The notes for the balance of the purchase money for the machinery provide that "it is a part of the contract of sale that the title shall not pass from Malsby Company until all of said notes are paid; and if the amount of this note, with interest, is not paid at maturity, or in case of the removal of said machinery from the county of St. Lucie, <sup>594</sup> or if the said machinery shall not be properly cared for, then the said Malsby Company may declare all our notes at once due and payable, and take possession of said machinery, sell or dispose of the same privately or publicly, at the discretion of Malsby Company or their authorized agent. And after payment of their debts and all cost, including counsel fees, pay over the remainder, if any, to me. The purchaser from them to receive a good and irrevocable title against me to the machinery, without offset of any kind. And further, we, makers and indorsers, hereby guarantee Malsby Company against any damage or loss to said machinery by fire or other cause, and we shall in no event be entitled to a rescission of the contract or to an abatement in the price for any cause, and also agree to keep the same insured for at least one-half the purchase money for the benefit of Malsby Company." The notes are signed only by "Charlotte Hilliard."

The grounds of the demurrer are that the bill of complaint states no equity, and that the allegations show the Malsby Company did not own or have a lien upon the property, and the policy was properly issued and the remedy at law is adequate.

Where by inadvertence or otherwise a policy of fire insurance is issued contrary to the intention of the parties thereto, a court of equity may in a proper case reform the policy so as to make it express the real agreement and intention of the parties, and as so reformed to enforce the policy in order to do complete justice in the controversy: *Taylor v. Glens Falls Ins. Co.*, 44 Fla. 273, 32 South. 887. See, also, *Horne v. J. C. Turner Cypress Lumber Co.*, 55 Fla. 690, 45 South. 1016; 19 Cyc. 652, 655; 11 Ency. of Pl. & Pr. 378. The right to the reformation of an instrument is not absolute, but depends on an equitable showing: 34 Cyc. 907.

In this case the policy expressly provides that it shall <sup>595</sup> be void unless otherwise indorsed on the policy "if the interest of the insured be other than unconditional and sole ownership." An allegation of the bill of complaint is that Charlotte Hilliard requested the agent of the insurance company "to write a policy on said described property to protect herself and the said Malsby Company against loss by fire," and that through inadvertence, accident or mistake the agent omitted the name of the Malsby Company as the owner of the machinery. The prayer is that the policy be so corrected or reformed as to show the Malsby Company to be the owners

of the machinery, and the demurrer to the bill of complaint states that as matter of law the Malsby Company was not the owner of the machinery.

Where a purchaser of personal property takes possession of it, but the title remains in the vendor till the purchase price is paid in full, the vendee in possession has an insurable interest in the property even though he has not fully paid for it: *Reed v. Williamsburg City Fire Ins. Co.*, 74 Me. 537. But under the terms of the policy the insured must have the "unconditional and sole ownership" of the property. The interest of a purchaser of property, which he has unqualifiedly agreed to buy and which the former owner has absolutely contracted to sell to him upon definite terms, is the sole and unconditional ownership within the true meaning of the ordinary clause upon that subject in insurance policies, because the vendor may compel the vendee to pay for the property and to suffer any loss that occurs: *Insurance Co. of North America v. Erickson*, 50 Fla. 419, 111 Am. St. Rep. 121, 39 South. 495, 2 L. R. A., N. S., 512, 7 Ann. Cas. 495; *Phenix Ins. Co. v. Kerr*, 129 Fed. 723, 64 C. C. A. 251, 66 L. R. A. 569; *Rumsey v. Phenix Ins. Co.*, 17 Blatchf. 527, 1 Fed. 396; 8 Words and Phrases, 7154; 2 Cooley on Insurance, 1375; Richards on Insurance, 3d ed., 336.

<sup>596</sup> Appellees contend that this rule does not apply to personal property, and cite 2 Clements on Fire Insurance, 170. The rule there announced has some support in cited cases where the vendor reserved the right to retake possession and ownership of the property. The facts in this case are not of that character.

The just and reasonable purpose of insurance policies in requiring the insured to have the "unconditional and sole ownership" of the property insured is to give protection to only those upon whom the loss insured against would inevitably fall but for the insurance, and to avoid taking risks for those whose lack of interest or whose contingent interest in the property insured might tend to encourage carelessness or wrongdoing in the use or preservation of the property. Wager policies are not approved, and should be avoided.

A conditional sale of personal property by which the vendee takes possession of the property with an unconditional promise to pay for it, but the vendor retains the title till payment in full of the purchase price is made, confers upon the vendor the absolute right of the purchase price, and imposes upon the vendee the unconditional obligation to pay the purchase price, and also casts upon the vendee all the risks of loss incident to the full and complete ownership of the property, unless otherwise specially provided by contract: 6 Am. & Eng. Ency. of Law, 2d ed., 455.

To be "unconditional and sole" the interest or "ownership" of the insured must be completely vested, not contingent or conditional, nor in common or jointly with others, but of such nature that the insured must alone sustain the entire loss if the property is destroyed; and this is so whether the title is legal or equitable: *Hartford Fire Ins. Co. v. Keating*, 86 Md. 130, 63 Am. St. Rep. 499, 38 Atl. 29.

<sup>597</sup> By fair construction and intendment the "unconditional and sole ownership" of property for the purposes of insurance is in those upon whom the loss insured against would certainly fall, not as a matter of mere contract obligation, but as the result of real bona fide rights in the property insured.

The contract of sale in this case expressly reserved the title in the vendor till all the goods were paid for, with a provision that upon certain defaults and contingencies the vendor might take possession of the property, not for the purpose of resuming the ownership of it, but to sell it to make the purchase price out of it. The vendors were guaranteed against any loss or damage to the property by fire or other cause; and as an express stipulation the vendee was in no event entitled to a rescission of the contract or to an abatement in the price for any cause. These agreements expressly fixed the rights of the vendee, and the agreement to keep the property insured for the benefit of the vendor was only an additional security for the purchase price, and did not affect the vendee's interest or risks in the property.

While the vendor, the Malsby Company, did not have the "unconditional and sole ownership" of the machinery when the policy was issued, such vendor reserved the title for the purpose of securing the purchase price, and consequently had an insurable interest in the machinery: 19 Cyc. 588; 13 Am. & Eng. Ency. of Law, 2d ed., 181. The prayer for relief for the Malsby Company is on the ground that it is "the owner of said . . . machinery," but it is alleged that it was mutually intended to enter into a contract that would protect the interests of the insured "according to their respective interests." Under this allegation, admitted by the demurrer, the real interest of the parties in all the property insured may be <sup>598</sup> shown and appropriate relief may be granted under the general prayer: 16 Cyc. 224; 18 Ency. of Pl. & Pr. 867.

The order appealed from is affirmed and the cause is remanded, with leave to amend if so desired.

Shackleford and Cockrell, JJ., concur.

Taylor, Hocker and Parkhill, JJ., concur in the opinion.

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*A Vendee in Possession of Premises Under an Executory Contract of purchase has an interest of sufficient dignity to satisfy the calls of*



an insurance policy as to the interest of the insured being entire, unconditional and sole ownership: *Arkansas Ins. Co. v. Cox*, 21 Okl. 873, 129 Am. St. Rep. 808; *Evans v. Crawford County etc. Ins. Co.*, 130 Wis. 189, 118 Am. St. Rep. 1009; *Insurance Co. v. Pitts*, 88 Miss. 587, 117 Am. St. Rep. 756; *Baker v. State Ins. Co.*, 31 Or. 41, 65 Am. St. Rep. 807; *Loventhal v. Home Ins. Co.*, 112 Ala. 108, 57 Am. St. Rep. 17; *Johannes v. Standard Fire Office*, 70 Wis. 196, 5 Am. St. Rep. 159. But in *Dow v. National Assur. Co.*, 26 R. L. 379, 106 Am. St. Rep. 728, it is held that a policy of insurance on household furniture, which provides that it shall be void if the interest of the insured is other than the unconditional and sole ownership, is void as a whole, if a portion of the furniture is held by the insured on the installment plan.

*Insurance Policies may be Reformed by Suit in Equity*: *Barnes v. Hekia Fire Ins. Co.*, 75 Iowa, 11, 9 Am. St. Rep. 450; *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 11 Am. St. Rep. 121; *Esch Brothers v. Home Ins. Co.*, 78 Iowa, 334, 16 Am. St. Rep. 443; *Eastman v. Provident Mut. Relief Assn.*, 65 N. H. 176, 23 Am. St. Rep. 29. Equity will entertain a bill to reform a policy of fire insurance after a loss has occurred, on the ground that by mutual mistake, or error of the draftsman, the wrong person, who is not the owner, is named as beneficiary: *McIntosh v. North State F. Ins. Co.*, 152 N. C. 50, 136 Am. St. Rep. 818. Where a policy of insurance, negotiated on behalf of a firm by an individual partner, is made out by mistake in the name of the partner applying instead of the partnership, a court of equity will decree its reform so as to cover the partnership interest, even after loss: *Keith v. Globe Ins. Co.*, 52 Ill. 518, 4 Am. Rep. 624. And if, after the death of a person, his business is carried on by his wife or other successor in interest, and a policy of insurance is issued in such name either by accident, mistake or design, it is not necessary to go into equity to have it reformed, but the person to whom it was issued may sue thereon in his true name, averring that the instrument was made to him or her by the name appearing therein: *Lumbermen's Mut. Ins. Co. v. Bell*, 166 Ill. 400, 57 Am. St. Rep. 140.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**IDAHO.**

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**BLAKE v. JACKS.**

[18 Idaho, 70, 108 Pac. 534.]

**COUNTY—Annexation of Territory—Indebtedness and Taxes.**  
Where a county is enlarged by annexing a portion of another county, the annexed portion is liable to pay its proportionate share of the indebtedness of the county to which it is annexed. (pp. 178, 180.)

**COUNTY—Annexation of Territory—Indebtedness and Taxes.**  
Under the provisions of section 1963, Revised Codes, which pledges the faith, credit and all taxable property within the limits of the county as it was constituted at the time the indebtedness was incurred for its payment, all taxable property subsequently brought into the county is liable for its proportionate share of such indebtedness. (pp. 178, 180.)

**COUNTY—Annexation of Territory—Indebtedness and Taxes.**  
Under the provisions of our statute, the indebtedness of a county becomes a burden upon all of the taxable property brought within the county after the creation of such indebtedness, as well as upon the taxable property that was within the county at the date of the creation of the indebtedness. (pp. 178, 180.)

(Syllabi by the court.)

Action to enjoin the assessor and tax collector from the collection of any tax for the payment of certain indebtedness of Nez Perce county that existed prior to the annexation of a part of Shoshone county thereto.

Morgan & Morgan, for the appellant.

D. C. McDougall, attorney general, J. H. Peterson, assistant, and Dwight E. Hodge, county attorney for Nez Perce county, for the respondent.

<sup>72</sup> SULLIVAN, C. J. An act was passed by the legislature in 1903 (see Sess. Laws 1903, p. 209) which segregated from Shoshone county a portion of such county and annexed it to Nez Perce county, and this action is brought to test the right of Nez Perce county to levy and collect taxes on property in said annexed portion for the purpose of paying the principal or interest of warrants or bonded indebtedness

created by and existing against said county prior to the annexation.

The facts plead in the complaint were sufficient to put in issue the right of Nez Perce county to levy and collect taxes on the annexed territory for the purpose of paying the indebtedness of Nez Perce county, existing at the time of the annexation. The court sustained a general demurrer to the complaint and entered judgment of dismissal, the plaintiff having declined to plead further, and the appeal is from said judgment. The sustaining of the demurrer and entering judgment of dismissal is assigned as error.

<sup>73</sup> It is contended that since this court held in *Shoshone County v. Profitt*, 11 Idaho, 763, 84 Pac. 712, that the portion of Shoshone county segregated therefrom and attached to Nez Perce county must pay its ratable portion of the indebtedness of Shoshone County, and that Nez Perce county as it existed at the time of the annexation was not liable for any part of that indebtedness, it would be unjust and inequitable now to require the segregated and annexed portion to pay its proportionate part of the indebtedness of Nez Perce county that existed at the time of the annexation. In the case of *Shoshone County v. Profitt*, 11 Idaho, 763, 84 Pac. 712, it was held by a majority of this court, under the provisions of section 3, article 13, of the state constitution, that whenever any part of a county is stricken off and attached to another county, the part stricken off must pay its ratable proportion of all of its then existing liabilities to the county from which it is taken, and that the county to which it is attached was not liable to pay any of such indebtedness, and that is the law of that case.

In support of counsel's contention that it would be unjust and inequitable to require the annexed portion to pay its proportionate share of the mother county's indebtedness, and also its share of the county's indebtedness to which it is annexed, section 1963, Revised Codes of 1909, is cited, which provides that the faith, credit and all taxable property within the limits of a county, as it was constituted at the time the indebtedness was contracted or incurred, are and must continue pledged for the payment of the same, and that that being true, Nez Perce county as it existed before the annexation must and ought to pay all of the then existing indebtedness of the county.

The provisions of that section pledge the faith, credit and taxable property within the limits of a county as it was constituted at the time of incurring the indebtedness, to the payment of such indebtedness. But it was not intended by such provisions to exempt any taxable property that was brought into the county after the indebtedness was incurred from the payment of its ratable share of such indebtedness. The pledge of property then in the county to the payment of

<sup>74</sup> indebtedness was not intended to release other taxable property within such county from taxation for that purpose. Where it is not prohibited by statute, the natural and legal result of annexation of one portion of a county to another is that such annexed portion must pay its ratable share of the indebtedness of the county to which it is annexed.

It was held in *Watson v. Commissioners of Pamlico Co.*, 82 N. C. 17, that where a county is enlarged by annexation of new territory, the property thus brought within the corporate limits will be subject to taxation to discharge the pre-existing indebtedness of the old corporation. In the course of that decision, the court cites *Commissioners of Currituck v. Commissioners of Dare*, 79 N. C. 565, and states that the court in that case cites with approval the doctrine laid down in 1 Dillon on Municipal Corporations, section 123, where it is stated that where a new county is created out of the territory of an old county, or if a part of its inhabitants or territory is annexed to another county, unless some provision is made in the act respecting the property and existing liabilities of the old county, the latter will be entitled to all of the property and be solely answerable for all of the liabilities, and says:

"The plaintiffs can derive no support to their claim of exemption from the decision in *Currituck v. Dare*, 79 N. C. 565, since the liability of all the taxable property in the county of Dare, as constituted, to assessment to meet its obligations is recognized, while so much as is taken from Currituck by the express terms of the enactment is additionally charged with its ratable share of the debt of the latter incurred for internal improvement."

That case is clearly against the contention of the appellant. The case of *Chicago etc. Ry. Co. v. Cuming Co.*, 31 Neb. 374, 47 N. W. 1121, involved the question whether certain property was exempt from taxation to pay the debts of the county to which it was annexed that existed prior to the annexation. The court disposed of that contention as follows: "If the position contended for by the plaintiff should be sustained, then only such property as was within the county <sup>75</sup> when the bonds were voted would be liable for the payment of the same. This, however, is not the law. The voters of a county, when voting bonds, assume a burden, not only for themselves, but for all the property owners in the county; and, in effect, agree that the county shall pay the bonds, with lawful interest thereon. This applies to all taxable property in the county, whether in the county when the bonds were voted, or such as may be brought therein afterward."

In *Lake Shore etc. Ry. Co. v. Smith*, 131 Ind. 512, 31 N. E. 196, the court said: "The general and well-settled rule is that, where the territorial boundary of a body politic or corporation is extended so as to include new and additional property, such property is thereby subjected to taxation in

like manner and to the same extent as property previously included within the corporation; and this is true, even though such taxation be for the purpose of paying pre-existing debts of the corporation."

It is held in 28 Cyc., page 222 et seq., as follows: "Debts of a municipality contracted before an addition become a burden upon the added territory as well as upon the original territory, unless it is otherwise provided by statute."

The rule there laid down was applied to cities and towns, and the same rule extends to counties as well as cities: *Commissioners of Laramie Co. v. Commissioners of Albany Co.*, 92 U. S. 307, 23 L. ed. 552.

We arrive at the conclusion that the property in the annexed portion of the county is liable for its proportionate share of the indebtedness of Nez Perce county as it existed before the annexation. The judgment of the trial court must therefore be sustained, and it is so ordered, with costs in favor of respondent.

Stewart and Ailshie, JJ., concur.

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*In Changing, Dividing, or Annexing Municipal Corporations*, the legislature may make provision concerning existing indebtedness, and its power so to do, unless restrained by special constitutional provision, is clear and ample: *Mayor of Valverde v. Shattuck*, 19 Colo. 104, 41 Am. St. Rep. 208. The legislative act authorizing the consolidation of two or more cities may make the consolidated city liable for the indebtedness of the old municipalities, or provide for an equitable apportionment of existing burdens by requiring each of the respective municipalities to be responsible for its own indebtedness at the time of consolidation and providing for the payment thereof by taxation limited to the property located within the limits of the municipality contracting the same: *Pennsylvania Co. v. Pittsburg*, 226 Pa. 322, 134 Am. St. Rep. 1063.

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## RASICOT v. ROYAL NEIGHBORS OF AMERICA.

[18 Idaho, 85, 108 Pac. 1048.]

**LIFE INSURANCE—Warranties and Representations.**—Where an applicant for fraternal benefit insurance specifically warrants the literal truth of the answers given to the questions submitted, the statements made in the application are treated in law as warranties and not as mere representations. (p. 184.)

**LIFE INSURANCE—Warranties—Matters of Opinion or Judgment.**—The warranty as to the truth of an answer which by its nature expresses only the opinion or judgment of the applicant should not extend further than to insure the honesty and good faith of the party answering the question, and that it was in truth and in fact his honest opinion or judgment. (p. 188.)



**LIFE INSURANCE—Warranties as to Pregnancy.**—Where a fraternal benefit society received an application from a woman for insurance which warranted the literal truth of the answers given by her, and she represented and at the time honestly believed that she was not pregnant, when in fact and in truth she was, and the contract provided that the society would not become liable in such a case and that it would not consider such an application until at least two months after confinement, and the society collected and received dues, assessments and premiums from the insured for a period of nearly five years thereafter, during which time the applicant was in good health, the insurance society will be held to have waived the right to insist on a breach of the contract for the falsity of the answer. (p. 185.)

**FRATERNAL INSURANCE—Local Camp as Agent.**—Where a local camp of a fraternal benefit society receives and collects the dues and assessments and insurance premiums from its members and transmits them to the officers of the superior or head organization, which issues the benefit certificates, and has supervision and right of expulsion of members, the local camp should be regarded and treated as the agent of the superior or head department of the society. (p. 186.)

**LIFE INSURANCE—Avoiding Liability—Public Policy.**—It is contrary to sound public policy and detrimental to the best interests of society at large to allow a fraternal benefit society to issue to an applicant a benefit certificate, and thereafter continuously collect and receive from the applicant his dues and assessments for a number of years, and induce him to continue his payments and keep up his membership and dues, under the belief that his savings are being devoted to the purchase of protection for his family and dependent ones, and then after his death to allow the society to repudiate the contract, on the ground that the policy never went into effect because of some temporary cause of disability which existed at the time of the delivery of the policy, and of which the applicant had no knowledge and which was wholly obviated and did not in any manner contribute to the cause of death, increase the risk or lessen the life expectancy of the applicant, and which cause or condition would not have avoided the policy or been a breach of the contract had it occurred after the contract went into force and operation. (p. 187.)

**LIFE INSURANCE—Sound Health—Pregnancy.**—An agreement or stipulation in a contract of insurance made with a married woman that the policy shall not go into effect unless it is delivered to her "while in sound health" is not violated by reason of the applicant being pregnant at the time of the delivery of the policy. (pp. 188, 189.)

**LIFE INSURANCE—Consulting Physician—Childbirth.**—A statement made by a married woman who applies for insurance in a fraternal benefit society that she has not consulted with a physician "in regard to a personal ailment" within the last seven years does not cover a single attendance by a physician upon the applicant some three years prior thereto when she was confined and gave birth to a child. Confinement in childbirth is not a "personal ailment" within the meaning of such a provision in the contract. (p. 189.)

**LIFE INSURANCE—Action on Policy—Proofs of Death.**—In an action for recovery on a life insurance certificate, it is error for the trial court to exclude the proofs of death which have been furnished by the beneficiary, where the same are offered in evidence on the trial by the insurance society. (p. 189.)

**TRIAL—Argument of Counsel as to Abandoned Defenses.**—Where an amended answer has been filed in a case which omits and abandons certain affirmative defenses pleaded in the original answer,

the trial court should not permit the counsel for the plaintiff in his opening statement to read and comment upon the defenses contained in the original answer, and which have been omitted and abandoned in the answer on which the case is to be tried. (p. 191.)

(Syllabi by the court.)

Edwin McBee, for the appellant.

B. S. Bennett, for the respondent.

¶ AILSHIE, J. The plaintiff commenced this action in the district court to recover upon a benefit certificate for one thousand dollars issued by the defendant, the Royal Neighbors of America, to plaintiff's wife, Emeline Rasicot. About May 14, 1902, Emeline Rasicot was elected as a beneficiary member of Dewey Camp No. 1037 of the Royal Neighbors of America located at Little Falls, Minnesota. Under date of April 25th she answered the prescribed list of questions, and made application for a benefit certificate in the society. This application appears to have been witnessed and filed by the camp recorder on June 4th, and on the same date she was given the medical examination and answered the list of questions submitted by the camp physician. On June 28th the society issued its benefit certificate for the sum of one thousand dollars, payable to Victor R. Rasicot, husband of the insured. The insured afterward removed to Idaho and transferred her membership to Lakeside Camp No. 2373, located at Sandpoint, Idaho, and thereafter kept up the regular payment of all dues and assessments until the date of her death, February 7, 1907. The beneficiary, Victor R. Rasicot, made the necessary proofs of death and demanded payment on the certificate. The society refused payment, and this action was accordingly instituted. The defendant filed an answer, denying generally the allegations of the complaint and setting up four separate affirmative defenses. The first defense pleaded the by-laws of the society, and the application made by Emeline Rasicot for insurance, and alleged that certain of her answers were false and untrue, and that by <sup>§2</sup> the provisions of the application and benefit certificate she had warranted the literal truth of every answer given, and that the policy was therefore void, and never became effective by reason and on account of the falsity and untruth of her answers. The second affirmative defense alleged that under the stipulations and agreements of the application and certificate it is essential to the validity of the policy or certificate that it should be delivered to the applicant while she was in sound health, and that in truth and in fact she was not in sound health at the time of the delivery of the certificate, and that therefore the policy never took effect. The third and fourth defenses are each to substantially the same effect, and allege that the insured died from a criminal and self-



inflicted abortion and miscarriage, and that under the terms of her certificate no recovery could be had in such a case. The defendant subsequently filed an amended answer, containing more specific denials of the allegations of the complaint, and later it filed a second amended answer on which the case was finally tried.

The defendant omitted from this last answer the third and fourth defenses relating to the charge that the insured had died from a self-inflicted operation. This answer contained a further allegation as to the falsity of a further question propounded by the company and answered by the applicant. The answer as it finally stood alleged that the applicant had given false and untrue answers to questions 17, 18, 25 (in two particulars), 28, 33-j, 33-v, and 33-l, the questions and answers being as follows:

"17. Are you now of sound body and mind, in good health, free from disease or injury, of good moral character, exemplary habits and a believer in a Supreme Being?" "Yes."

"18. Have you within the last seven years, consulted any physician or physicians in regard to personal ailment? If so, give dates, ailments and physician's or physicians' names and addresses." "No."

"25. Have you ever had any disease of the following named organs, or any of the following named diseases or symptoms? Fistula." "No."

<sup>23</sup> "25. Have you ever had any disease of the following named organs, or any of the following named diseases or symptoms? Rheumatism?" "No."

"28. Have you ever had any disease of the urinary or genital organs?" "No."

"33-j. Is your menstruation regular and healthy?" "Yes."

"33-v. Have you now or ever had any disease of the breast, ovaries or uterus?" "No."

"33-l. Are you now pregnant?" "No."

The application contains the following provision in several different forms and in different paragraphs and subdivisions thereof: "I have verified each of the foregoing answers and statements, from 1 to 33, both inclusive, adopt them as my own, whether written by me or not, and declare and warrant that they are full, complete and literally true, and I agree that the exact literal truth of each shall be a condition precedent to any binding contract issued upon the face of the foregoing answers, and I hereby constitute and make the officers of the local camp and of the Royal Neighbors of America, who have aided in making this application, my agents for such purpose. I further agree that the foregoing answers and statements, together with the preceding declaration, shall form the basis of the contract between me and the Royal Neighbors of America, and are offered by me as a con-

sideration for the contract applied for, and hereby made a part of any benefit certificate that may be issued on this application, or a substitute therefor issued at my request, and shall be deemed and taken as a part of any such certificate. That this application may be referred to in any said benefit certificate as the basis thereof, and that they shall be construed together as one entire contract; and I further agree that if any answer or statement in this application is not literally true, or if I should fail to comply with and conform to any and all of the laws of said Royal Neighbors, whether now in force or hereafter adopted, that my benefit certificate shall be void."

When it came to the trial the chief controversy revolved about the answer to question 33-1. On this question special<sup>94</sup> findings were submitted to the jury, and the questions submitted and the answers thereto are as follows:

"1. State whether or not the deceased, Emeline Rasicot, was pregnant at the time she made application for a policy of insurance with the defendant, to wit, on June 4, 1902.

"Answer: We, the jury, answer, Yes.

"2. State whether or not the said decedent, Emeline Rasicot, if you answer that she was pregnant on June 4, 1902, or June 28, 1902, knew of her condition as to pregnancy on either of said dates, and if so, on what date.

"Answer: We, the jury, answer that she did not know her condition on the fourth day of June, 1902, and did not know such condition June 28, 1902."

The jury at the same time returned a general verdict in favor of the plaintiff for the sum demanded by his complaint.

At the outset it must be conceded that under the terms of this contract the answers given by the applicant for insurance are viewed by the law in the nature of warranties rather than as mere representations: 3 Joyce on Insurance, sec. 1944; Bacon on Benefit Societies, sec. 194; Hoover v. Royal Neighbors of America, 65 Kan. 616, 70 Pac. 595; Beard v. Royal Neighbors of America, 53 Or. 102, 99 Pac. 83, 19 L. R. A., N. S., 798, 17 Ann. Cas. 1199; Supreme Lodge Knights and Ladies of Honor v. Payne, 101 Tex. 449, 108 S. W. 1160, 15 L. R. A., N. S. 1277. It has been found as a fact that the insured was pregnant at the time she made application for insurance and at the time the benefit certificate was issued to her. It is also established that she did not know of her pregnancy at the time and that her answer was in good faith and honestly made. Viewing these facts alone, if we should follow the inflexible technical rule of warranties which has been adopted by many courts, the inquiry would end here and we would hold that the breach itself avoided the contract and that the subsequent conduct of the society could not be considered: Joyce on Insurance, sec. 1970; McDermott v.

Modern Woodmen of America, 97 Mo. App. 636, 71 S. W. 833; Hoover v. Royal Neighbors of America <sup>95</sup> 65 Kan. 616, 70 Pac. 595; Beard v. Royal Neighbors of America, 53 Or. 102, 99 Pac. 83, 19 L. R. A., N. S., 798, 17 Ann. Cas. 1199; and authorities above cited.

We are of the opinion, however, that there are rules of law and principles of equity that must be applied to the insurer as well as to the insured, and that its treatment of the contract for a number of years after the effects and consequences of the breach had disappeared is a subject requiring our consideration. The benefit certificate was issued to the insured on the twenty-eighth day of June, and thereafter and on the twenty-fifth day of November of the same year she gave birth to twins, both of whom were healthy and normal. No unusual or unfavorable condition of health resulted from her confinement. She continued to be a member of Lakeside Camp No. 2373 located at Sandpoint, and continued the regular payment of dues and assessments from time to time and was in fairly good health until shortly before the date of her death in February, 1907. In the meanwhile, she bore at least one child after the birth of the twins. It should at this point be observed that there is no provision of the contract or policy of insurance which attempts to suspend or avoid the contract after it is once entered into on account of subsequent pregnancy. The provision of the contract confronting us is a stipulation against pregnancy existing at the time of the application for the insurance. It is conceded in this case that the death of the insured did not result from any condition of the insured which existed at the time of making the application or of the issuance of the policy; nor, indeed, is it contended that the pregnancy of the insured at the time of the issuance of the policy in any way contributed to the ultimate cause of death or in any way augmented the subsequent risk or diminished her life expectancy. In the application question 33-1 is followed by a star, and at the foot of the application blank is the following note: "If applicant is pregnant, application will not be accepted by supreme physician. Examination should be postponed until at least two months after confinement." It appears that under the by-laws, rules and regulations of the society in a case of this kind, the application is withheld <sup>96</sup> until a period of two months after the confinement of the applicant, and thereupon the physician makes the examination and takes the applicant's answers to the questions, and if they prove satisfactory in other respects, the application is accepted and the certificate is issued.

In this case no fraud was practiced whatever. Although the society contends that the policy never went into effect and that the contract never became binding, still it received

and accepted dues and assessments from the insured for a period of more than four years continuously succeeding her confinement and also covering a subsequent period of gestation and confinement, and the society is presumed to have had notice through the local camp of the existence of the facts and the happening of the contingency which would have avoided the contract. The local camp of which the insured was a member collected and received the dues and assessments from its members, and was charged with the duty of looking after the health and conduct of its members and of expelling or suspending its members for any violation of the laws of the order or breach of their duties as members of the society. The local lodge was, therefore, the agent of the society which issued the benefit certificate, and the appellant after the lapse of more than four years is chargeable with notice of the existence of the condition on the part of the insured which would have avoided the risk and prevented the contract becoming effective and operative: *Modern Woodmen v. Breckenridge*, 75 Kan. 373, 89 Pac. 661, 10 L. R. A., N. S., 136, 12 Ann. Cas. 636; *Order of Foresters v. Schweitzer*, 171 Ill. 325; *Supreme Lodge K. of H. v. Davis*, 26 Colo. 252, 58 Pac. 595; *Modern Woodmen of America v. Lane*, 62 Neb. 89, 86 N. W. 943; *Modern Woodmen of America v. Colman*, 68 Neb. 660, 94 N. W. 814, 96 N. W. 154; *Supreme Lodge v. Wellenvoss*, 119 Fed. 671, 56 C. C. A. 287; *Pringle v. Modern Woodmen of America*, 76 Neb. 384, 107 N. W. 756, 113 N. W. 231. Under these facts and circumstances the doctrine of waiver should be applied to the society.

In *Supreme Lodge K. of H. v. Davis*, 26 Colo. 252, 58 Pac. 595, the court said: "In a mutual benevolent order, composed of a supreme lodge <sup>97</sup> and subordinate lodges, an officer of a subordinate lodge charged with the duty of notifying the members of assessments made by the supreme lodge for the purpose of paying insurance certificates of deceased members, and of collecting and forwarding to the supreme lodge such assessments, is an agent of the supreme lodge, notwithstanding a rule or by-law of the order recites that such officer in collecting and forwarding assessments shall be the agent of the members of the subordinate lodge, and the supreme lodge is charged with all knowledge possessed by the agent in making the collection."

In *Trotter v. Grand Lodge Legion of Honor*, 132 Iowa, 513, 109 N. W. 1099, 7 L. R. A., N. S., 569, 11 Ann. Cas. 533, the court said: "The rule that courts will give effect to any act or circumstance from which it may fairly be argued that the insurer has waived the right to strict and literal performance by the insured, or upon which an estoppel against forfeiture may be founded, applies to fraternal or lodge insurance. And whether a waiver of forfeiture of a certificate of insurance will be found in any particular case depends, not on the in-



tention of the insurer, against whom it is asserted, but on the effect which its conduct or course of business has had upon the insured, and this rule is applicable where the insurer acts under a mistake."

In *Pringle v. Modern Woodmen of America*, 76 Neb. 384, 107 N. W. 756, 113 N. W. 231, Pringle held a benefit certificate which contained a clause to the effect that it should become null and void if the insured should at any time be convicted of a felony. While holding the certificate, the insured was convicted of felony and sentenced to the state penitentiary, where he was confined for about six months and died. The beneficiary sued on the contract to recover the amount of the policy. It appeared that the insured had continuously kept up the payment of his dues and assessments. The supreme court of Nebraska, in speaking through Mr. Justice Barnes, said: "The local camp and its clerk being the agents of the association, the conclusive presumption, in the absence of fraud, is that they seasonably communicated the fact of Pringle's conviction to the head <sup>of</sup> camp. Indeed, the clerk testified that the governing body knew of the fact, and his statement stands unchallenged, except by the evidence of one C. W. Hawes, the head clerk of the association. A like state of facts has often been held to amount to waiver of a similar forfeiture clause."

The state is vitally interested in the thrift and frugality of its citizens, and in encouraging the citizen in providing for his family and looking to their protection and comfort in the event of his demise. To allow him, when acting honestly and from the most laudable motive, to be led on under the belief that he is devoting his savings to the purchase of a legacy for his dependent ones, and then when the beneficiary comes to make demand for that paltry recompense to tell him that the courts, the final arbiters of his rights, will not listen to the equity of the case, would be doing violence to the principles of fair dealing, and would be likewise contrary to the best interests of the public at large which we term public policy. Had the insured been in any manner advised that her policy was not in force, she would perhaps have procured one that would have been valid, and this would have been to the benefit of her family and in the interest of society as well, and the state itself must feel an interest in having her take such precautions, and in that sense the construction of such contracts becomes a matter of public policy. The insurer cannot suffer half so much from such a policy, and such a construction as the individuals interested, and society at large must in the end of necessity suffer from the cold-blooded, technical rule that seems to prevail in so many jurisdictions. This ought to be the rule in order to prevent organizations soliciting membership, receiving insurance applications and accepting dues and assessments for years, and then after the

applicant is perhaps too old to procure insurance elsewhere, tell the insured that he made a false answer in some one of the numerous questions propounded by the society, and that consequently his policy has never been in force. Such a contract is clearly violative of the interests of society at large and of the welfare of its citizens and ought to be discouraged.

<sup>99</sup> The more than one hundred questions contained in one application blank run the gamut of the applicant's ancestry from his grand ancestors down to date, and ask him about every disease and pathological condition for which the medical world has been able to invent a name, and then if forsooth he misses a guess on any one of them, he is chargeable with expert knowledge and warranting the correctness of his answers and must lose his protection on the venture of a guess. In such a game the insured has only a chance in hundreds, and the result must follow that he only thinks he is insured—it amounts to mental insurance and nothing more. The insurance society in such case could exist for the sole and only purpose of collecting dues and assessments with no insurance liability.

Some courts have held, and we think the rule sound, that notwithstanding the stipulation of warranty in such contracts, answers which merely express the opinion or judgment of the applicant cannot be classed among the facts, the truth of which is insured by the applicant—that he only warrants his honesty and good faith as to such answers: *Rupert v. Supreme Court U. O. F.*, 94 Minn. 293, 102 N. W. 715; *Ranta v. Supreme Tent of Maccabees*, 97 Minn. 454, 107 N. W. 156; *Royal Neighbors of America v. Wallace*, 73 Neb. 409, 102 N. W. 1020; *Royal Neighbors of America v. Wallace*, 5 Neb. (Unof.) 519, 99 N. W. 256. "It would be solemn nonsense," says the supreme court of Minnesota in *Ranta v. Supreme Tent of Maccabees*, 97 Minn. 454, 107 N. W. 156, "to hold that an ordinary applicant insures the exact reality of physical conditions and causes at a time when the greatest pathologists might differ or even when they might be impossible of definite determination." This rule seems to us more in consonance with reason and justice than the rule of strict literal warranty contended for by appellant.

The application contained the stipulation that any certificate which might be issued to the applicant "shall be delivered to me while in sound health and in pursuance of the by-laws of the order." It is also contended that the insured was not in "sound health" at the time of delivery because <sup>100</sup> of pregnancy. Pregnancy is not per se a condition of "unsound" health, nor is it a "disease" or "ailment" within the meaning of those terms used in this application and policy. The term "sound health" has been frequently defined by the courts, and so far as we are advised it has never been



held that this term used in an insurance policy or certificate covered every slight ailment or indisposition of health of a temporary character which does not tend directly to shorten the life or undermine the constitution of the insured: *Packard v. Metropolitan Life Ins. Co.*, 72 N. H. 1, 54 Atl. 287; *Morrison v. Wisconsin Odd Fellows' Mutual Life Ins. Co.*, 59 Wis. 162, 18 N. W. 13; *Brown v. Metropolitan Life Ins. Co.*, 65 Mich. 306, 8 Am. St. Rep. 894, 32 N. W. 610; *Manhattan Life Ins. Co. v. Carder*, 82 Fed. 986, 27 C. C. A. 344; 7 Words and Phrases, 6554. So far as we are informed, this term, of itself and standing alone, has never been held to cover or include a case of pregnancy. Appellant must, therefore, rest its case on the falsity of the representation that the insured was not pregnant.

Appellant attempted to show that the answer to question 18 was false for the reason that the insured had consulted a physician within a period of seven years immediately preceding her application. On this point there was a sharp conflict in the evidence, except with reference to one visit by a physician, who it is admitted attended her on April 5, 1899, the date of her last previous confinement. The appellant had notice that the applicant was a married woman, and that she had already borne five children and that she had been confined on April 5, 1899, which was only about three years prior to this application. It might have assumed that either a physician or a midwife attended her on this confinement. The attendance, however, of a physician at the time of a normal case of confinement is clearly not a "consultation" or treatment of a "personal ailment" of the female confined. Child-birth is a physiological fact which occurs in the regular course of nature, and neither signifies nor entails disease or ailment in the usual and ordinary use of those terms.

<sup>101</sup> On the trial of the case the plaintiff introduced the physician who attended the insured during her last sickness, and examined him as to the nature of her illness and the cause of death. He testified that she died following an operation performed by him, and testified to the general nature and character of her condition and the cause for which the operation was performed. He said: "The object of it was to remove the right tube and the right ovary and drain for an abscess in the pelvis." He also testified to signing the death proofs, and identified the paper containing the proofs made by him. The defendant thereafter offered to introduce in evidence the death proofs made by this physician. The plaintiff objected and the objection was sustained by the court. This ruling is assigned as error. The court should have admitted this exhibit in evidence. It is a uniform rule almost without exception that such proofs are admissible when offered by the insurer: 3 Elliott on Evidence, secs. 2386-2389; *Mutual B. L. Ins. Co. v. Newton*, 22 Wall. 32, 22 L. ed. 739; *Beard v. Royal*

Neighbors of America, 53 Or. 102, 99 Pac. 83, 19 L. R. A., N. S., 798, 17 Ann. Cas. 1199. The defendant was not prejudiced by the exclusion of this exhibit. The exhibit has been preserved in the record and is before us. Answer No. 11 is the particular portion of the exhibit that defendant offered in evidence, and to the rejection of which counsel took their exception. It is an answer to the question: "State the remote cause of death." The answer given by the physician is as follows: "Exposure and cold. Patient had a recto vaginal fistula which may predisposed to the pelvic inflammation last symptoms, severe abdominal pains, tenderness of whole abdomen, vomiting and constipation, Tympanitis then located pelvic cellulitis uterus became filled was forming in right side filling up Douglas pouch." This answer was substantially the same as that given by the doctor when on the witness-stand. His explanation at length as given on the witness-stand was clearer and more complete than the answer given in the death proofs. This is evidently due, however, to the fact that he was asked more questions. The purpose of this proof should not be lost sight of. The defendant was not seeking to prove that <sup>102</sup> the answers given in the death proof showed that the insured had died from a disease or malady or cause not covered by the policy of insurance. The purpose must have been either to impeach or discredit the physician who was then testifying, or what is more probable, to show by inference that the insured had fistula at the time she made application for insurance. Death took place, however, nearly five years after the application was made, and while she was afflicted with fistula at the time of her death, the inference that she had this trouble at the time she made application for insurance would be very remote and at most only prima facie. These facts were substantially all before the jury, and we are satisfied that the appellant was not prejudiced by the erroneous ruling of the court.

Appellant assigns as error the action of the court in permitting the plaintiff to introduce evidence showing that defendant had never paid back or tendered the dues and assessments that had been paid on this benefit certificate. We do not think the admission of this evidence was prejudicial or reversible error. Of course, it was immaterial in view of the fact that the defendant had not tendered it into court or pleaded a return or tender of the premiums paid.

When the case was called for trial and prior to the introduction of any evidence, the attorney for the plaintiff read the pleadings to the jury and thereupon proceeded to make a statement to the jury, and in doing so commented upon the allegations contained in the first answer of defendant, whereupon counsel for defendant made objection to any comment being made on the original answer. This objection was overruled. Further along in counsel's statement, he again made

reference to that part of the defendant's original answer in which it had alleged that the insured came to her death by a self-inflicted criminal operation. Counsel for defendant again objected and the objection was overruled by the court. This action of counsel for the plaintiff and the ruling of the court is assigned as error. Without going into any discussion of the evils and dangers of such a practice, it is sufficient to say that we do not approve of the same, and that the court should <sup>103</sup> have sustained the objection and admonished counsel to refrain from commenting on any allegations contained in the pleadings that were not then at issue and on which the case was to be tried: *Owens, Lane & Dyer Co. v. Pierce*, 5 Mo. App. 576; *Stratton v. Nye*, 45 Neb. 619, 63 N. W. 928; *Giffen v. City of Lewiston*, 6 Idaho, 231, 55 Pac. 545. We cannot reverse the judgment in this case, however, on account of this error for the following reason: Counsel for appellant have not preserved in their statement and bill of exceptions any statement that was made by the counsel for the plaintiff, which it claims was prejudicial, and nowhere in the record does it appear what language counsel used. The comment made by counsel may have in no respect been prejudicial, and in the absence of any positive showing in the record as to what it was, we must assume that nothing prejudicial to the appellant's rights was said in this connection.

Many other errors are assigned on the admission and rejection of evidence and the giving and refusing to give instructions to the jury. It is unnecessary to give all these assignments of error specific and detailed consideration here, for the reason that what we have already said covers and disposes of the entire case. We find no error that will either require or justify a reversal of the judgment in this case. The judgment is eminently just, and the defense was highly technical and wholly unconscionable.

The judgment is affirmed, with costs in favor of the respondent.

Sullivan, C. J., and Stewart, J., concur.

Petition for rehearing denied.

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*An Untrue Answer in the Negative by an Applicant for Life Insurance* in regard to his health, or to his having been treated by a physician, does not as a matter of law invalidate the policy, unless the answer is willfully false, fraudulently made, or material: *Modern Woodmen of America v. Lawson*, 110 Va. 81, 135 Am. St. Rep. 927; *March v. Metropolitan Life Ins. Co.*, 186 Pa. 629, 65 Am. St. Rep. 887. For other recent decisions on this question, see *Fidelity Mut. Life Ins. Co. v. Miazza*, 93 Miss. 18, 136 Am. St. Rep. 534; *Metropolitan Life Ins. Co. v. Brubaker*, 78 Kan. 146, 130 Am. St. Rep. 356; *Mudge v. Supreme Court I. O. F.*, 149 Mich. 467, 119 Am. St. Rep. 686; *Rinker v. Aetna Life Ins. Co.*, 214 Pa. 608, 112 Am. St. Rep. 773; *Blumenthal v. Berkshire Life Ins. Co.*, 134 Mich. 216, 104 Am. St. Rep. 604; *Franklin Life Ins. Co. v. Galligan*, 71 Ark. 295, 100 Am. St. Rep. 73.

*If an Applicant for Life Insurance is Afflicted With an Occult Ailment*, unknown to her, her failure to communicate it cannot be regarded as a fraud on the insurer: *March v. Metropolitan Life Ins. Co.*, 186 Pa. 629, 65 Am. St. Rep. 887; *Owen v. Metropolitan Life Ins. Co.*, 74 N. J. L. 770, 122 Am. St. Rep. 413.

*A Statement by a Married Woman in Her Application for Life Insurance* made at a time when she is pregnant, and upon which insurance subsequently issues, that she is in sound bodily health is not a false representation by reason of such pregnancy. And she is under no duty, after her application is approved and a policy issued, to notify the insurer of any subsequently discovered evidence that she is pregnant: *Merriman v. Grand Lodge etc. A. O. U. W.*, 77 Neb. 544, 124 Am. St. Rep. 867.

### MILLER v. KETTENBACH.

[18 Idaho, 253, 109 Pac. 505.]

**CANCELLATION OF GUARANTY—Existence of Legal Remedy.**—An action in equity cannot be maintained to release the liability of an estate upon a contract of guaranty made by the decedent, when there exists a legal remedy at law, either affirmative or defensive, which would be adequate, certain and complete. (p. 194.)

**CANCELLATION OF GUARANTY—Existence of Legal Remedy.**—A court of equity will not decree the release of a guarantor upon the contract of guaranty unless special and peculiar circumstances are shown to exist which could not be shown as a defense in an action at law based upon such contract of guaranty. (pp. 194, 199.)

**CANCELLATION OF GUARANTY—Estate of Decedent.**—Where C. signs a joint and several contract of guaranty guaranteeing the payment of promissory notes, and afterward dies, and an administrator is appointed, and the holder of such notes files the same as claims against the estate of C., and full opportunity is given to contest such claims upon any legal or equitable ground by the administrator, heirs or creditors of said estate, such administrator, heirs or creditors of said estate cannot afterward maintain an action in equity against the holder of said notes for the purpose of releasing said estate from its liability upon said contracts of guaranty, upon the ground that a conspiracy was entered into between the holder of such notes, the administrator of said estate and the stockholders of the principal debtor, whereby property belonging to the principal debtor was transferred to the holder of such notes at less than its actual and true value and the purchase price thereof improperly applied upon such indebtedness. (pp. 193, 198.)

(Syllabi by the court.)

John O. Bender, for the appellants.

James E. Babb, for the respondents.

254 STEWART, J. This is a most comprehensive case, comprehensive in extent of record, in the extent of the briefs and in the manifold questions presented upon the argument. Counsel for appellant opens the discussion of this case with the following statement:



<sup>255</sup> "This action is brought to release a guarantor from the payment of certain promissory notes, on the ground that the payee of said notes participated in the fraudulent conveyance of the principal debtor's property.

"It is neither an action to set aside a conveyance, on the ground that it was made with intent to defraud creditors, nor an action to participate in the distribution of a fund with other creditors, on the ground that other particular creditors were preferred; and hence we do not attempt to presume that the plaintiff is a judgment creditor or a lienholder of the principal debtor, the Colby, Coryell & Howe Lumber Company, Ltd. (nor do we ask that the plaintiff, the estate of Cary A. Coryell, deceased, be allowed to participate in the distribution of the receipts of such conveyance with the other creditors), but we claim that the Lewiston National Bank, the payee of these promissory notes, is a party to this fraudulent transaction, and for that reason the estate of Cary A. Coryell, deceased, is released from the contract of guaranty of the payment of said notes."

This statement of the purpose of the action is repeated in different parts of the brief and especially reiterated in the reply brief, and we shall treat the questions from this standpoint. The object and purpose of this action, then, is to cancel and release the estate of Cary A. Coryell from liability upon a contract of guaranty, indorsed upon certain notes executed by the Colby, Coryell and Howe Lumber Company.

On December 29, 1905, the lumber company executed a note payable on demand to the Lewiston National Bank in the sum of \$10,000. Indorsed upon said note was the following guaranty: "For value received I hereby guarantee the payment of the within note and waive protest, demand and notice of nonpayment thereof. C. W. Colby, J. Howard Howe, C. A. Coryell."

On March 30, 1906, the lumber company executed a note payable on demand to the Lewiston National Bank in the sum of \$10,000. Indorsed upon said note was the following guaranty: "For value received I hereby guarantee the payment of the within note and waive protest, demand and notice <sup>256</sup> of nonpayment thereof. C. W. Colby, C. A. Coryell, J. Howard Howe, Lewis Diether."

On June 13, 1906, the lumber company executed a note payable on demand to the Lewiston National Bank in the sum of \$5,000. Indorsed upon said note was the following guaranty: "For value received I hereby guarantee the payment of the within note and waive protest, demand and notice of nonpayment thereof. J. Howard Howe, C. A. Coryell, Lewis Diether, C. W. Colby."

In this opinion we shall refer to the Colby, Coryell and Howe Lumber Company as the lumber company, to the estate

of C. A. Coryell as the estate, and to the Lewiston National Bank as the bank.

On March 2, 1907, Cary A. Coryell died in Lewiston, Idaho, and on April 30, 1907, J. Howard Howe was appointed administrator. On November 16, 1907, the Lewiston National Bank presented to J. Howard Howe, as administrator, said three notes as claims against the estate of Cary A. Coryell. Before Howe resigned he allowed such claims and afterward, upon protest of the heirs of the estate, the allowance was set aside and the validity of such claims reached this court. Howe resigned as administrator April 30, 1908, and George T. Miller was appointed as such administrator. Upon a reversal of said cause said claims finally passed to judgment as claims against the estate of Cary A. Coryell in the district court of Nez Perce county, on November 19, 1909, in which the district court rendered judgment in favor of the bank against the estate for the sum of \$38,865.58. An appeal was taken from that judgment to this court and this court has affirmed said judgment: 16 Idaho, 201, 101 Pac. 723.

The respondent contends that inasmuch as this is an action brought for the purpose of releasing the estate upon the contract of guaranty for the payment of the said notes and commenced after the maturity of such notes, and while proceedings were pending for the collection of said notes against the estate in the probate court, in which action full opportunity was given to appellants to make any defense they might have against the enforced payments of said notes, <sup>257</sup> that this action cannot be maintained. If this position of respondent is correct, then it is unnecessary to consider or determine the manifold other questions presented by appellant.

This action was commenced March 26, 1909, long after the maturity of said notes and after said notes had been filed as claims against the estate, and after heirs of the estate had protested against their allowance.

In the case of *County of Ada v. Bullen Bridge Co.*, 5 Idaho, 188, 95 Am. St. Rep. 180, 47 Pac. 818, 36 L. R. A. 367, in discussing the right to maintain an action in equity to cancel a written instrument, this court said: "Where the invalidity of an instrument appears on its face, or where there is no danger of the instrument passing into the hands of an innocent holder, and where there is an adequate remedy at law, a court of equity will not take jurisdiction, and decree the cancellation of such instrument: *Story's Equity Jurisprudence*, sec. 700a; *Atlantic Delaine Co. v. James*, 94 U. S. 207, 24 L. ed. 112. In *Ada County v. Gess*, 4 Idaho, 611, 43 Pac. 71 (which was an application for an injunction to restrain the payment of certain county warrants), the court holds that there was a complete and adequate remedy at law, and therefore equity could not be invoked: See, also, *Morgan*



v. Board, 4 Idaho, 418, 39 Pac. 1118; Rogers v. Hays, 3 Idaho, 597, 32 Pac. 259; Clark v. Dayton, 6 Neb. 192."

In that case the court comments upon and approves the decision in the case of Farmington Village Corp. v. Sandy River Nat. Bank, 85 Me. 46, 26 Atl. 965, as follows: "That was a bill in equity praying for a perpetual injunction against the defendants, enjoining them from negotiating or delivering certain bonds issued by said corporation. It is there held that a court of equity, in a proper case, has full power to order the cancellation of bonds or other written instruments. But that it is a power which the court in its discretion will exercise with care, and only in accordance with what the court believes to be proper and right under the <sup>258</sup> circumstances, and that such power will not be exercised where the legal remedy, either affirmative or defensive, would be adequate, certain and complete. To the same effect is Atlantic Delaine Co. v. James, 94 U. S. 207, 24 L. ed. 112, and Town of Glastenbury v. McDonald, 44 Vt. 450."

In Ada County v. Bullen Bridge Co., 5 Idaho, 188, 95 Am. St. Rep. 180, 47 Pac. 818, 36 L. R. A. 367, the court also quotes with approval from Lewis v. Tobias, 10 Cal. 574, as follows: "While if we recognize the principle invoked by the respondent, we must necessarily admit that in every case in which the payer of a note, or bond, or other money security has a defense to it, though purely legal, we must admit him, at his pleasure, into a court of equity, deny the holder a trial by jury, and permit the payer to take the place of the actor in a proceeding to test his liability. We see no necessity for such a principle, and we think it would produce only confusion, and that it starts with a denial of a positive right of the holder. If the holder unreasonably delays to sue, the payer may force him to do so under the statute." The case of Lewis v. Tobias is affirmed in Smith v. Sparrow, 13 Cal. 596, and in Shain v. Belvin, 79 Cal. 262, 21 Pac. 747.

The case of Taylor v. Ford, 92 Cal. 419, 28 Pac. 441, was an action under the statute to determine an adverse claim which the defendant asserted against the plaintiff by a promissory note. The defendant filed an answer and cross-complaint which was in form a complaint upon the note, and praying for judgment against the plaintiff for the amount due thereon. The plaintiff answered the cross-complaint setting up want of consideration and other defenses, and the court held that the issues thus joined were triable by a jury in the ordinary course of law; that the action was a common-law action upon a promissory note.

But counsel for appellant contends that the principle announced in these cases does not apply to the facts of this case. He contends, first, that the action is not to cancel a written instrument, and, second, that the rights and equities alleged in the complaint are of so peculiar and unusual character as to

take the case out of the ordinary rule in such cases. The complaint filed by George T. Miller, administrator, <sup>259</sup> is very lengthy, and after alleging the making of the notes, the death of Coryell, the appointment of the administrators, the organization of the lumber company and the names of the stockholders and their respective interests, it then alleges that the bank presented to J. Howard Howe, as administrator of the estate of Coryell, its claim based upon the promissory notes involved in this action, and that the administrator indorsed his allowance on said claims, and also the probate judge made the same allowance and thereafter vacated such allowance. Then follow the allegations with reference to the appeal taken to the district court, the hearing in the district court and the appeal to the supreme court; that on the twentieth day of May, 1908, Miller, the administrator of the Coryell estate, brought an action against the lumber company, and its stockholders, praying for an injunction against the disposition of the corporate property, and also asked for a receiver, the action in the district court upon the application for an injunction and the appointment of a receiver and the dismissal of such a lien. The complaint then alleges that on or about March 10, 1909, the defendants sold and conveyed all property belonging to the lumber company to the defendant, Will F. Kettenbach, for the sum of \$18,000; that no notice was given to the stockholders of the intention of the corporation to make such sale, or to its board of directors or to any other person, and that defendants conspired and confederated together to transfer the property to said Will F. Kettenbach to cheat and defraud the plaintiff and other stockholders and directors of said corporation, and that the bank is interested with Kettenbach in said conveyance and that said purchase was not made in good faith, and that the consideration of \$18,000 has not been paid and that the conveyance was made for the purpose of vesting all of said defendants with the ownership of said property, and that the purchase price will not pay twenty-five cents on the dollar of the indebtedness of the lumber company.

Afterward an amendment was offered and allowed to the complaint which alleged that the \$18,000 was given to Frank W. Kettenbach and Howe; that the lumber company was not <sup>260</sup> a going concern and could not carry on business by reason of the sale, and that thereafter Frank W. Kettenbach and Will F. Kettenbach sold a portion of said property for about \$40,000 and still hold a portion of said property of the value of at least \$35,000; that thereafter Frank W. Kettenbach and J. Howard Howe sold and disposed of the remaining portion of said property of said company not sold to W. F. Kettenbach, and paid the receipts therefrom to said Idaho Trust Company; that said sales and each of them were made

for the purpose of paying the receipts therefrom to said Frank W. Kettenbach, Howe and said banks.

The prayer of this complaint asks that the defendants be estopped from denying the allegations contained in the answer filed in the action for an injunction, and the appointment of a receiver and denying that the estate and property of the lumber company are of the value of \$156,440.97, and denying that Will F. and Frank W. Kettenbach, the Lewiston National Bank, the Idaho Trust Company, J. Howard Howe and A. Hawkins be held as trustees of said property and the value thereof for the creditors and stockholders of the corporation, and that they be directed to account for said property and be charged with said amount; that an order be made directing all creditors of the lumber company to appear and file their claims, and that such claims be determined and that defendants be directed to pay and discharge the same, and that the stockholders appear and show their respective share, and after the creditors have been paid, that the stockholders be paid the balance remaining of said fund.

Answers were filed by the defendants which put in issue the allegations of the complaint as to the fraudulent and collusive transfer alleged and the value of the property, and alleging that the property purchased was at its full value, and that Kettenbach paid therefor the sum of \$18,000, and in addition thereto paid and discharged other obligations and charges against said property and lumber company in the aggregate amount of \$55,000, and that the transfer was made in good faith on the authority of the board of directors with full notice.

<sup>281</sup> A complaint in intervention was also filed by A. W. Phillips, which alleged that he was a creditor of the Coryell estate, and then alleged substantially the same facts as are alleged in the complaint, and the prayer was that the notes involved in this case be satisfied and discharged, and for other equitable relief. The same counsel appeared for both the original plaintiff and the plaintiff in intervention.

The findings of the court are very lengthy and deal with many questions which were not in issue under the pleadings, and relate to matters which appeared in evidence; and the court in substance finds that the sale of the lumber company's property to William F. Kettenbach was fully authorized by the company, made in good faith, and that he paid therefor the aggregate of about \$52,000, which was the full market value of said property; that the sale was publicly noticed, full and fair opportunity given to anyone to bid at such sale; that such sale was not made collusively or for the purpose of defrauding either the creditors or stockholders of the company. And upon these findings the court entered judgment dismissing the complaint and complaint in intervention and giving respondents judgment for costs.

It is somewhat difficult to reconcile the allegations of the complaint and the complaint in intervention with the statement of counsel for plaintiff as to the nature and character of this action. From the allegations of the complaint and the complaint in intervention it would seem that the object and purpose of the action is to set aside the sale and transfer made by the board of directors of the lumber company of its property to Kettenbach, on the ground of fraud, inadequacy of purchase price, lack of notice of intention of the lumber company to sell. But counsel for appellant insist that the action was not brought and is not prosecuted for that purpose, no doubt making this contention by reason of the fact that it may be questioned whether the plaintiffs show such interest as would entitle them to maintain an action to set aside such transfer. Accepting appellant's contention as to the purpose of the action, we see no peculiar facts in this case which take it out of the ordinary rule of law as announced in the cases <sup>202</sup> heretofore cited. We are unable to discover, and counsel have not pointed out, any reason why a defense might not have been interposed to such notes when filed as claims against the estate, based upon the ground that the estate was no longer liable upon said notes, and had been released from such liability by reason of the alleged fraudulent acts which are now made the basis of this action. When the bank filed the notes as claims against the estate of Coryell, the bank relied upon the contract of guaranty. If a state of facts existed which in law released the estate from liability, such facts could have been shown in the probate court in defense to the allowance of such claims. Under the statute of this state, equitable defenses may be plead as a defense in an action at law, and even if there were peculiar equitable considerations which it was necessary to plead as a defense to such notes, the same were permissible under our statute.

This question seems to be very fully covered by the provisions of Revised Codes, sections 5667 and 5668. By the former, "All issues of fact joined in the probate court must be tried in conformity with the requirements of chapter 2 of this title, in cases of contests of wills, and in all such proceedings the party affirming is plaintiff, and the one denying or avoiding is defendant. Judgments therein on the issues joined, as well as for costs, may be entered and enforced by execution or otherwise by the probate court as in civil actions." By the latter section, "If no jury is demanded, the court must try the issues joined. If, on written demand, a jury is called by either party, and the issues are not sufficiently made up by the written pleadings on file, the court, on due notice to the opposite party, must settle and frame the issues to be tried, and submit the same, together with the evidence of each party, to the jury, on which they must render a verdict. Either may move for a new trial upon the same



grounds and errors, and in like manner, as provided in this code for civil actions." Where, therefore, issues are joined in the probate court, triable by a jury, and no demand is made that a jury be called, then such issues are tried by the court. If, however, a jury is demanded and the court is of the opinion that the <sup>263</sup> issues are not sufficiently made, the court is directed to settle and frame the issues to be tried and submit the same with the evidence to the jury. There is no statutory reason which would prevent pleading an equitable defense in the probate court just the same as it may be plead in the district court; and if an equitable defense is plead in the probate court, it should be tried in the same manner as if plead in the district court, and when the statute extends to all heirs and creditors and all persons interested in the estate an opportunity to appear and contest claims filed against such estate, it thereby extends to such persons the right to plead as a defense to such claims any matter which will defeat or avoid such claims. Thus a remedy at law is provided, which in this case would have been adequate and sufficient to have entitled the appellants to plead as a defense against the allowance of the claims the facts which appellants now rely upon as entitling them to equitable relief in this action.

But counsel for appellant contends that such facts could not have been plead as a defense in the probate court because interests of other parties are involved, and there is no method by which such parties could have been brought into the probate court for the purpose of adjudicating their interests. An examination of the facts alleged, however, does not disclose that it would have been necessary to have brought into the probate court any additional parties in order to have determined whether the bank by its acts or conduct, and in collusion with other parties, had done acts or committed a wrong or fraud against the estate which in equity or law released the estate from its contract of guaranty as indorsed upon such notes. The only relief demanded in this case is against the bank; that is, that the estate be released from its contract of guaranty, and the only one who claimed any right under the contract of guaranty was the bank. Such could have been urged in the probate court as a defense to the allowance of such claims. And while it appears from the allegations that other parties aided the bank in the alleged fraudulent transaction, yet such parties were not necessary parties to the determination of the question whether the bank <sup>264</sup> had entered into collusion with such persons for the purpose of fraudulently acquiring the property of the principal debtor, and thereby committed such wrongful acts as in equity or law would prevent it from enforcing the contract of guaranty.

We have disposed of this case upon the theory maintained by the appellant upon this appeal, and while there are a

number of other questions which counsel has discussed in his brief, a consideration of such questions becomes of no consequence under the view we have taken of the nature of the action. If property belonging to the lumber company was disposed of fraudulently or not in accordance with law, and thereby the bank profited by such transaction and failed to give proper credit upon the notes involved in this case, such facts could and should have been presented as a defense when such notes were filed as claims against the estate.

The judgment is affirmed. Costs awarded to respondents.

Sullivan, C. J., concurs.

**Allshie, J., Dissenting.**—"I do not think there is any good reason, either under the statute or the rules of practice and procedure, why the plaintiff cannot maintain this action, and I am therefore constrained to dissent from the views of the majority on this question.

"In the first place, the plaintiff has no plain, speedy or adequate remedy at law, and if he is entitled to any relief whatever, it must be by reason of the application of the rules of equity to the particular facts of the case. He contends that the injury alleged has accrued by reason of the defendants conspiring and confederating together to defraud the estate represented by the plaintiff out of its share of the property owned by Colby, Coryell and Howe Lumber Company. The only method by which the plaintiff could secure any relief in this case in a court of law is by reason of the provisions of our constitution and statute abolishing all distinctions between actions at law and suits in equity. This change, however, does not abrogate the application of the principles of equity to the facts of any given case. The equitable principle is still as applicable as if it were to be applied in a court of purely chancery jurisdiction.

"As I understand the facts of this case as pleaded by the plaintiff and disclosed by the record, the cases of *Ada County v. Bullen Bridge Co.*, 5 Idaho, 188, 95 Am. St. Rep. 180, 47 Pac. 818, 36 L. R. A. 367, and *Ada County v. Gess*, 4 Idaho, 611, 43 Pac. 71, and the other cases cited from this court, are wholly inapplicable. In *Ada County v. Bullen Bridge Co.*, relief in equity was denied on the ground that the plaintiff had a plain, speedy and adequate remedy at law, either by affirmative action or as a defense to an action on the pretended obligation. *Ada County v. Gess*, and the other cases cited from this court, turned upon the same rule and principle. It will at once be seen that that principle is not applicable here. There is no known action at law whereby the plaintiff could obtain the relief sought by this present action. His cause of action appeals purely and solely to the equitable jurisdiction of the court. It is true that equitable defenses may be pleaded to actions at law, but it is not every case where an equitable defense can be pleaded that a failure to plead it is a bar to recovery in an independent suit in equity. The very facts of this case illustrate the unwisdom of attempting to apply the rule which seems to be announced by the court in this case. Here the fraudulent transactions alleged and from which the plaintiff seeks relief were consummated on the tenth day of March, 1909. On the other hand, these notes had been presented to the administrator on November 16, 1907. They had been allowed by the administrator,



and subsequently on the application of certain of the heirs the allowance was vacated and set aside. As early as March 27, 1908, the heirs filed exceptions to the account of the administrator, which account included these specific notes, and the matter was continuously litigated in the probate court and the district court, and in this court until the ninth day of April, 1909, on which latter date this court affirmed the judgment of the district court, and held that the claims were still pending in the probate court for a hearing on the objections made by the heirs. According to the pleadings in the present case, the cause of action set forth had not accrued up to the date of appeal to this court prosecuted by the bank involving the allowance of this identical claim.

"As no other question is considered in the majority opinion, I have not examined the record for the purpose of ascertaining whether the judgment should be affirmed or reversed on any of the other questions presented by the appellant. It is unnecessary and useless for me to enter into any consideration of any further questions, for the reason that the court has disposed of the case on the specific ground that the plaintiff cannot maintain this action."

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*The Cancellation of Instruments Notwithstanding the Existence of a defense at law is the subject of a note to Fitzmaurice v. Mosier, 9 Am. St. Rep. 859. According to some authorities, if a legal remedy exists, either affirmative or defensive, a suit cannot be maintained to cancel written instruments: County of Ada v. Bullen Bridge Co., 5 Idaho, 188, 95 Am. St. Rep. 180; Vannatta v. Lindley, 198 Ill. 40, 92 Am. St. Rep. 270.*

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## FLYNN GROUP MINING COMPANY v. MURPHY.

[18 Idaho, 266, 109 Pac. 851.]

**APPEAL—Finding Based on Conflicting Evidence.**—When there is a substantial conflict in the evidence upon which any finding of fact is based, such finding will not be reversed on appeal. (p. 205.)

**NEW TRIAL—Newly Discovered Evidence.**—Held, that the court did not err in denying a new trial on the ground of newly discovered evidence. (p. 205.)

**MINING CLAIM—Location on Land Already Located.**—A subsequent valid location of a mining claim in this state cannot be made on mineral land that is already covered by a valid location. (p. 206.)

**MINING CLAIM—Excessive Location—Subsequent Location.**—Where a discovery is made on a vein of mineral-bearing rock and the notice provides that such claim extends seven hundred feet in a northwesterly direction and eight hundred feet in a southeasterly direction from such discovery, and the corner stakes on the southeasterly end are so placed as to take in more than eight hundred feet of such vein, subsequent locators may legally locate the excess of ground, as the first location is valid only to the extent of eight hundred feet southeasterly from the point of discovery on said claim. (p. 206.)

**MINING CLAIM—Making Location Definite and Certain.**—The law requires the locator to make his location so definite and certain that from the location notice and stakes and monuments on the ground the limits and boundaries of the claim may be ascertained, and so definite and certain as to prevent the changing or floating of such claim. (pp. 206, 207.)

**MINING CLAIM—Excessive Location—Fraud.**—Where the boundaries of a claim are made excessive in size with fraudulent intent, it is void; or if so large as to preclude the presumption of innocent error, fraud will be presumed. (p. 207.)

**MINING CLAIM—Location—Monument and Distances.**—Under the provisions of section 3207, Revised Codes, the locator of a mining claim is required to erect a monument at the place of discovery upon which, among other things, he must place the distance claimed along the vein each way from such monument. (p. 207.)

**MINING CLAIM—Notice and Description—Subsequent Location.**—Held, that where a location notice states that the mining claim which it describes extends seven hundred feet in a north-westerly direction and eight hundred feet in a southeasterly direction along the lode, a locator may go to the point of discovery of such claim and measure the ground from the discovery point eight hundred feet in a southeasterly direction along the lode, and if there be any unlocated ground beyond that eight hundred feet, may legally locate it, regardless of the fact that the easterly end stakes had been established beyond the eight hundred feet. (pp. 207, 208.)

**MINING CLAIM—Excessive Location—Fraud.**—The case of *Nicholls v. Lewis & Clark Min. Co.*, 18 Idaho, 224, 109 Pac. 346, cited and approved, and the case of *Atkins v. Hendree*, 1 Idaho, 95, cited and disapproved so far as it holds that no fraud can be perpetrated where there exists the means of ascertaining or discovering the fraud. (p. 208.)

**MINING CLAIM—Notice—Description of Exterior Boundaries.**—Under the provisions of section 3207, Revised Codes, of 1909, the location notice is not required to describe the exterior boundaries of the claim. (pp. 208, 209.)

**MINING CLAIM—Location Notice—Sufficiency of Description.**—Where it appears that a mining claim has been located in good faith, if by any reasonable construction the language used in the location notice describing the claim and referring to natural objects and permanent monuments imparts knowledge of the location of such claim to a subsequent locator, it is sufficient. (p. 209.)

**MINING CLAIM—Notice of Location to Subsequent Locator.**—Held, that the locator had actual notice that the ground in controversy had been located, as well as constructive notice by an examination of the recorded notice, and that no technicalities will be resorted to to sustain his relocation of the same ground. (p. 210.)

**MINING CLAIM—Assessment Work and Possession.**—Held, that the finding of the court to the effect that the respondent had performed the assessment work on the Murphy Fraction for nine years and that he had worked and was in possession of said fraction for more than five years, and that during said period of time there was no adverse claim made to said premises or to any part thereof, is fully sustained by the evidence. (p. 210.)

(Syllabi by the court.)

Franklin Pfirman, for the appellant.

Gray & Knight, for the respondent.

<sup>269</sup> SULLIVAN, C. J. This is an action in support of an adverse claim under the provisions of United States Revised Statutes, section 2326. It appears that in June, 1908, the respondent Murphy, claiming to be the owner of the Murphy Fraction lode situated in Leland Mining District, Shoshone county, made application for a patent therefor in the United States land office at Coeur d'Alene, to which application the appellant, the Flynn Group Mining Company, which will hereafter be referred to as the mining company or the appellant, filed its adverse claim, and thereafter on October 6, 1908, commenced this action in support of said adverse claim.

The mining company's adverse claim was based on its alleged ownership of the Erin Fraction lode claim, which it is <sup>270</sup> alleged covered almost the identical ground included in the Murphy Fraction claim. The contention of the mining company is that the Murphy Fraction claim was not a valid location, for the reason that the ground included within its boundaries was at the time of its location included in other mining locations, to wit, the Snowdrift, the Buffalo and Parret Fractions.

The issues as made by the pleadings were tried by the court without a jury, and findings of fact and judgment were made and entered in favor of the respondent. Thereafter a motion for a new trial was denied, and this appeal is from the judgment and order denying the new trial.

The following, among other facts, appear from the record: On April 8, 1887, Francis Murphy, the respondent (whose name appears in the record sometimes as Francis and sometimes as Frank Murphy), and Andrew Short located the Snowdrift lode mining claim and in the location notice described said claim as "Commencing from discovery, running N. W. 70 feet, running S. E. 800 feet from discovery, bounded on N. W. by Black Bear and Cape Horn Lodes." In July, of 1899, one William P. Flynn, who owned two claims known as the Buffalo Fraction and Parret Fraction, situated in an easterly direction from the Snowdrift, had the same surveyed for a United States patent. It appears that the westerly end lines of those two claims were drawn in by the surveyor in an easterly direction, leaving some vacant ground between the Snowdrift on the easterly end and the Buffalo and Parret Fractions on the westerly ends; that Flynn had a number of mining claims on Flynn Mountain where said named claims were located, and informed a man by the name of Faulkner of the vacant ground and advised him that inasmuch as he had no mining ground, he had better locate it; that Flynn had lived upon that mountain for a great many years and knew the claims, their discoveries and corners; that he and Faulkner went to the discovery on the Snowdrift claim and measured off in a southeasterly direction eight hundred feet for the purpose of ascertaining how far



in a southeasterly direction the Snowdrift ground extended. They <sup>271</sup> thereupon made a discovery on said vacant ground and located the same by staking the ground and extending the stakes outside of the limits of the vacant ground in order that they might be sure to take in all of the ground there vacant. Said claim was located in the name of Frank Murphy as the Murphy Fraction and the location notice was filed for record on August 26, 1899. It appears that during each subsequent year Murphy has performed the assessment work and has constructed two tunnels upon that ground; that in June, 1906, Joseph F. Whelan, who was the secretary and general manager in full charge of said company's affairs, knew of the Murphy Fraction claim and the ground included within its boundaries and knew that it was claimed by the respondent, and knew that Murphy had constructed two tunnels on said fraction; but on an examination by Whelan of the recorded location notice of the Murphy Fraction he concluded that said notice was not sufficient, and proceeded to locate said ground by the Erin Fraction claim on behalf of said mining company. Murphy having ascertained that the original location notice of the Murphy Fraction was defective, made an amended location of said claim on November 13, 1906, and thereafter made application for a United States patent for said claim, and the mining company's adverse claim is based upon said Erin Fraction location.

The Erin Fraction lode was located long after the Murphy Fraction lode, and the title of the appellant to the ground in controversy depends upon the invalidity of the Murphy Fraction location. Appellant largely rests its case on the fact that the Murphy Fraction was an invalid location, for the reason that it was located on premises included within the Snowdrift claim. The Snowdrift claim was located in 1887; the Murphy Fraction on the 26th of August, 1899; the Erin Fraction on the 6th of June, 1906. Appellant contends that the Snowdrift claim was staked upon the ground and included within its exterior boundaries the discovery of the Murphy Fraction lode, and that said Murphy Fraction lode was therefore a void location. There was a conflict in the evidence upon this point, and the court expressly found that the discovery <sup>272</sup> of the Murphy Fraction lode was not made within the exterior boundaries of the Snowdrift claim, but was made at a point easterly from the southeasterly end line of said claim.

There was some controversy over the exact location of the original northeast corner of the Snowdrift claim. There is a direct conflict in the testimony upon that question, and the trial court in its seventh finding of fact, among other things, found as follows: "That the northeast corner stake on the said Snowdrift claim was placed at a point from five to eight feet in a northeasterly direction from the present patent corner on the Snowdrift lode claim which is located at the

same place as the northwest patent corner of the Murphy Fraction lode claim." The court having thus found upon conflicting evidence the location of the corner stake, this court, upon all the evidence on that point, is not inclined to reverse that finding. However, on the motion for a new trial the appellant introduced the field-notes, plats and survey of the Buffalo and Parret Fraction lodes and the affidavit of Mr. Pfirman, which, it is contended, clearly establishes the fact that the court made an error in said finding and that said plat and field-notes show that Mr. Flynn testified falsely on the trial when he testified that said northeast corner of the Snowdrift lode was within five or eight feet of the corresponding corner as patented.

In opposition to said affidavit, the respondent filed the affidavit of Arthur A. Booth, deputy mineral surveyor, who surveyed said Buffalo and Parret Fractions for a patent in the month of July, 1899. From that affidavit it appears that said fractions were staked for patent and the patent corners established and the westerly end lines of the said claims were drawn in in an easterly direction, and that a large portion of the land now included in the Murphy Fraction lode was originally within the exterior boundaries of the Buffalo and Parret Fraction lodes, and upon establishing the patent corners of said fractions, the land now included within the Murphy Fraction lode, or a large portion thereof, was left outside of said fraction lodes as established upon the ground by that survey; that in the patent plat of the survey for said <sup>273</sup> fractions and in the field-notes he reported the Snowdrift lode unsurveyed as lying west of the Buffalo and Parret Fraction lodes and so marked upon the patent plat; that he did so purely from hearsay, and he did not at that time survey to any of the corners of the Snowdrift lode and that he did not intend and did not show, either by his plat or field-notes, that the northeast corner of the Snowdrift was identical with corner No. 2 of the Buffalo Fraction lode; but referring specifically to his field-notes, he did report that corner No. 2 of the Buffalo Fraction lode was identical with corner No. 2 of the Josephine lode and corner No. 9 of the Exchequer, and that said field-notes and survey did not show, and did not pretend to show, any of the corners of the Snowdrift lode; that he simply marked the name of the Snowdrift lode unsurveyed on said plat, which he was told was situated in a westerly direction.

We have carefully considered the plats and affidavits used on motion for a new trial, and are satisfied that the court came to the right conclusion in regard to the location of the northeast corner of said Snowdrift lode claim, and did not err in denying a new trial on the ground of newly discovered evidence.

It appears from the evidence of the locators of the Murphy Fraction lode that when they went to locate it they went to the discovery shaft or point on the Snowdrift lode and measured off in a southeasterly direction eight hundred feet from that point, that being the length upon the lode in that direction called for by the location notice, and then located the Murphy Fraction easterly of and adjoining said Snowdrift location. But it is contended by appellant that the easterly end line of said Snowdrift claim as marked upon the ground extended more than eight hundred feet easterly from said point of discovery, and for that reason was included in said claim and was not open to location at the time of the location of said Murphy Fraction lode; that if said Snowdrift location included more ground than the locators were entitled to, the ground included within the stakes had been segregated from the public domain and <sup>274</sup> was not subject to location until the locators adjusted the exterior lines thereof and excluded therefrom any surplus ground contained therein, and cites in support of that contention, *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735, and quotes the following from said decision:

“Locations can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done.”

We fully recognize the rule laid down by the supreme court of the United States in that decision, but we do not think that rule applies to the facts of this case. The location notice of the Snowdrift claim provides that the lode claim extends from the point of discovery seven hundred feet in a northwesterly direction and eight hundred feet in a southeasterly direction. If the parties who located it in fact placed their stakes at the northeasterly and southeasterly corners of said claims so as to take in more ground than called for in the notice, such excess was not and could not be legally included in that location. It is not left to the pleasure of the locator to adjust his boundaries when and where he likes within an excessive location when it will interfere with a subsequent locator.

Counsel for appellant contends that a locator may cover or include within his location an excessive area of ground and hold it against the world until he gets ready to conform it to the area allowed by the mining laws or until he has the same surveyed for a patent. We recognize the rule that where a claim is excessive in area, the location is not void unless the excess is so great as to impress the locator with a fraudulent intent. The intent of the law is to require the locator to make his location so definite and certain that from the location notice and the stakes and monuments on the



ground the limits and boundaries of the claim may be readily ascertained, and so definite and certain as to prevent the changing or floating of the claim. This court held in *Burke v. McDonald*, 2 Idaho, 679, 33 Pac. 49, 17 Morr. Min. Rep. 325, <sup>275</sup> that where the boundary of a claim is made excessive in size with fraudulent intent, it is void; or if so large as to preclude innocent error, fraud will be presumed; *Stemwinder Min. Co. v. Emma & L. C. Con. Co.*, 2 Idaho, 456, 21 Pac. 1040.

Among other things it is provided in section 3207 of the Revised Codes of 1909, as follows: "The locator at the time of making the discovery of such vein or lode must erect a monument at such place of discovery, upon which he must place his name, the name of the claim, the date of discovery and distance claimed along the vein each way from such monument. Within ten days from the date of discovery, he must mark the boundaries of his claim by establishing at each corner thereof and at any angle in the side lines, a monument, marked with the name of the claim and the corner or angle it represents; also at the time of so marking his boundaries, he must post at his discovery monument his notice of location in which must be stated: First, the name of the locator; second, the name of the claim; third, the date of discovery; fourth, the direction and distance claimed along the ledge from the discovery; fifth, the distance claimed on each side of the middle of the ledge; sixth, the distance and direction from the discovery monument to such natural object or permanent monument, if any such there be, as will fix and describe in the notice itself the location of the claim; and seventh, the name of the mining district, county and state."

The provisions of said section require a monument of some kind to be erected at the point of discovery, which point is supposed to be on the ledge, and require the locator to place on such monument "the distance claimed along the vein each way from said monument," and also require the location notice to state the direction and distance claimed along the ledge from the discovery. In the location notice of said Snowdrift lode it is stated that said claim extends in a northwesterly direction along the lode seven hundred feet, and in a southeasterly direction along the lode eight hundred feet. That notice fixes the distance along the lode that said claim extends from the point of discovery. The ground beyond the eight hundred feet southeasterly <sup>276</sup> from the discovery was not included in said claim, even though the stakes marking the northeasterly and southeasterly corners of said claim were placed beyond the eight hundred feet. Any locator had a right to go to the point of discovery of the Snowdrift claim and measure the ground from the discovery point eight hundred feet in a southeasterly direction along the lode, and if there was any unlocated ground beyond the eight hun-

dred feet, locate it, regardless of the fact that the easterly end stakes had been established beyond the eight hundred feet.

In *Nicholls v. Lewis & Clark Min. Co.*, 18 Idaho, 224, 109 Pac. 846, 28 L. R. A., N. S., 1029, just decided by this court, the court had occasion to review and disapprove of certain language used by Chief Justice McBride in *Atkins v. Hendree*, 1 Idaho, 95, to wit: "To claim more than the law allows is no fraud on others, for they have the same means of ascertaining the attempted fraud that the other has to commit it," and held that where an excessive mineral location has been made though mistake, while the locator was acting in good faith, the location will be void only as to the excess; but where the locator has purposely included within his exterior boundaries an excessive area with fraudulent intent to hold the entire area under one location, such location is void. Or if made so large that the location cannot be deemed the result of innocent error or mistake, fraud may be presumed. Chief Justice McBride virtually holds in the case of *Atkins v. Hendree*, that no fraud can be perpetrated where there exists the same means of ascertaining or discovering the fraud that the other parties had to commit it. We cannot assent to that doctrine, for, as we view it, a fraudulent act still remains fraudulent even though there exists very plain and simple means of ascertaining or discovering the fraud. Where a claim is located in good faith and contains some excess of ground, the location is valid except as to the excess, and others who may desire to make a location may measure the ground and confine the first locator to the limits prescribed by law. This court therefore holds that a subsequent locator may measure the ground of a prior location from the discovery and ascertain the extent of such location, and if it contains <sup>377</sup> more ground within its boundaries than is described in the location notice, and more land than can be located under one location, the subsequent locator may locate the excess and maintain his right thereto. This rule applies to locations not fraudulent on account of containing an unreasonable excess of ground, and it has no application to fraudulent locations such as in the case of *Nicholls v. Lewis & Clark Min. Co.*, 18 Idaho, 224, 109 Pac. 846, 28 L. R. A., N. S., 1029, for if the location is absolutely void, the ground included therein has not been segregated thereby from the public domain. There is no contention made in the case at bar that the excess in the Snowdrift location, if there was any, was the result of fraudulent intent, but we think it is conceded that such excess, if there was any, was the result of innocent error.

It is contended that the location notice of the Murphy Fraction is so defective as to impart no notice whatever. It must be admitted that it does not describe the exterior boundaries of said mining claim. It does, however, contain the seven requisites of a location notice as provided by said section 3207,

**Revised Codes.** It contains (1) the name of the locator; (2) the name of the claim; (3) the date of the discovery; (4) the distance along the ledge from the discovery; (5) the distance claimed on each side of the ledge; (6) such a description as will fix and describe the location of the claim; (7) the name of the mining district, county and state. The locator attempted to describe the exterior boundaries of the claim and utterly failed to do so. The law, however, does not require the notice to describe the exterior boundaries of the claim. It is recited in the notice that the adjoining claims are the Snowdrift on the west and the Buffalo Fraction and the Parret Fraction on the east, and the evidence shows that those claims were well-known claims at the time of the location of the Murphy Fraction.

This court held in *Morrison v. Regan*, 8 Idaho, 291, 67 Pac. 955, that where it appears a mining claim has been located in good faith, if by any reasonable construction the language used in the notice describing the claim and in reference to natural objects and permanent monuments will impart knowledge of the location of the claim to a subsequent locator, it is <sup>278</sup> sufficient. It has frequently been held that reference to well-known mining claims is a sufficient compliance with the law (U. S. Rev. Stats., sec. 2324; Rev. Codes 1909, sec. 3207) requiring mining locations to be tied to some natural object or permanent monument so as to identify the claim: *Hammer v. Garfield M. & M. Co.*, 130 U. S. 291, 9 Sup. Ct. Rep. 548, 32 L. ed. 964; *Duncan v. Fulton*, 15 Colo. App. 140, 61 Pac. 244; *Kinney v. Fleming*, 6 Ariz., 263, 56 Pac. 723.

In *Hammer v. Garfield M. & M. Co.*, 130 U. S. 291, 9 Sup. Ct. Rep. 548, 32 L. ed. 964, the location notice stated as follows: "This lode located about 1,500 feet south of Vaughan's Little Jenny mine." The supreme court of Montana held that that was a sufficient reference to a natural object or permanent monument, and the supreme court of the United States, sustaining that decision, said: "We agree with the court below that the Little Jenny mine will be presumed to be a well-known object or permanent monument until the contrary appears."

In *Bismark Mining Co. v. North Sunbeam Co.*, 14 Idaho, 516, 95 Pac. 14, this court stated as follows: "It is the well-settled doctrine of all of the later decisions that location notices and records should receive a liberal construction, to the end of upholding a location made in good faith"; and quotes from the case of *Londonderry M. Co. v. United G. M. Co.*, 38 Colo. 480, 88 Pac. 455, as follows: "Every case where this question is raised must therefore depend upon its own circumstances. As previously stated, the purpose of such location certificate is to give notice to subsequent locators; and if by reasonable construction the language descriptive of the situs

of a claim, aided or unaided by testimony aliunde, will do so, it is sufficient in this respect. In other words, the object of requiring a reference to a natural object or permanent monument is to furnish means by which to identify the claim, and whatever reference will accomplish this object satisfies the law."

It appears from the evidence that said Murphy Fraction was staked, and with the exception of one stake, they remained standing up to the time the survey was made for patent. It seems that one of the stakes had fallen down and was not up <sup>279</sup> during the year prior to its survey for a patent. After reciting certain facts in *Bismark Min. Co. v. North Sunbeam Co.*, 14 Idaho, 516, 95 Pac. 14, this court said: "Those facts appearing, every reasonable presumption that can be drawn therefrom should be in favor of his knowing of said locations; and his grantees should not be permitted to take advantage of any minor defects in the location notices of said mining claims. If Oster had actual notice of the location and boundaries of said claims, neither he nor his grantees will be permitted to take advantage of some technical defect in the location notice, where it appears that said claims were located in good faith."

We think the notice in this case is sufficient under the facts of the case, as it clearly appears that Whelan, who located the Erin Fraction claim for appellant, had full knowledge of the location of the Murphy Fraction claim, and one of the principal reasons that he gives for locating it is that on an examination of the location notice he concluded it was defective. Whelan had actual notice that the ground had been located, also constructive notice by an examination of the recorded notice, and had seen the work done by Murphy on the claim for six or seven years. It is true that Whelan also claimed that the ground was not subject to location at the time Murphy located it as the Murphy Fraction, for the reason that the ground was covered by other locations, but the trial court found against this contention. Whelan testified that after examining the notice, he concluded it was not sufficient.

The court found that the respondent had performed the assessment work on the Murphy Fraction claim for nine years beginning with 1900 and ending with 1908, and that respondent had held, worked and was in the possession of the Murphy Fraction lode for more than five years from and after the 26th of August, 1899, the date of its location, and that during said period of time, and for more than five years after the date of said location, there was no adverse claim made to said premises, or to any part thereof, and that such possession was open, notorious, exclusive and continuous for more than six years. We think that finding is supported by the evidence. <sup>280</sup> Under the facts and circumstances of this case, to permit



the appellant to recover on purely technical grounds would be doing a great injustice to the respondent.

Counsel for appellant contends that the evidence is not sufficient to support the findings to the effect that respondent has been in open, notorious and adverse possession of said claim for a period of more than six years. On an examination of the evidence, we are fully satisfied that that finding is amply supported by the evidence.

The argument contained in appellant's brief is predicated upon four propositions: (1) That the Murphy Fraction lode was located within the lines of the Snowdrift lode; (2) that the notice of location filed for record was void; (3) that there was no adverse possession of said Murphy lode; (4) that after the abandonment of the easterly portion of the Snowdrift location, the Erin Fraction was located so as to cover such abandoned portion, and was therefore a valid location. All of the assignments of error are practically included within those contentions, and the trial court found in favor of respondent on each and every one of them, and such findings are based on a substantial conflict in the evidence.

Upon a careful review of the whole record, we are fully satisfied that the findings of fact are supported by the evidence and that the judgment must be affirmed, and it is so ordered. Costs are awarded to the respondent.

Stewart and Ailshie, JJ., concur.

#### ON PETITION FOR REHEARING.

SULLIVAN, C. J. A petition for rehearing has been filed in this matter, whereby it is contended that the rule laid down in this case is in conflict with the rule laid down in the case of *Nicholls v. Lewis & Clark Min. Co.*, 18 Idaho, 224, 109 Pac. 846, 28 L. R. A., N. S., 1029, decided at this term.

After a careful examination of both opinions, we are unable to find any conflict between the rules laid down therein. <sup>281</sup> Counsel for appellant also contends that the rule laid down in subdivisions 4, 7 and 8 of the syllabus is not the rule that should obtain in this state, and if it is the established rule, it will lead to many conflicts and disturbances among mineral claimants, and that it would be unjust to require a locator of a mining claim, when informed by another mineral claimant that his claim is excessive, to then and there relinquish the excess; that such a rule would be unfair to the excessive claimant. Counsel thus contends, in effect, that it should be left to the discretion of the one who claims an excessive area of surface ground in his mining claim when he should relinquish the excess.

We cannot agree with that contention. Under the law, a locator should not be permitted to hold an excess of ground with a single location, and when his notice provides that his mining claim extends a certain number of feet in a certain

direction from the discovery, subsequent locators may be governed by the statement in the notice and not by stakes that include within their boundary an excess of surface ground. We are not inclined to depart from the rule laid down in the opinion in this case.

Our attention has been called to the fact that the Snow-drift claim was located under the provisions of sections 3101 and 3102, Revised Statutes, instead of under the provisions of section 3207, Revised Codes, and under the provisions of said section 3101, the notice of location was required to be conspicuously attached to one of the center end stakes instead of being posted at the place of discovery; but that would make no difference so far as the rule laid down in this opinion goes. It was, in fact, posted at the discovery and not on the center end stake, and recited that the claim extended seven hundred feet in a northwesterly direction from the notice and discovery, and eight hundred feet in a southeasterly direction therefrom, and under that notice he was only entitled to eight hundred feet in a southeasterly direction from the discovery point.

Some question is raised in regard to newly discovered evidence and the admission of counter affidavits. The newly discovered evidence consisted of field-notes, plat and surveys <sup>282</sup> of the Buffalo and Parret Fraction lodes. Upon an examination of those, we are fully satisfied that the decision of this court would not have been different from what it now is had that evidence been introduced on the trial. We do not think, as contended by counsel, that this newly discovered evidence, had it been introduced on the trial, would have entitled appellant to recover in this action.

No sufficient reason appearing why a rehearing should be granted, the application is denied.

Ailshie, J., concurs.

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*Where an Excessive Mineral Location has Been Made Through Mistake*, while the locator was acting in good faith, the location will be void only as to the excess; but where the locator has purposely included within his exterior boundaries an excessive area with the fraudulent intent of holding the entire area under one location, such location is void; or if made so large that the location cannot be deemed the result of innocent error or mistake, fraud may be presumed. Where the exterior boundaries of a mineral location include such an unreasonably excessive area that such boundary lines cannot be said to impart notice to a prospector of a mineral location or discovery within the reasonable distance of a lawful claim as located under the statute, such location will be held void on the ground that the boundaries of the claim have never been marked and established as required by law: *Nicholls v. Lewis & Clark Mining Co.*, 18 Idaho, 224, 109 Pac. 846, 28 L. R. A., N. S., 1029, citing *Burke v. McDonald*, 2 Idaho, 679, 33 Pac. 49; *Gohres v. Illinois & J. Gravel Min. Co.*, 40 Or. 516, 67 Pac. 666; *Richmond Min. Co. v. Rose*, 114 U. S. 576, 5 Sup. Ct. Rep. 1055, 29 L. ed. 273, and criticising *Hauswirth v. Butcher*, 4 Mont. 299, 1 Pac. 714; *Leggatt v. Stewart*, 5 Mont. 107, 2 Pac. 320.



**WILSON v. LINDER.**

[18 Idaho, 438, 110 Pac. 274.]

**REMAINDER—Action to Protect Contingent Interest.**—Under the provisions of section 4538 of the Revised Codes, an action may be maintained by a remainderman for the protection of a contingent remainder as against one who claims an estate or interest in the property adverse to such remainderman. (p. 215.)

**REMAINDER—Rule in Shelley's Case.**—Under the provisions of section 3076 of the Revised Codes, the common-law rule, generally known as the "Rule in Shelley's Case," has been abrogated, and the term "heirs" has been changed from a word of limitation to one of purchase. (p. 216.)

**WILL—Construction.**—The Cardinal Rule to be Applied in the construction of a will is to gather the intent of the testator from the language he has employed in the will, and this intent is to be ascertained from a full view of everything within the "four corners of the instrument." This rule must be understood and applied in connection with that other rule to the effect that a clearly expressed intention in one portion of the will is not to yield to a doubtful construction in another portion of the instrument. (p. 217.)

**WILL—Estate Created—Cutting Down Fee.**—When property is given in clear language sufficient to convey an absolute fee, the interest so given will not be taken away, cut down, or diminished by any subsequent, vague and general expressions. (By the editor.) (p. 217.)

**WILL—Estate Created—Contingent Remainder.**—Where a testator provided by a will as follows: "My son Jesse shall have the home place. [Here follows a description of the property.] . . . But should my son Jesse die without any wife or children, the property herein conveyed to him shall be equally divided between my other four children, or their heirs, share and share alike"—held, that the devisee, Jesse Wilson, took a limited estate only, subject to the vesting of an absolute and fee simple title on his leaving surviving him at time of his death a wife or child, and that the remaindermen had only an expectancy which might be vested in them as an absolute estate upon the contingency of Jesse Wilson dying without either wife or child. (pp. 217, 218.)

**WILL—Estate Created.**—Where a Contingency Named in a will upon which an absolute estate may vest in one devisee as against another is unlimited as to time and is such a contingency as may never occur either prior or subsequent to the death of the testator, and may also occur at any time, the contingency should not be limited by construction to the period prior to the death of the testator so as to exclude therefrom the possibility of that contingency happening during the period subsequent to the death of the testator and prior to the death of the devisee. (p. 218.)

(Syllabi by the court except when stated to be by the editor.)

Cavanah & Blake and E. J. Dockery, for the appellants.

Ira E. Barber, for the respondents.

<sup>442</sup> AILSHIE, J. This action was commenced for the purpose of determining an adverse claim to certain real property. It is alleged in the complaint that James Wilson died in Ada

county in March, 1899, leaving a last will and testament which was thereafter duly admitted to probate; that William E. Wilson, Charlotta Calhoun, Emma Linder, Lizzie Everett, and Jesse Wilson, all of whom are sons and daughters of James Wilson, and Myrtle Goble, a grand-daughter, are named in the will as devisees and legatees of the testator; that, among other things, the will provided as follows: "That my son Jesse shall have the home place. [Then follows description.] . . . . But should my son Jesse die without any wife or children, the property herein conveyed to him shall be equally divided between my other four children, or their heirs, share and share alike." During the course of administration, application was made for a decree of partial distribution, and the petition was granted and the decree was entered by virtue of which the real estate described in the complaint herein and involved in this litigation was distributed to the parties entitled thereto in accordance with the terms and conditions of the will and in the identical language of the will itself. It is further alleged that one of the devisees, Lizzie Everett, has conveyed all her interest in the property described to Norman Gratz, and that the plaintiffs are the owners of and entitled to an undivided three-fourths interest in the property in controversy, subject only to the conditions of the will, namely, that if Jesse Wilson should die without leaving a wife or child, the property mentioned and described shall be equally divided between the other devisees named in the will.<sup>443</sup> It is further alleged that for the purpose of preventing William E. Wilson, Charlotta Calhoun, and Lizzie Everett, and their heirs and successors in interest, from holding or acquiring an undivided three-fourths interest in the property described in the complaint in the event of the death of Jesse Wilson without leaving surviving him a wife or child, the defendants, Anthony V. Linder and Emma Linder, have secured a pretended deed from the said Jesse Wilson purporting to convey a fee simple title to the land described in the complaint to themselves; and that for the further purpose of defeating the title of William E. Wilson, Charlotta Calhoun and Lizzie Everett in the land described and in collusion with Jesse Wilson, the defendants have permitted the land to be sold for delinquent taxes, and thereby secured a pretended tax title by virtue of which they claim a fee simple title to the whole tract of land.

It is also alleged that for the further purpose and intention of defeating the title of the devisees and plaintiffs herein, defendants have made and executed a pretended mortgage on the land described in the sum of ten thousand dollars in favor of the defendant Robert Noble.

The prayer of the complaint is that the defendants be required to come in and set up their claim and interest in

the property, and that the title to the property be adjudicated and decreed, and that it be adjudged and decreed that the plaintiffs have a contingent interest in the property, the vesting of title to which is dependent upon Jesse Wilson dying without leaving surviving him a wife or child. Defendants demurred to the complaint on the ground that it did not state a cause of action. The demurrer was sustained, and this is an appeal from the judgment.

The first question presenting itself to our consideration is the contention made by the respondent that the plaintiffs do not show such an interest as will entitle them to maintain the action. Now, it must be conceded that if the complaint shows any interest in the plaintiffs whatever to the land described it is only a contingent remainder: Rev. Codes, sec. 3075. Their expectancy in this property is subject to <sup>444</sup> be defeated upon the death of Jesse Wilson leaving surviving him either a wife or child, or, to put the question another way, the interest of the plaintiffs can only vest upon the death of Jesse Wilson without leaving surviving him a wife or child. Under the provisions of our statute (Rev. Codes, sec. 4538), "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

In *Coleman v. Jaggers*, 12 Idaho, 125, 118 Am. St. Rep. 207, 85 Pac. 894, this court said: "The provisions of said section 4538 of the Revised Statutes above quoted are very broad, and under them any person, whether in possession or out of the possession, whether holding the legal title or equitable title or what not, may bring his action against another who claims an estate in real property adverse to him, and may in such action have the adverse claim determined and settled. . . . The provisions of section 4538 of the Revised Statutes, and the decisions of this court in *Shields v. Johnson*, 10 Idaho, 746, 79 Pac. 393, 3 Ann. Cas. 245, *Johnson v. Hurst*, 10 Idaho, 308, 77 Pac. 784, *Fry v. Summers*, 4 Idaho, 424, 39 Pac. 1118, settle this contention, for under them we think every estate or interest known to the law in real property, whether legal or equitable, may be determined in an action of this kind."

It follows from the authority of the foregoing cases that if the plaintiffs have any interest in this property, either contingent or expectant, they may maintain an action to determine any adverse claim or interest thereto: *German-American Sav. Bank v. Gollmer*, 155 Cal. 683, 102 Pac. 932, 24 L. R. A., N. S., 1066.

The next question to be determined is whether under the will of James Wilson, Jesse Wilson took a fee simple title to this property or a lesser estate therein. It is conceded that at common law, under what is generally known as the "Rule in *Shelley's Case*," the language of this will passes a fee

simple title in the property to the devisee. It is contended, however, by counsel for appellant that the "Rule in Shelley's Case" has been abrogated by section 3076 of the Revised Codes of this state. That section provides as follows:

<sup>445</sup> "When a remainder is limited to the heirs, or heirs of the body, of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the successors or heirs of the body of the owner for life, are entitled to take by virtue of the remainder, so limited to them, and not as mere successors of the owner for life."

The foregoing section of our statute is identical with section 779 of the Civil Code of California, and was evidently copied from the California statute. In *Barnett v. Barnett*, 104 Cal. 298, 37 Pac. 1049, the supreme court of California had occasion to construe the provisions of section 779 of their Civil Code, and among other things said:

"The effect of this section is to abrogate the rule in Shelley's Case, and, with other sections in the Civil Code, to furnish the rules by which to determine the estate or interest in the lands which the plaintiff took by virtue of the grant: Civ. Code, sec. 4. Section 1105 declares that 'a fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended'; and, if it does appear from the grant that a lesser estate was intended, no such presumption exists. A grant is to be interpreted in the same manner as any other contract (sec. 1066), so as to give effect to the intention of the parties, if that intention can be ascertained (sec. 1636); and, for the purpose of ascertaining that intention, 'the whole of the contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.' . . . . By section 779, Civil Code, the term 'heirs' is changed from a word of limitation to one of purchase, and becomes a specific designation of a class which will have the right to the property upon the termination of the life estate. Upon that event they take the property, not by descent or as successors of the plaintiff, but by virtue of the remainder which was created for them at the execution of the deed to him. This remainder, although not capable of immediate enjoyment (Civ. Code, sec. 690), and therefore denominated a 'future interest,' is, nevertheless, an estate in the property <sup>446</sup> capable of being transferred in the same manner as a present interest: Civ. Code, sec. 699."

Whether the construction of the provisions of section 3076, Revised Codes, will have any bearing on the ultimate conclusion to be reached in this case will depend on the interpretation given to the language of the testator as used in the will here under consideration.

We now turn our attention to the consideration of the will itself for the purpose of ascertaining the intent of the testator. We approach this inquiry in the light of the general rule for the construction of wills, namely: That the intent of the testator as gathered from the language he has employed in the will is the cardinal rule to be applied in the construction of the will, and this intent is to be ascertained from a full view of everything within "the four corners of the instrument": *Whiting v. Whiting*, 42 Minn. 548, 44 N. W. 1030; *Holt v. Wilson*, 82 Kan. 268, 108 Pac. 87; *Reeves v. School Dist. No. 59*, 24 Wash. 282, 64 Pac. 752. In the outset, however, respondent insists that where a will contains a clearly expressed intention on the part of the testator to confer an absolute and fee simple estate on the devisee, such intent cannot yield to any subsequent limitation although contained in the same instrument. That contention is certainly true where the testator gives in clear and unambiguous terms an absolute and fee simple estate, and the subsequent limitation or reservation is inconsistent with the estate devised. In such case the subsequent limitation must give way to the fee: *Bernstein v. Bramble*, 81 Ark. 480, 99 S. W. 682, 8 L. R. A., N. S., 1028, 11 Ann. Cas. 343; *Ide v. Ide*, 5 Mass. 500; *Jackson v. De Lancy*, 13 Johns. 537, 7 Am. Dec. 403.

We think the rule is correctly stated by the text-writers and many authorities as follows: "Where property is given in clear language sufficient to convey an absolute fee, the interest thus given shall not be taken away, cut down or diminished by any subsequent, vague and general expressions" (*Underhill on Wills*, sec. 689); or as said by Redfield, "A clearly expressed intention in one portion of the will is not to yield to a doubtful construction in any other portion<sup>447</sup> of the instrument": 1 Redfield on Wills, c. 9, sec. 30c; *Holt v. Wilson*, 82 Kan. 268, 108 Pac. 87; *McNutt v. McComb*, 61 Kan. 25, 58 Pac. 965; *Lohmuller v. Mosher*, 74 Kan. 751, 87 Pac. 1140, 11 Ann. Cas. 469; *Byrnes v. Stillwell*, 103 N. Y. 453, 57 Am. St. Rep. 760, 9 N. E. 241; *Washbon v. Cope*, 144 N. Y. 287, 39 N. E. 388. In other words, the rule adopted by many courts and as we believe the one more reasonable, when stated conversely, is substantially as follows: "When the limitation is clear and unmistakable, it is to be taken and considered in determining the intent of the testator, and the whole instrument must be considered together in determining the character and extent of the estate given."

In the light of these principles and rules of law, we turn to the provision of the will now under consideration to ascertain the intent and purpose of the testator as therein expressed. He first says, "My son Jesse shall have the home place." This is immediately followed by the limitation, "But should my son Jesse die without any wife or children, the

property herein conveyed to him shall be equally divided between my other four children," etc. It is contended that the words "shall have" pass an unqualified fee simple estate. It may be conceded for the purposes of this case that these words, standing alone, unlimited and unqualified, are sufficient to pass an absolute estate: *Fairclaim v. Guthrie*, 1 Call (Va.), 7; *Chapman v. Turner*, 1 Call (Va.), 280, 1 Am. Dec. 514; *Franklin v. State*, 52 Ala. 414; *George v. Green*, 13 N. H. 521. These words, however, immediately followed by the modification must be considered in view and in light of the words thus modifying and limiting the estate given. A testator can no more readily than anyone else express his full purpose and intent in one sentence—he cannot devise and limit an estate in one and the same word, phrase, clause or sentence. He must express his intention in words, and each person adopts his own peculiar methods of expressing himself. The duty of the law is to discover his intent as conveyed by the language employed. Had the words "without any wife or children" been omitted from this sentence employed in this will, then it would have been the clear intent of the testator <sup>448</sup> to refer to the death of Jesse Wilson as taking place prior to the death of the ancestor, because to attempt to give it any different construction would be to render the language meaningless. That Jesse Wilson would die some time, either before or after the death of the testator, was self-evident and axiomatic, but that he would die prior to the death of the testator was uncertain and problematic. Since, however, the testator saw fit to insert the words "without any wife or children," and thereby designate the condition and circumstance under which the death of Jesse Wilson should vest a fee simple estate, and since that condition may as readily occur subsequent to the death of the testator as prior, and may also fail to ever occur, it would therefore be robbing the limitation of the greater portion of its meaning and scope of operation to limit it to the period of time prior to the death of the testator. There can be no room for reasonable doubt but that the testator here meant to give his son Jesse Wilson a limited or qualified fee in the home place subject to divestiture on the death of Jesse Wilson without leaving surviving him a wife or child. It is therefore clear to us that the plaintiffs have a contingent remainder in this estate which may be defeated upon the happening of the contingency named in the will which was intended by the testator to vest the absolute fee to the estate: Rev. Codes, secs. 3062, 3072 and 3075; *Jewell v. Pierce*, 120 Cal. 79, 52 Pac. 132; *First Universalist Society v. Boland*, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231. Upon the death of the devisee leaving surviving him a wife or child, the limitation or qualification will instantly be removed and the fee will be left absolute. If, on the other



hand, he die without leaving surviving him a wife or child, this base or qualified fee will be instantly terminated and the unqualified fee will be vested by the terms of the will in the other brothers and sisters therein named.

It is also contended by respondent that the decree of distribution made by the probate court in this matter under sections 5621 and 5624, Revised Codes, is void for the reason that no bond was required. Whatever the error might be in not requiring a bond in case of a partial distribution under sections <sup>449</sup> 5621 and 5624, Revised Codes, it can make no difference to respondents in this case, for the reason that the language of the order is in identically the same words as the will, and they and their grantor must rest any claim they have to this real estate on either the provision of the will or the decree. No objection to the failure to give bond is being made by either a creditor or the executor or administrator, and respondents do not claim to be creditors, but are claiming the estate through the medium of the will.

The contention over this case in this court has revolved about the right of appellants to maintain their action and the construction of the will under which the parties claim their respective interests to this property. No point has been made and no discussion has been had as to the sufficiency or insufficiency of this complaint to charge fraud, collusion or conspiracy between the respondents and the devisee, Jesse Wilson, in order to have this property sold at tax sale and thereby procure a tax title to the property for the purpose of defeating the expectancy of the appellants. We therefore express no opinion whatever with reference to the sufficiency of the allegations in this respect.

For the reasons hereinbefore given, the judgment in this case must be reversed, and it is so ordered, and the cause is hereby remanded. Costs awarded to appellants.

Sullivan, C. J., concurs.

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*The Rights and Remedies of Remaindermen* or reversioners are discussed in the note to *Allen v. De Groodt*, 14 Am. St. Rep. 628.

*The Distinction Between Vested and Contingent Remainders* is stated in *Golladay v. Knock*, 235 Ill. 412, 126 Am. St. Rep. 224. A devise to the testator's wife for life "and to her children after her death," and if she does not have children "that will live to inherit" the land, then it shall, on the death of her and her children, go to a named person and his heirs, creates a contingent remainder with a double aspect, and the children have no vested interest unless they survive the mother: *Golladay v. Knock*, 235 Ill. 412, 126 Am. St. Rep. 224, and see cases cited in the cross-reference note thereto.

*The Law Favors the Vesting of Estates*, and, if possible, construes the terms of a will as creating a vested estate rather than a contingent one: *Patton v. Ludington*, 103 Wis. 629, 74 Am. St. Rep. 910; *Ducker v. Burnham*, 146 Ill. 9, 37 Am. St. Rep. 135; *Gray v. Whittemore*, 192 Mass. 367, 116 Am. St. Rep. 246; *Mettler v. War-*

ner, 243 Ill. 600, 134 Am. St. Rep. 888; McKinley v. Martin, 226 Pa. 550, 134 Am. St. Rep. 1076.

*When the Words of a Will at the Outset Clearly Indicate a disposition in a testator to give the entire interest, use and benefit of the estate devised absolutely to the first donee, that estate will not be cut down to a less one by subsequent or ambiguous words inferential in their intent:* Jackson v. Littell, 213 Mo. 589, 127 Am. St. Rep. 620; Sevier v. Woodson, 205 Mo. 202, 120 Am. St. Rep. 728; Platt v. Brannan, 34 Colo. 125, 114 Am. St. Rep. 147. However, a devise of a fee may be restricted by subsequent words in the will and reduced to a life estate. Thus, if the first sentence in one section of a will, standing alone, vests a fee simple in the husband of the testatrix, although there are no words of inheritance in the devise, but the second sentence provides that after his death the property shall revert to her heirs upon their paying his heirs the value of the improvements thereon, he takes an estate for life only: Hill v. Giannelli, 221 Ill. 286, 112 Am. St. Rep. 182.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**ILLINOIS.**

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**AETITUS v. SPRING VALLEY COAL COMPANY.**

[246 Ill. 32, 92 N. E. 579.]

**JUROS—Examination on Voir Dire.**—In an action for personal injuries by an employee against his employer, it is improper for counsel, except for the purpose of exercising the right of peremptory challenge, to ask a juror on his voir dire if he is interested in any casualty company which insures employers against damages for injuries to employees; but if an objection to such examination is promptly sustained, and the verdict is not large considering the extent of the injuries, the error is not ground for reversal. (pp. 223, 224.)

**EMPLOYER'S LIABILITY—Report of Accident as Evidence.** In an action by a mining employee for injuries sustained in an accident, the report to the state mining inspector and the record of the accident, which are required by statute to be made, are admissible in evidence. If some parts thereof are objectionable, counsel should point them out to the court and ask that they be excluded from the consideration of the jury. (pp. 224, 225.)

**EMPLOYER'S LIABILITY—Duty to Mark Dangerous Places in Mine.**—The owner or operator of a mine cannot excuse himself from liability in consciously violating the statute requiring him to mark dangerous places in the mine, on the ground that his examiner and manager looked at the places and in good faith thought them not dangerous. (p. 225.)

**EMPLOYER'S LIABILITY—Duty to Mark Dangerous Places in Mine.**—When a mine owner or operator is advised of the conditions in the mine, he must place therein, if it is dangerous, the marks required by statute. If he fails to do so, he acts at his peril, and cannot excuse himself because he or his examiner or manager may think the mine safe. (p. 226.)

**EMPLOYER'S LIABILITY—Duty to Mark Dangerous Places in Mine.**—The duty imposed by the Illinois statute on the operator or owner of a mine of examining and marking dangerous places therein is mandatory. (p. 226.)

McDougall, Chapman & Bayne, for the plaintiff in error.

J. L. Murphy and William Hawthorne, for the defendant in error.

<sup>23</sup> HAND, J. This was an action on the case commenced in the circuit court of Bureau county by Charles Aetitus, the

defendant in error, against the Spring Valley Coal Company, the plaintiff in error, to recover damages for a personal injury alleged to have been sustained by the defendant in error while in the employ of the plaintiff in error as a company man in its coal mine, in consequence of the willful violation by the plaintiff in error of sections 16 and 18 of the mines and mining act in force on January 21, 1907, the date of the injury. The jury disagreed upon the first trial, and upon the second trial a verdict was rendered in favor of defendant in error for the sum of two thousand dollars, upon which the court, after overruling motions for a new trial and in arrest of judgment, rendered judgment, which judgment upon appeal, was affirmed by the appellate court for the <sup>34</sup> second district, and the record has been brought to this court by a writ of certiorari for further review.

The case was submitted to the jury upon a declaration consisting of two counts, and the general issue was pleaded. The first count was based upon section 18 of the mines and mining act, and charged a duty rested upon the plaintiff in error to employ a legally qualified mine examiner, and on each day to cause said mine examiner to visit and inspect the mine before the men were permitted to enter it, and to observe whether there were any unsafe conditions in the mine, and to mark conspicuously all places where dangerous conditions existed; and the second count was based upon section 16 of said act, and charged the duty of the plaintiff in error, through a duly qualified manager of said mine, to see that all dangerous places above and below were properly marked and danger signals displayed when required. Each count averred a willful disregard of the duty charged, in consequence of which the defendant in error was injured.

The evidence introduced on behalf of the defendant in error fairly tended to show that the plaintiff in error was engaged in constructing a mule stable in its mine; that in order to prepare a location for the stable it cleared out a space in an old entry-way in the mine some thirteen feet square, which entry-way had at one time been used as a lye or switch and later as a gob room; that the space had been timbered about twenty years and was situated beneath about four hundred feet of rock and earth; that the sides were perpendicular for four or five feet from the floor of the entry-way and came together in the form of an arch at the top, the highest place, near the center, being from twelve to thirteen feet from the floor of the entry-way; that the accident occurred in the forenoon on Monday; that on the previous Friday, Saturday and Sunday plaintiff in error had caused the gob timbers and the rock and debris which had fallen down to be removed from the said <sup>35</sup> space; that on the morning of the injury the defendant in error and a workman by the name

of Challenger, with the mine manager, met at the place where the stable was to be built, and the defendant in error and Challenger were directed by the mine manager to cut into the south rib of the cleared space two places, some five feet apart, from the floor to the height of eight or more feet, into which to place timbers as a support for the wall and roof of the stable; that the manager made chalk marks where the cuts for the upright timbers were to be made, and directed defendant in error to make one and Challenger the other; that thereafter the manager went away, and during the morning the assistant manager visited the place and gave the defendant in error and Challenger some directions as to the work; that the manager stated to the defendant in error and Challenger, before he left them, to be careful, as the rock might fall; that there were no marks or other signs notifying the defendant in error or Challenger the place was dangerous, neither of whom, so far as the evidence shows, had been at the place after the gob, debris and timbers had been removed until they went to work to make the cuts in the rib; that the only lights in the place were from small lamps worn upon the caps of the men; that the defendant in error and Challenger pulled down some loose rock and tested the roof above them with their picks so far as they could and then commenced to make the cuts in the rib; that after they had worked about two hours, and after the defendant in error had made a cut in the rock of the rib from the floor of the entry-way about seven or eight feet high and from six inches deep at the bottom to from fifteen to eighteen inches deep at the top, there was a fall of about two tons of rock from the roof immediately over where the defendant in error was standing, which struck him and knocked him down, rendering him unconscious and breaking his right arm and otherwise injuring him. The mine manager, the assistant mine manager <sup>36</sup> and the mine examiner of the plaintiff in error testified that they had each examined the space where the stable was to be built after the gob timbers and other debris had been removed, and that it was not a dangerous place in which to work at the time the defendant in error was set to work, and that no report had been made showing the place to be dangerous or any danger marks placed or notice for men to keep out for the reason that the place was not dangerous, and the mine manager testified the fall of rock was caused by reason of the work done by the defendant in error and Challenger in the place.

It is first contended that the court erred in refusing to take the case from the jury at the close of all the evidence. The question whether the rock and other debris which fell and struck defendant in error fell by reason of the condition of the roof before the defendant in error commenced work and that the place should have been marked as dangerous was

a question of fact for the jury, and we think the evidence fairly tended to support the contention of defendant in error that the place was a dangerous place and should have been marked. The trial court, therefore, did not err in declining to take the case from the jury.

The attorney for defendant in error inquired of two of the jurors, on their voir dire, if they were interested in any casualty company which insured employers of labor against damages for injuries to employees. The court sustained an objection to that course of examination. Such examination, if made for the purpose of enabling counsel to exercise their right of peremptory challenge, was held in *Iroquois Furnace Co. v. McCrea*, 191 Ill. 340, 61 N. E. 79, to be proper. The trial court sustained an objection to the examination, and doubtless was of the opinion, from the character of the examination and the persons who were being interrogated, that the questions were not asked for the purpose of exercising the right of peremptory challenge of said jurors, but that the examination, under the authority <sup>37</sup> of *McCarthy v. Spring Valley Coal Co.*, 232 Ill. 473, 83 N. E. 957, was improper. As the amount of the verdict is not large considering the defendant in error's injuries, and as the objection to the examination was promptly sustained by the trial court, we think, although the examination may have been for an improper purpose, its effect was not prejudicial and that the judgment of the trial court should not be reversed by reason of such examination. In a case, however, where the verdict is large and it is not apparent the examination was for the purpose of exercising the right of peremptory challenge, under the authority of the *McCarthy* case we should not hesitate to reverse a judgment where the fact that the defendant, an employer of labor, was insured by a casualty company against damages for injuries to his employees had been improperly brought before the jurors during their voir dire.

It is also insisted by the plaintiff in error that the trial court committed reversible error in admitting in evidence the report of the accident made by plaintiff in error's general superintendent to the state mine inspector, and in admitting in evidence the record of the accident made and filed in plaintiff in error's office under the provisions of section 27 of the mines and mining act, first, on the ground that said report and record were not admissible in evidence for any purpose; and secondly, because the general superintendent's report contained a statement that "a piece of rock fell from the top and struck him," and because the record of the accident contained a statement that the defendant in error "had a wife and child." The report and the record were required by the statute to be made, and we see no reason why they were not admissible in evidence to establish the facts required



to be reported to the mine inspector and kept in the office of the plaintiff in error with reference to the accident. If, when the report and record were offered in evidence, any particular parts thereof were thought by counsel to have been objectionable, they should <sup>38</sup> have pointed out to the court the objectionable parts and asked that those parts of the report and of the record be excluded from the consideration of the jury. The particular portions now complained of were not thus objected to in the trial court, and the court did not err in admitting the report and record in evidence: *McCann v. People*, 226 Ill. 562, 80 N. E. 1061.

The case was apparently tried by plaintiff in error on the theory that if the mine examiner and the mine manager looked the place over where the injury occurred and thought it was not dangerous, and their determination of that fact was made in good faith, the plaintiff in error would not be liable for the injury to defendant in error, even though the jury were justified, from the evidence, in finding the place was dangerous and should have been marked as a dangerous place—in other words, that “good faith” on the part of the owner or operator of a coal mine in a suit for a willful violation of the mines and mining act is a defense. We do not think the owner or operator of a mine can excuse himself from liability growing out of a willful violation of the mines and mining act—that is, from a conscious violation of the act—in failing to properly examine the mine and mark dangerous places therein which are known to him, on the ground that his examiner or manager in good faith thought the place was not dangerous. If this were the law, the right of recovery would not rest upon a conscious violation of the statute but upon the opinion of the owner or operator or his vice-principal—that is, his examiner or manager—as to whether the mine was safe or in a dangerous condition. It has been repeatedly held to this court that it is the duty of the owner or operator of a mine to have his mine examined and if it is in a dangerous condition to have the dangerous places designated by the statutory marks, and if he fails in either particular, with knowledge of its dangerous condition or with knowledge of facts from which he ought to know of its dangerous <sup>39</sup> condition he is liable to a person in the mine under his employ who is injured as a result of his willful failure to obey the mandates of the statute. If the mine is in a dangerous condition, and the owner or operator has failed, with knowledge of its condition, to comply with the statute, he is liable, and he cannot excuse himself on the ground that he had the mine examined and in good faith thought it was not dangerous. His liability does not rest upon the ground that in good faith or bad faith he thought there

was no danger in the mine, but upon the ground that he has, knowing the facts which made the mine dangerous, failed to have the statutory marks properly placed in the mine. When the mine owner or operator is advised of the conditions in the mine, he must place in the mine, if it is dangerous, the statutory marks, and if he fails to do so he acts at his peril, and he cannot excuse himself because he or his examiner or manager may think the mine safe. To so hold would be to permit the mine owner or operator, or his examiner or manager, to usurp the functions of the court and jury, and to pass upon a question which, in every case like this, is a matter of proof and is to be determined as a fact by the jury: *Catlett v. Young*, 143 Ill. 74, 32 N. E. 447; *Odin Coal Co. v. Denman*, 185 Ill. 413, 76 Am. St. Rep. 45, 57 N. E. 192; *Davis v. Illinois Collieries Co.*, 232 Ill. 248, 83 N. E. 836; *Eldorado Coal etc. Co. v. Swan*, 227 Ill. 586, 81 N. E. 691; *Mertens v. Southern Coal etc. Co.*, 235 Ill. 540, 85 N. E. 743; *Olson v. Kelly Coal Co.*, 236 Ill. 502, 86 N. E. 88; *McCarthy v. Spring Valley Coal Co.*, 232 Ill. 473, 83 N. E. 957.

It is said by the plaintiff in error that the duties imposed upon the owner or operator of a mine by the mines and mining act in some instances are mandatory, while in others the performance of the duties imposed by that act upon the owner or operator involves the exercise of judgment, and that the performance of the latter class of duties, among which is that of discovering and marking dangerous places in the mine, involves only the exercise of good faith on the part of the owner or operator. We do not <sup>40</sup> think the distinction pointed out a valid one, but are of the opinion this court is committed to a different doctrine. In *Eldorado Coal and Coke Co. v. Swan*, 227 Ill. 586, 81 N. E. 691, the claimed violation was the failure to maintain a light at the bottom of the shaft. The evidence showed there was a light at that place, but was conflicting as to the size and power of the light. The statute required a light sufficient to show the landing and surrounding objects distinctly, and the contention was made that the determination of the question whether the light was sufficient to show the landing and its surroundings distinctly involved the exercise of judgment, and if the appellant company had attempted in good faith to comply with the requirements of the statute in that particular it was relieved from liability. The court held otherwise. On page 590 it was said: "Appellant's most serious contention is, that even if it be conceded that the light was not fully up to the legal requirements in respect to the amount of light, still when the evidence all shows that appellant had made an honest effort to comply with the statute and had partially failed, it cannot be adjudged guilty of a willful violation of the law even if its partial failure arises from negligence on its part in the selection of the means or the method of their

application with the view of complying with the statute. This argument is more ingenious than sound. The fallacy of the argument results from the assumed meaning of the word 'willful,' as it is used in the miners' act. If it were necessary to show an evil intent or any blamable conduct to establish the willfulness contemplated by this statute, then there would be more force in this contention. But no such construction of this statute has ever been recognized by this court. On the contrary, it has often been held that an act consciously done—that is, proceeding from the free and voluntary will—is willful, within the statute." The court then cited *Catlett v. Young*, 143 Ill. 74, 32 N. E. 447, and numerous other cases, and commented thereon, and on page 592 <sup>41</sup> said: "These cases are sufficient to show that under the established construction given to the word 'willful' in this statute the questions of the existence or nonexistence of good faith or the presence or absence of an intention to comply with the statute on the part of the operator are not involved. In the case at bar the jury have found against appellant on the question of fact as to its willful failure to maintain a sufficient light so that persons could discern the cage and surroundings, and this finding is supported by evidence, and the mere fact that the undisputed evidence shows that appellant maintained an inadequate light at the bottom does not, as a matter of law, show a compliance with the statute. The intent and purpose of this statute is to require the mine owner to provide a light at the bottom of the shaft of sufficient capacity to enable any person approaching the bottom to clearly discern the cage and the objects in the vicinity. The sump is in the vicinity of the cage, and the light ought to be sufficient to enable one coming to the bottom to see where the sump is. It cannot be said, either as a matter of fact or law, that a small oil torch located a few inches from the bottom of the shaft, giving out a flame one or two inches high, is such a light as the law contemplates shall be maintained."

In *Olson v. Kelly Coal Co.*, 236 Ill. 502, 86 N. E. 88, the defendant was charged with the willful violation of the mines and mining act, and the court, on page 506, said: "The evidence was conflicting as to the condition of the debris upon the gob side of the entry, where the accident occurred. The evidence of the appellee tended to show it was piled near the track to a height of from eighteen inches to three feet, which made it very dangerous to persons similarly situated to appellee at the time he was injured, while the evidence of the appellant tended to show the entry at the point of the injury was in a safe condition. The question of the condition of the entry at the point where the accident occurred was one of fact to be determined by the jury, and <sup>42</sup> not by the mine examiner. The mine examiner had no

power to adjudicate the question of the safety of the entry at that point (Davis v. Illinois Collieries Co., 232 Ill. 284, 83 N. E. 836), and if the appellant permitted the appellee to enter the mine to work therein, otherwise than under the direction of its mine manager, knowing of said dangerous condition, before said dangerous condition had been made safe, such conduct on its part constituted upon the part of the appellant a conscious violation of section 18 of the mines and mining act and rendered the appellant liable to the appellee for a willful violation of said act."

The plaintiff in error has urged as grounds of reversal certain remarks made to the jury by the attorney for the plaintiff on the argument of the case. While what was said by the attorney might well have been omitted, we do not think the remarks constitute grounds of reversal.

Finding no reversible error in this record, the judgment of the appellate court will be affirmed.

**Cooke, Cartwright and Dunn, JJ., Dissenting.**—"We do not agree with the majority that every failure on the part of a mine examiner to discover a dangerous condition in a mine is a willful violation of the statute, nor do we think that the cases cited in the majority opinion support that doctrine. A willful violation of this statute must necessarily be a conscious or knowing violation. To hold that a mine examiner is bound to discover a dangerous condition in the mine, even though by the honest application of every known means it is impossible to detect it at the time of the examination, and that a failure to discover such condition under such circumstances is willful, is to read into the statute that which is not there, and is to require of a mine operator that which is impossible for him to perform. This statute is not meant to make the operator an insurer against every accident in his mine which results from dangerous conditions, but only requires him to cause an examination to be made by an authorized examiner, to make the required records of the examination, and to mark such places as are found, upon proper examination and the honest use of approved methods, to be dangerous. It is only a failure to make such an examination that constitutes a willful violation of the statute in respect to guarding against dangerous conditions in mines."

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*The Duty of Mine Owners to Prevent Injury to Their Employees* is the subject of a note to *Wellston Coal Co. v. Smith*, 87 Am. St. Rep. 557.

*Where the Statute Declares That a Master Shall Adopt Specific Precautions* for the safety of his servants, as that he shall use iron cages of a specified kind for lowering and elevating men in deep mines, the rule of reasonable care is no longer the measure of his duty. His compliance with the command of the legislature becomes imperative, and any failure to observe the required precautions or to provide the prescribed appliance is such a breach of duty as renders him liable for any injury caused by his disobedience: *Monson v. La France Copper Co.*, 39 Mont. 50, 133 Am. St. Rep. 549, and see the cases cited in the cross-reference note thereto.

**VENNER v. CHICAGO CITY RAILWAY COMPANY.**

[246 Ill. 170, 92 N. E. 643.]

**CORPORATION—Common-law Right to Inspect Books.**—Under the common law the right of a stockholder to inspect the books of his corporation can be enforced only when he asks it in good faith and for reasons connected with his rights as a stockholder. (p. 231.)

**CORPORATION—Statutory Right to Inspect Books.**—Where the right to inspect corporate books is conferred by statute in absolute terms upon stockholders, their purpose or motive in demanding an inspection is not material, and they cannot be required to state their reasons therefor. (p. 231.)

**CORPORATION—Statutory Right to Inspect Books.**—Where the right of a stockholder to inspect the books of his corporation is given in absolute terms by statute, he need not show, in his petition for mandamus to enforce the right, the object of his inspection, and it is no defense to allege improper purposes or that he desires the information in order to injure the business of the company. (p. 231.)

**CONSTITUTIONAL LAW.**—One Legislature cannot Tie the Hands of future legislatures so as to prevent the proper exercise of the reserved rights of the people to pass all reasonable laws which the constantly changing conditions of the state may require for the promotion of its general welfare. (p. 232.)

**CORPORATION—Franchise is Subject to Subsequent Statutes.** Whatever grants, stipulations or restrictions may be found in the charter of a corporation, it is within the power of subsequent legislatures to render it subject to general laws enacted under the police power of the state. (pp. 232, 233.)

**CORPORATION—Statutory Right of Inspection.**—The purpose of section 13 of the Illinois incorporation act, which requires corporations to keep books of account at their principal place of business and gives stockholders the right to examine the records and books of their corporation, is to protect the public from monopolies, unlawful combinations, and unreasonable exactions from corporations, as well as to protect the interests of stockholders. (p. 234.)

**CORPORATION—Statute Giving Right to Inspect Books.**—Under a statute requiring the directors "of every stock corporation" to keep books of account at its principal place of business, and giving "every stockholder in such corporation" the right to inspect the books and records of the corporation, "every stockholder" means "each and all." (pp. 235, 236.)

**WORDS AND PHRASES.**—The Word "Every" means "each and all." (pp. 235, 236.)

**CORPORATION—Statute Giving Right to Inspect Books.**—The Illinois statute requiring corporations to keep books of account at their principal place of business and giving stockholders the right to inspect these books applies to corporations organized under previous special laws, and is not unconstitutional. (pp. 235, 236.)

**CORPORATION—Statute Giving Right to Inspect Books.**—A statute requiring corporations to keep books of account at their principal place of business, and giving stockholders the right to inspect the books and records of their corporations, is a proper exercise of the police power. (p. 238.)

**CORPORATION—Inspection of Books—Mandamus.**—The right of a stockholder to inspect the books of his corporation may be enforced by mandamus. (p. 238.)

Elijah N. Zoline, for the appellant.

E. R. Bliss and George Gillette, for the appellees.

<sup>171</sup> VICKERS, C. J. Clarence H. Venner filed a petition for mandamus against the Chicago City Railway Company and its president and secretary to compel the defendants to permit him to examine the books, records and accounts of the company which were under the control of the president and secretary thereof. A demurrer having been sustained to the petition, an amended petition was filed, alleging that Venner acquired certain shares of stock of the Chicago City Railway Company in the year 1905, which he held at the time the petition was filed. He alleged that he had made frequent applications to the company for the privilege of examining its books and that he had been denied such right. The amended petition contains other averments which were intended to support the application for mandamus on common-law grounds. In the view that we have of this controversy it will not be necessary to determine the sufficiency of the petition under the common law, and therefore not necessary to set out those averments in the petition. A demurrer <sup>172</sup> interposed to the answer filed by defendants was carried back and sustained to the amended petition. The petitioner elected to abide by his amended petition, and it was dismissed and judgment rendered against petitioner for costs. The appellate court for the first district affirmed the judgment below, and the cause has been brought to this court by petitioner on a certificate of importance.

Section 13 of chapter 32 of Hurd's Revised Statutes of 1909 provides as follows: "It shall be the duty of the directors or trustees of every stock corporation to cause to be kept at its principal office or place of business in this state, correct books of account of all its business, and every stockholder in such corporation shall have the right at all reasonable times, by himself or by his attorney, to examine the records and books of account of the corporation." This section of the statute is a part of our general act concerning corporations for pecuniary profit, which was approved April 18, 1872, and went into force July 1, 1872.

The Chicago City Railway Company was incorporated under a special public act of the legislature, which was approved February 14, 1859, and by its terms went into force from and after its passage. The act of 1859 created certain persons therein named a body corporate, by the name of "The Chicago City Railway Company," and authorized the said corporation to "construct, maintain and operate a single or double track railway, with all necessary and convenient tracks for turnouts, sidetracks and appendages, in the city of Chicago, and in, on, over and along said street



or streets, highway or highways, bridge or bridges, river or rivers, within the present or future limits of the south or west division of the city of Chicago, as the said council of said city have authorized said corporators or any of them, or shall authorize said corporators so to do." The capital stock of the said corporation was fixed at one hundred thousand dollars, with power to increase from time to time at the pleasure of said corporation, and it was provided by section 4 of <sup>173</sup> said act that "all the corporate powers of said corporation shall be vested in and exercised by a board of directors and such officers and agents as said board shall appoint. . . . They [the board of directors] may also adopt such by-laws, rules and regulations for the government of said corporation and the management of its affairs and business as they may think proper, not inconsistent with the laws of this state.

There is nothing in the act of 1859 in relation to the keeping of books by the corporation or the inspection thereof by the stockholders, and no express declaration in said act that the corporation thereby chartered should be subject to laws that might thereafter be passed by the legislature. Under the situation thus presented appellant contends that he has a statutory right, under section 13 of the general corporation act, to inspect the books of the company. Appellees deny that the Chicago City Railway Company is subject to section 13, and insist that appellant's right to the inspection of its books exists only under the common law and must be exercised in accordance therewith.

There is a well-recognized distinction between the right of a stockholder to inspect the books and papers of a corporation under the common law and an unlimited right given by statute. Under the former the examination can only be compelled where the stockholder asks it in good faith and for reasons connected with his rights as a stockholder: *Heminway v. Heminway*, 58 Conn. 443, 19 Atl. 776; *Sage v. Lake Shore R. R. Co.*, 70 N. Y. 220; *Phoenix Iron Co. v. Commonwealth*, 113 Pa. 563, 6 Atl. 75; *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222. Where the right is conferred by statute in absolute terms, the purpose or motive of the stockholder in making the demand for an inspection is not material and he cannot be required to state his reasons therefor: *Thompson on Corporations*, 2d ed., sec. 4516. The weight of American authority is to the effect that where the right is statutory the stockholder need not aver or show the object <sup>174</sup> of his inspection, and it is no defense under a statute granting the absolute right to inspection to allege improper purposes or that the petitioner desires the information for the purpose of injuring the business of the corporation. A clear legal right given by a statute cannot be defeated by showing an improper motive. If this were so, the stockholder would

be driven from a certain definite right given him by the statute, to the realm of uncertainty and speculation: Thompson on Corporations, 2d ed., sec. 4516, Johnson v. Langdon, 135 Cal. 624, 87 Am. St. Rep. 156, 67 Pac. 1050. Leaving out of view entirely the sufficiency of the petition under the common law it must be conceded that it is sufficient under the statute, and it follows that if section 13 of the general corporation law applies to the Chicago City Railway Company, the court erred in sustaining the demurrer to and dismissing the amended petition.

Charters granted to a corporation by the legislature are regarded as contracts between the corporation and the state and are within the protection of the constitution of the United States, which prohibits a state from passing any law impairing the obligation of contracts. While these rules are fundamental and are thoroughly established in the American law of corporations, still the state possesses certain reserved powers in relation to the control and management of corporations which can never be surrendered. One legislature cannot tie the hands of future legislatures so as to prevent the proper exercise of the reserved rights of the people to pass all reasonable laws which the constantly changing conditions of the state may require for the promotion of its general welfare. Whatever grants, stipulations or restrictions may be found in a charter of a corporation, it is within the power of subsequent legislatures to render it subject to general laws enacted under the police power of the state. The power of the state to protect the lives, limbs, health and property of all persons within the state exists at all times, and its proper exercise cannot be <sup>175</sup> restricted or embarrassed by any previous attempt to grant any person, either natural or artificial, immunity from its exercise. In Galena etc. R. R. Co. v. Appleby, 28 Ill. 283, this court held that an exemption in a railroad charter from the thirty-eighth section of the general railway law, which required locomotives to carry a bell of at least thirty pounds weight, or a steam whistle, and that the bell be rung or the whistle blown at the distance of at least eighty rods from every road crossing, did not give the railroad company a vested right to operate its trains without complying with said section, and that the legislature had the power to repeal the exemption clause in the charter and to require the railroad company to comply with the general law upon that subject. And in Ohio etc. R. R. Co. v. McClelland, 25 Ill. 140, the question was presented whether the General Assembly might require railroads already constructed and in operation to fence their tracks where there was no such requirement imposed by the charter, and it was there held that it was a police regulation and that the legislature might impose the duty. It was also held that the right

to adopt such police regulations for the safety of the people is a fundamental principle lying at the very foundation of government itself and may be exercised by the legislature upon individuals and corporations alike; that when these bodies accept their charters it is upon the implied condition that they are to exercise their franchises subject to the power of the state to impose such regulations as the safety of the public may require; and it was said in that case, "that when the safety of persons or property may require it, the legislature may demand the exercise of their franchises in such a mode as to afford the necessary protection." In *Toledo etc. Ry. Co. v. Deacon*, 63 Ill. 91, it was held that by the grant of corporate franchises to railroad companies to procure the right of way and operate their trains by the power of steam the state did not deprive itself of its inherent <sup>176</sup> power to enact all police laws necessary and proper to protect the lives and property of its citizens.

The distinction between the powers which the legislature may exercise where there is an express reservation in the charter and those which may be exercised under the general police power where there is no reservation is not very clearly drawn. In those cases where a reservation is present the subsequent legislation has usually been sustained because of such reservation, and where no reservation is found, the subsequent legislation is sustained, if at all, under the general police power, which, as we have already seen, is always reserved. Even where the power of the state to alter or amend a charter is expressly reserved in the grant, it is still subject to the limitation that it shall not be exercised in such way as to destroy vested rights or impair the obligations of contracts. The legislature cannot reserve the right to pass an unconstitutional law under the guise of altering or amending a corporate charter: *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629; *Hays v. Commonwealth*, 82 Pa. 518. Subject to these limitations the legislature has the power to make any reasonable amendments regulating the exercise of the corporate franchises which in its discretion may be deemed necessary or proper: *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357; *Maynard v. Looker*, 111 Mich. 498, 69 N. W. 929, 56 L. R. A. 947.

By reference to section 13 of our general corporation act it will be seen that there are two propositions embodied in that section. The first proposition imposes a duty upon the directors or trustees of "every stock corporation to cause to be kept at its principal office or place of business in this state, correct books of account of all its business"; and the second proposition is, that "every stockholder in such corporation shall have the right at all reasonable times, by himself or by his attorney, to examine the records and books of

account of the corporation." The intention of the legislature in passing this section is the controlling <sup>177</sup> consideration in determining its proper construction. Manifestly, the principal purpose of the legislature was to protect the rights and interests of stockholders. But this was not the sole purpose. In order to protect the public from monopolies, unlawful combinations and unreasonable exactions from corporations enjoying special franchises and privileges, the state has the right to exercise a visitorial power over them, and to make this power effective and to facilitate its exercise was one of the important purposes in requiring "every stock corporation to cause to be kept at its principal office or place of business in this state, correct books of account of all its business." In the case of *North and South Rolling Stock Co. v. People*, 147 Ill. 234, 35 N. E. 608, 24 L. R. A. 462, in discussing this section of the statute, this court, on page 252, said: "The thirteenth section of the statute under which the defendant was incorporated provides that it shall be the duty of the directors or trustees of every stock corporation to cause to be kept at its principal office or place of business in this state correct books of account of all its business, and every stockholder in such corporation shall have the right, at all reasonable times, by himself or by his attorney, to examine the records and books of account of the corporation. It would seem that the primary object of this statutory provision is to protect the rights of stockholders, and the evidence is positive that whenever a stockholder has desired to examine the books at that place they have been produced there for his examination. It is probable that the statute may have had other objects in view in requiring the books to be kept at the principal office in this state, as, for instance, to aid the state in exercising its visitorial power over the corporation, or, perhaps, to enable creditors of the several stockholders to ascertain the number of shares of stock standing in the names of each, so as to levy their executions or attachments thereon."

In the case of *People v. Chicago etc. Ry. Co.*, 223 Ill. 581, 79 N. E. 144, 7 Ann. Cas. 1, this court had under <sup>178</sup> consideration the validity of section 6 of the act relating to the railroad and warehouse commissioners in its application to a railroad doing an interstate business. Section 6 requires: "Every railroad company incorporated or doing business in this state, or which shall hereafter become incorporated or do business under any general or special law of this state, shall, on or before the first day of September, in the year of our Lord 1871, and on or before the same day in each year thereafter, make and transmit to the commissioners . . . a full and true statement . . . of the affairs of their said corporation as the same existed on the first day of the preceding July." This court held that section 6 was a valid exercise of

the general police power of the state, and that it was within the reserved powers of the state to require all railroad companies, whether incorporated under the laws of this or any other state, to make and transmit a detailed report once each year. On page 593, in discussing the purposes to be accomplished by section 6, this court said: "All this is, manifestly, for the purpose, in part at least, of uncovering the necessity for such corrective legislation as the state may properly enact. How is the commission to perform these duties unless it has some means of obtaining the necessary data upon which it can act, and such as the executive and legislative branches of the government will require as a guide in the application of appropriate remedies? Section 6 meets this requirement and is the superstructure of the whole act. This law does not impose any tax or license on the business or the property of the company. It does not direct when or how its trains shall be run, or seek to direct, manage or control its internal affairs. So far as this particular section is concerned, it, in effect, says: 'Do your business in your own way, but report to the people of the state once a year what you have, what you are doing and how you are doing it.' "

<sup>179</sup> If the legislature may require railroad corporations incorporated under the laws of other states and engaged in interstate commerce to make these annual reports under the general police power of the state, it would seem clear that section 13 of our general corporation act might be held to apply to the Chicago City Railway Company, and that such company could be compelled by a mandamus to keep correct books of account at its principal office in this state. If this section does not apply to appellee the Chicago City Railway Company, then it may move its principal office to New York or London and keep its books there. There is nothing in the law of 1859 that would prohibit the establishment and maintenance of its principal office in a foreign state or country. It cannot, we think, be seriously contended that the state ever intended that corporations chartered by our legislature should enjoy such complete immunity from the visitorial powers of the state as would result if the construction of section 13 contended for by appellees were adopted. To require corporations to keep correct books of account in this state and to permit their inspection by stockholders does not deprive such corporations of any vested rights or impair the obligations of any contracts, and cannot, therefore, be held unconstitutional when applied to the Chicago City Railway Company. It will be noted that the language "every stock corporation," and "every stockholder in such corporation," is broad, comprehensive and unambiguous. If the requirement that "every stock corporation" shall keep correct books at its principal office in this state includes the Chicago City Railway Company,



then there is no escape from the conclusion that the other clause, "every stockholder in such corporation," includes its stockholders, and the right of the stockholder to examine the books and records exists in all cases where the first clause requires the keeping of such books. The word "every," as used in this section, means "each one and all." It must be held to include the Chicago <sup>180</sup> City Railway Company and its stockholders, unless to so hold would render the act violative of some vested or constitutional right. Similar language to that now under consideration has been judicially construed. A statute of New York provided that "every foreign corporation having an office for the transaction of business in this state shall keep therein a book to be known as a stock-book, containing the names . . . of stockholders," and required such book to be open daily for the inspection of stockholders, and provided a penalty of two hundred and fifty dollars for the refusal to permit any stockholder to examine such book, which penalty was incurred both by the corporation and the officer or agent refusing such examination. In a suit for the penalty by a stockholder for refusing him the right to inspect the book, it was held that the language "for any refusal" meant every refusal, and that cumulative penalties could be recovered for each daily refusal. In the course of the opinion it is there said: "Johnson says the word 'every' means 'each and all,' and the same great lexicographer defines 'any' to mean 'every,' and says it is in all its senses applied indifferently to persons or things": *Purdy v. People*, 4 Hill, 384. In *Cox v. Island Min. Co.*, 65 App. Div. 508, 73 N. Y. Supp. 69, it was held that the language of the New York constitution, "any corporation," meant every corporation, and that it included all corporations, both public and private. Thompson, in his work on Corporations, second edition, section 4516, says: "These statutes [giving stockholders the right to inspect books] apply as well to pre-existing as to subsequently organized corporations," and in support of the text cites *Bay State Gas Co. v. State*, 4 Penne. (Del.) 238, 56 Atl. 1114. That case will be found, upon examination, to sustain the text above quoted. In the Delaware case certain stockholders of the gas company filed a petition for mandamus to compel the inspection of certain books and papers, and based their right to relief on section 29 of the general corporation law of the state of Delaware. <sup>181</sup> The gas company contended that section 29 did not apply to any corporations except those formed under the general corporation law, but the supreme court held otherwise, and sustained the contention of the petitioner that the statute giving the stockholder the right to inspect the books was general and included the gas company, although it was not organized under the general corporation law of the state.



Counsel for appellees attempt to avoid the force of the Delaware case by calling attention to the fact that the court found evidence of the legislative intention to make section 29 applicable to previously existing corporations in section 3 of the act under consideration. It is true that the court referred to section 3 as manifesting an intention that the act should be applied to corporations previously formed. This circumstance does not in any degree weaken the authority. The case is an authority for the general proposition that the legislature may pass a general law of this character and make it applicable to corporations previously organized. This simply brings us back to the question whether there is a manifest intention in section 13 of our corporation act that it shall apply to corporations previously organized. The difference between the Delaware case and the situation presented by this record is, that in the Delaware case the legislative intention was gathered from the consideration of two sections of the statute of that state, while in the case at bar we think the legislative intention to apply section 13 to pre-existing corporations is clearly manifest from the language of said section 13 alone.

Appellees insist that this court is committed to the holding that section 13 only applies to corporations organized under the general corporation law. In support of this contention they rely on *Wincock v. Turpin*, 96 Ill. 135, *Union Life Ins. Co. v. Frear Stone Mfg. Co.*, 97 Ill. 537, 37 Am. Rep. 129, and *Stevens v. Pratt*, 101 Ill. 206. None of these cases apply to section 13 of our chapter on corporations. The *Turpin* <sup>182</sup> case, in 96 Ill. 135, was a bill by a receiver and a depositor against certain stockholders in a bank to enforce their liability under section 25 of the general corporation act, and it was held that section 25, which provides that when certain contingencies arise suits in chancery may be brought by joining the corporation in the suit against all the stockholders, and each stockholder may be required to pay his pro rata share of the debts against the corporation to the extent of his unpaid stock after exhausting the assets of the corporation, applied only to corporations organized under that law and did not embrace bodies created by special charter. If the question here presented was whether section 25 applied to the Chicago City Railway Company, that case would be an authority in point, but it does not follow because section 25 does not apply to companies specially chartered, no other part of the chapter can be applied to such companies. The other cases cited and relied on by the appellees are not in point for the same reason. None of them involved a consideration of section 13. There is nothing in those cases, or in any others decided by this court to which our attention has been called or which we have been able to find, that precludes this court

from holding section 13 applicable to the Chicago City Railway Company. Said section is a proper exercise of the general police power of the state, the enforcement of which will tend to protect the property rights of stockholders, and the security thus afforded will enhance the value and facilitate the sale of corporate stocks.

Appellant's petition states a proper case for a peremptory writ of mandamus under section 13 of the statute.

From what has been said it follows that the court erred in sustaining the demurrer to the petition.

The judgments of the appellate and superior courts are reversed and the cause is remanded to the superior court for further proceedings in accordance with the views herein expressed.

**Justice Carter Dissenting.**—"I do not concur in the conclusion reached in the foregoing opinion. If it were a question of the wisdom of a legislative enactment requiring that the provisions of section 13 of the general incorporation act of 1872 should apply to all corporations, I should most heartily concur, but the question here is whether the legislature intended that section to apply to corporations not organized under the act. This court has already decided that section 25 of this act did not affect corporations not organized thereunder: *Stevens v. Pratt*, 101 Ill. 206; *Wincock v. Turpin*, 96 Ill. 135. Section 5 expressly provides that 'the provisions of this section shall apply to and be binding upon all corporations now existing by virtue of any special charter granted by this state.' In section 26 of the act foreign corporations are expressly mentioned. It would seem to follow naturally that the legislature, in expressly mentioning other corporations in certain sections, did not intend the other sections of this general incorporation act to apply to corporations not organized thereunder. To hold otherwise seems inconsistent not only with the provisions of said sections 5 and 26, but as well with the decisions of this court construing section 25. I do not think that section 13 was intended to apply to corporations not organized under that act."

**Justice Cartwright Dissenting.**—"The general incorporation act provides for the organization, management and dissolution of corporations and defines the rights of stockholders of such corporations. The decision that section 13, which gives to stockholders the right to examine the records and books of account of the corporation, extends to corporations created by special acts, seems to me to disregard a settled and established rule for the construction of statutes which was followed and applied in the decision of the case of *People v. Healy*, 231 Ill. 629, 83 N. E. 453, and was applied to the act now in question in *Wincock v. Turpin*, 96 Ill. 135. The supposed distinction between this case and the one where section 25 was held not to apply to corporations created by special acts, which the opinion adopted in this case says exists, is purely verbal and seems to me to be without substance. The opinion recognizes, and by citation of authorities shows, that the words 'any corporation,' used in section 25, and 'every corporation,' found in section 13, mean precisely the same thing. So the only distinction, in fact,

between the former decision and this one is that the sections are numbered differently, one being numbered 25 and the other 13. That, of course, affords no ground for applying a different rule of construction to the different sections."

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*As to Right of a Stockholder to Inspect the Books of his corporation and the remedies for its enforcement, see the note to Harkness v. Guthrie, 107 Am. St. Rep. 674. The New York statute gives a stockholder the absolute right to inspect the books of the corporation during business hours, and imposes on the corporation and the custodian of the books the absolute duty to permit such inspection, without any disclosure by the stockholder of his purpose: Henry v. Babcock, 196 N. Y. 302, 134 Am. St. Rep. 835. The right of a stockholder to examine the books of his company will be enforced against a foreign corporation, when its usual place of business, and its books and the officer having their custody, are in this state: Andrews v. Mines Corporation, Limited, 205 Mass. 121, 137 Am. St. Rep. 428.*

*Mandamus is a Proper Remedy to Enforce the Right of a Stockholder to examine the books of his corporation: Andrews v. Mines Corporation, Limited, 205 Mass. 121, 137 Am. St. Rep. 428.*

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## PEOPLE v. AMOS.

[246 Ill. 299, 92 N. E. 857.]

**ATTORNEYS—Power of Court to Disbar.**—It rests with the court to determine who are qualified to become its officers as attorneys and for what cause they may be removed. But this power is not arbitrary or despotic, to be exercised according to the pleasure of the court, but is judicial. (p. 241.)

**ATTORNEYS.—The Power of a Court to Disbar Attorneys** should be exercised with sound and just discretion, according to the same rules of law which govern in the determination of other civil rights which are brought before the court for disposition. (p. 241.)

**ATTORNEYS—Disbarment—Evidence and Trial.**—The hearing of an application for the disbarment of an attorney, being judicial, must be governed by the same rules which govern other trials of questions of fact, and the evidence on either side must be such as is legally competent to maintain the issue. He is entitled to a trial before the court upon evidence taken according to the established rules of law. (p. 241.)

**JUDGMENT—Res Judicata—Parties and Privies.**—The doctrine of res judicata has no application against or in favor of anyone not a party or privy. (p. 242.)

**ATTORNEYS—Disbarment—Evidence.**—The Record in a Private suit against an attorney, in which private interests only were represented, while it may be used in disbarment proceedings against him as a basis for entering a rule to show cause, is not admissible in evidence on the hearing. (p. 242.)

John L. Fogle, for the relator.

Helmer, Moulton & Whitman, for the respondent.

<sup>300</sup> DUNN, J. On June 17, 1907, an information was filed by the state's attorney of Cook county, on the relation of the committee on grievances of the Chicago Bar Association, for the disbarment of the respondent, John E. Amos, Jr. The charges made related to the alleged unprofessional conduct of the respondent in connection with the affairs of Joseph J. Miller, who became the respondent's client in October, 1902, and in substance stated that Joseph J. Miller, at the time respondent became his attorney and during all the time that relation existed, was of unsound mind and incapable of transacting business, and that the respondent knew of his want of mental capacity; that the respondent actively assisted the said Joseph J. Miller in converting his property into money, conspired with other unknown persons to get possession of the property and money of the said Joseph J. Miller, and actually did reduce to their possession all, or nearly all, of the property of the said Joseph J. Miller; that the said Miller, soon after the respondent became his attorney, sold for \$4,300 cash certain real estate which was worth four times that amount, and that the respondent received \$1,500 of the purchase money; that on April 8, 1903, \$4,000 in cash was paid to the said Miller in the presence of respondent, which represented an alleged loan by respondent's wife to said Miller, secured by a trust deed upon certain real estate of said Miller; that on April 28, 1903, said Miller was adjudged insane, and the American Trust and Savings Bank was appointed his conservator, but was unable to find any property belonging to him except that included in the trust deed to the respondent's wife and a store building on Cottage Grove avenue, in Chicago—the amounts received from the sale and loan above mentioned, as well as all papers belonging to said Miller, having disappeared. The respondent answered the information, admitting that he had been Miller's <sup>301</sup> attorney in certain matters but denying Miller's insanity; denying knowledge of any want of mental capacity in said Miller and denying any improper conduct on his part; admitting the making of the \$4,000 loan and claiming that it was made in absolute good faith. The American Trust and Savings Bank, after its appointment as conservator, filed a bill in the circuit court for the purpose of canceling the \$4,000 note and trust deed against respondent's wife and respondent, who was named as trustee in the deed. A decree was rendered in accordance with the prayer of the bill, which was affirmed in *Amos v. American Trust etc. Bank*, 221 Ill. 100, 77 N. E. 462. On February 17, 1909, an amended information was filed setting forth the proceedings and decree in that cause and the affirmance thereof by the appellate court and the supreme court, and relying upon that record as cause for the disbarment of the respondent. We sustained a demurrer to the

amended information and ordered that the cause proceed on the original information and respondent's answer thereto. The case was referred to a commissioner to take the proofs and to report his conclusions of law and fact. The evidence has been taken, and the cause is now before us for final disposition upon the exceptions of the respondent to the report of the commissioner.

The evidence taken by the commissioner consists of the transcript of the record which was filed in this court in the case of *Amos v. American Trust etc. Bank*, 221 Ill. 100, 77 N. E. 462, and of the testimony of the respondent orally given before the commissioner. By sustaining the demurrer to the amended information we held that the decree in that case was not a cause for the disbarment of the respondent, and necessarily held that he was not bound in this proceeding by that record. It rests with the court to determine who are qualified to become its officers as attorneys and for what cause they should be removed: *In re Day*, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519. This power, however, is not arbitrary or despotic <sup>302</sup> to be exercised according to the pleasure of the court, but is judicial: *In re Day*, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519; *Ex parte Secombe*, 19 How. 9, 15 L. ed. 565. It should be exercised with sound and just discretion, according to the same rules of law which govern in the determination of other civil rights which are brought before the court for disposal. Accordingly, rule 40 of this court requires an information for disbarment to make clear and specific charges, giving time, place and acts of misconduct with reasonable certainty, and provides for notice to the attorney charged with misconduct and a hearing upon proofs by either side. The hearing, being judicial, must be governed by the same rules which govern other trials of questions of fact, and the evidence on either side must be such as is legally competent to maintain the issue. It is not consonant with law or justice that the respondent's right to practice law should be determined upon evidence which would not be competent against him if he were sued for a debt. "An attorney, by his admission as such, acquires rights of which he cannot be deprived at the discretion of a court any more than a physician of the practice of his profession, a mechanic of the exercise of his trade, or a merchant of the pursuit of his commercial avocation": *People v. Turner*, 1 Cal. 143; *Fletcher v. Daingerfield*, 20 Cal. 427. On an application for the disbarment of an attorney he is entitled to a trial before the court upon evidence taken according to the rules of the common law: *In re Eldridge*, 82 N. Y. 161, 37 Am. Rep. 558; *In the Matter of an Attorney*, 83 N. Y. 164; *In the Matter of an Attorney*, 86 N. Y. 563. "On that trial," it is said in *Eldridge's* case, *supra*, "the accused is not to be buried under affidavits or swamped with

hearsay, but is entitled to confront the witnesses, to subject them to cross-examination and to invoke the protection of wise and settled rules of evidence. In adopting this conclusion we only secure to the members of the bar the common rights and ordinary privileges of the citizen."

<sup>303</sup> It is essential to the administration of justice according to law that the recognized rules of evidence should be observed in this class of cases as well as in all others. The issue is of the most serious importance to the respondent. Unless he should be entitled to the protection of the established rules of law in the admission of the evidence by which he is to be condemned or discharged, the trial would cease to be judicial, and would become merely an inquiry for the purpose of determining the personal action of the judges. If rules of evidence should be observed or not, according to the will of the court, then the action of the court would be arbitrary and not judicial.

The only evidence of any of the material averments of the information is contained in the transcript of the record of the suit instituted by the American Trust and Savings Bank against the respondent and his wife. The decree in that case is conclusive between the parties to it. The doctrine of *res judicata* is, that a point once adjudicated by a court of competent jurisdiction may be relied upon as conclusive upon the same matter, as between the parties or their privies, in any subsequent suit, in the same or any other court, at law or in chancery. But the doctrine has no application against or in favor of anyone not a party or privy. No one not a party to the judgment can claim the benefit of it: *First Nat. Bank v. Peoria Watch Co.*, 191 Ill. 128, 60 N. E. 859; *Litchfield v. Crane*, 123 U. S. 549, 8 Sup. Ct. Rep. 210, 31 L. ed. 199; *Brooklyn City & Newton R. R. Co. v. Nat. Bank*, 102 U. S. 14, 26 L. ed. 61; 1 Greenleaf on Evidence, sec. 523. The American Trust and Savings Bank represented only its own interest and that of John J. Miller in the litigation. That litigation was a private lawsuit, and private interests only were represented. No other interest is now entitled to the benefit of the decree and no other interest is bound by it. Such a record, and the information thereby furnished, may be used as a basis for the entering of a rule to show cause, but upon the return to the rule the cause must be heard <sup>304</sup> upon evidence which is competent against the respondent under the law. The findings of the commissioner, being based entirely on this record, are not sustained by evidence legally competent to establish the truth of the charges against the respondent.

The exceptions to the report will therefore be sustained and the rule on the respondent to show cause why he should not be disbarred will be discharged.



*Proceedings for the Disbarment of Attorneys* are discussed in the notes to *Burns v. Allen*, 2 Am. St. Rep. 847; *In re Philbrook*, 45 Am. St. Rep. 71; *In re Thresher*, 114 Am. St. Rep. 839. A proceeding for the disbarment of an attorney is in no sense a criminal prosecution, though the alleged causes therefor are criminal acts. Its purpose is to ascertain whether the accused is worthy of confidence and possessed of that good moral character which is a condition precedent to the privilege of practicing law and of continuing in the practice thereof: *In re Thresher*, 33 Mont. 441, 114 Am. St. Rep. 834; *Ex parte Finn*, 32 Or. 519, 67 Am. St. Rep. 550. While the proceeding is civil and not criminal, yet more than a preponderance of the evidence is required, and the guilt of the attorney must be clearly established: *In re Evans*, 22 Utah, 366, 83 Am. St. Rep. 794.

*A Court Intrusted With the Power to Admit and Disbar Attorneys* should be considerate and careful in exercising its jurisdiction; the interests of the attorney must in every case be weighed in the balance against the rights of the public, and the court should endeavor to guard and protect both with fairness and impartiality: *People v. McCabe*, 18 Colo. 186, 36 Am. St. Rep. 270.

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## GILLAM v. WRIGHT.

[246 Ill. 398, 92 N. E. 906.]

**EVIDENCE—Competency of Parties as Heirs.**—Where the heirs of a wife bring suit against the heirs of her husband to set aside her deed to him of the homestead, and where the parties are therefore suing and defending as heirs, they are not competent to testify, nor are their husbands or wives in their behalf. (p. 244.)

**HOMESTEAD—Deed by One Spouse to the Other.**—A deed of a homestead by a householder to his or her wife or husband, not subscribed and acknowledged in accordance with the statute by the wife or husband, where possession is not abandoned or given pursuant to the conveyance, does not operate to convey the estate of homestead. (p. 245.)

**HOMESTEAD.—Where a Wife Conveys to Her Husband** the homestead, worth less than one thousand dollars, by a deed not subscribed and acknowledged by him in accordance with the statute, and she remains in possession until her death, the legal title descends to her heirs. (p. 245.)

**HOMESTEAD.—A Deed of a Homestead by the Wife** to her husband, inoperative because not subscribed and acknowledged by him as provided by statute, is not validated by her receiving a consideration therefor. (p. 246.)

**HOMESTEAD.—A Widow is Entitled to Occupy the Homestead**, worth less than one thousand dollars, whether she is the owner or her husband was the owner, and therefore her release to his heirs of her interest in his other land that she may occupy the homestead during her life is without consideration. (p. 246.)

**HOMESTEAD—Deed by Wife, Laches in Avoiding.**—Where a wife, after conveying the homestead to her husband by a deed in which he does not join as required by statute, remains in possession until her death, and her heirs do not delay asserting their rights to the property after her death, there is no laches on the part of either. (p. 246.)

**HOMESTEAD—Deed by Wife, Estoppel to Avoid.**—Where a wife conveys the homestead to her husband by a deed in which he does not join as required by statute, and remains in possession until her death, her heirs are not required, as a condition to avoiding the deed, to return the purchase price, which never came to them, nor are they estopped to avoid the deed if there has been no fraud, concealment or misrepresentation inducing any change of situation by anyone. (p. 246.)

Marvin T. Robison, for the appellants.

J. Ross Mickey and Flack & Lawyer, for the appellees.

**399** **CARTWRIGHT, J.** The appellees, the heirs at law of Minerva A. Wright, deceased, filed their bill in this case in the circuit court of McDonough county on August 4, 1909, against the appellants, the heirs at law of Isaac Wright, deceased, who was the husband of said Minerva A. Wright, asking the court to set aside a deed from said Minerva A. Wright to Isaac Wright of their homestead, which was worth less than <sup>400</sup> \$1,000, for the reason that the deed was not operative to convey the homestead estate, and to partition said premises between the complainants. The bill was answered, and the principal defenses were, that Minerva A. Wright received a valuable consideration for her deed, and that after the death of her husband she recognized the validity of the deed and released her right of dower in other lands as a consideration for the possession and use of the homestead during her life. The cause was referred to the master in chancery to take the evidence and report the same, with his conclusions. He reported that the homestead was worth less than \$1,000 and that the deed was void, and his conclusion was that the complainants were entitled to a decree canceling the deed and for partition. The cause was heard on exceptions to the report, which was approved, and a decree was entered accordingly.

On the hearing before the master one of the heirs of Isaac Wright and the husband of another and one of the heirs of Minerva A. Wright testified, and the testimony of each one was objected to on the ground that the witness was not competent. The complainants were suing as the heirs at law of Minerva A. Wright and the defendants were defending as the heirs at law of Isaac Wright. The complainants claimed the estate by inheritance from Minerva A. Wright as her heirs at law, and the defendants resisted that claim by insisting that the estate had descended to them as heirs at law of Isaac Wright, and as the complainants were suing for an estate by virtue of their inheritance and the defendants claimed the same estate by inheritance, they were suing and defending as heirs of deceased persons. The parties to the suit and those directly interested in the event were therefore not com-

petent to testify generally in the case, and as the heir was not competent her husband could not testify in her behalf: *Heintz v. Dennis*, 216 Ill. 487, 75 N. E. 192.

<sup>401</sup> The facts proved by competent testimony are as follows: Prior to and at the time of the marriage of Minerva A. Wright to Isaac Wright, in 1885, she owned the premises in question and occupied the same as her homestead. After the marriage the parties lived together as husband and wife upon the premises as their homestead, and were so residing thereon when Minerva A. Wright, on March 16, 1886, executed a quit-claim deed of the premises to her husband, Isaac Wright, and he did not join in the deed. The premises were worth about \$700. They continued to occupy the homestead until December 18, 1889, when Isaac Wright died, leaving Minerva A. Wright, his widow, and the defendants, his heirs at law. He had sold some real estate to his son in law and had taken two notes, of \$500 each, for unpaid purchase money. Minerva A. Wright collected these notes shortly after the death of her husband. Isaac Wright left some other real estate, worth \$400 or \$500, and personal property amounting to something over \$2,000. The estate was administered, and in a suit for partition of the other real estate between the heirs of Isaac Wright the court found that the widow had released her interest in the same to his heirs at law. She continued to occupy the premises as her homestead until her death, on August 4, 1908, and at the time of her death one of her daughters was living with her and has continued to occupy the premises.

The law in this state is, that a deed of a homestead by a householder to his or her wife or husband, not subscribed and acknowledged in accordance with the statute by the wife or husband, where possession is not abandoned or given pursuant to the conveyance, does not operate to convey the estate of homestead: *Kitterlin v. Milwaukee Mutual Ins. Co.*, 134 Ill. 647, 25 N. E. 772, 10 L. R. A. 220; *Jespersen v. Mech*, 213 Ill. 488, 72 N. E. 1114; *Despain v. Wagner*, 163 Ill. 598, 45 N. E. 129. The deed of Minerva A. Wright could only become operative by abandonment of the premises or giving possession pursuant to the conveyance, and <sup>402</sup> the possession was never abandoned or given by her. She remained in possession until her death, and the legal title to the homestead, which remained in her, descended at her death to her heirs at law. There was a controversy as to whether the premises subsequently became of greater value than \$1,000, but from a reading of the testimony we are unable to say that they were ever worth more than that sum.

It is contended that Minerva A. Wright obtained the two notes, for \$500 each, as a consideration for executing the deed, and that by collecting the same she gave life and validity to the deed. Eliminating the incompetent testimony, it is not at

all certain that she received the notes as a consideration for the conveyance; but assuming that she did, the fact could not make valid a deed which was a nullity in the law for a failure to comply with statutory requirements. To hold that the receipt of a consideration would operate to convey the estate would be to nullify the statute, which provides that it can only be conveyed in a certain way.

It is also insisted that Minerva A. Wright released to the heirs of her deceased husband all her interest in his other lands in consideration of an agreement that she might occupy the homestead during her life, and that this had the same effect as taking a lease from the heirs. The supposed agreement was verbal and proved by incompetent testimony. But assuming the fact as claimed, the agreement was without any consideration. She was entitled by law to occupy the homestead whether she was the owner or the widow of the owner, and the heirs surrendered nothing for her release of all interest in the other lands. During her lifetime she supposed that her deed was valid, and thought that the premises belonged and would go to the heirs of her deceased husband, but her view of the law could not change the statute.

It is argued that Minerva A. Wright and her heirs were barred by laches. But there was no laches on the part of <sup>408</sup> either. She was in possession until her death, and there was no delay by the complainants in asserting their rights after her death.

Finally, it is contended that the complainants are estopped to deny the validity of the deed, and, in any event, were bound to tender back the purchase price. There is no element of an estoppel against the complainants. All the parties were bound to know the law, and there was neither fraud, deception, concealment nor misrepresentation causing or inducing any change of situation by anyone. If, as a matter of fact, Minerva A. Wright received the notes for her deed, the purchase price never came to the hands of the complainants as her heirs, and as the deed was a nullity, they were not required to purchase the premises from the heirs of Isaac Wright. The statutory condition by which, alone, the homestead could be conveyed was wanting, and there was no estoppel to dispute the validity of the deed: *Richards v. Greene*, 73 Ill. 54. See, also, comprehensive note to *McDonald v. Sanford*, 9 Ann. Cas. 1, for the authorities on the questions involved in this case.

The decree is affirmed.

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*A Conveyance of the Homestead not Joined in by Both Spouses is ordinarily inoperative: Township of Jasper v. Martin*, 161 Mich. 336, 137 Am. St. Rep. 508; *Swan v. Walden*, 156 Cal. 195, 134 Am. St. Rep. 118; *Clark v. Bird*, 158 Ala. 278, 132 Am. St. Rep. 25, and cases cited in the cross-reference note thereto. As to whether this rule applies where the conveyance is to the wife or to the husband, see *Lininger*

v. Helpenstell, 229 Ill. 369, 120 Am. St. Rep. 264; Coon v. Wilson, 222 Ill. 633, 113 Am. St. Rep. 441; Kindley v. Spraker, 72 Ark. 228, 105 Am. St. Rep. 32; Roberson v. Tippie, 209 Ill. 38, 101 Am. St. Rep. 217.

*The Effect of a Conveyance of a Homestead by One Only of the spouses* is the subject of a note to Jerdee v. Furbush, 95 Am. St. Rep. 909.

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## WALLACE v. NOLAND.

[246 Ill. 535, 92 N. E. 956.]

**WILL—Meaning of “Children” and “Heirs”—Res Judicata.**—A decision by the supreme court that the word “heirs” means “children” is res judicata on that question on a subsequent appeal, but leaves open for determination the question whether the word “children” includes adopted children. (pp. 249, 250.)

**WILL—Adopted Child.—The Word “Heirs” will Include All** who stand in a relation to the ancestor that will entitle them to inherit upon his death, and this includes an adopted child where the statute puts him on an equality with children by birth for the purpose of inheriting from the adopting parents. (p. 251.)

**WILL—Construction—State of Law at Time of Execution.**—In determining the intention of a testator in the use of language capable of more than one construction, his circumstances and environment at the time of the execution of the will, including the state of the law at that time, may be considered. (p. 252.)

**WILL—Heirs—Adopted Children.—Where a Man Devises** land to his son B, “but should the said B die leaving no heirs, then the said devised property to descend” to designated persons, the word “heirs” means “children,” but does not include adopted children, there having been no statute at the time of the execution of the will or the death of the testator authorizing the adoption of a child and giving it the right to inherit from the adopting parents. (p. 253.)

Wilbur N. Horner, James M. Dill and Albert M. Kales, for the appellants.

Louis Zerweck, J. M. Hamill, L. D. Turner and R. D. W. Holder, for the appellees.

540 **FARMER, J.** This cause is a consolidation of two suits for the partition of the same land. Both bills were filed the same day. In the first bill filed, appellees James A. Wallace et al. were complainants and appellee C. E. Chamberlain was defendant. Appellants were not parties to the bill in that case. Chamberlain was the complainant in the other bill, and, in addition to the parties complainant and defendant to the bill filed by Wallace, he made appellants defendants to the bill filed by him. The two cases were consolidated by order of the court and appellants answered both bills. They also filed a cross-bill claiming to be the sole owners, in fee simple, of the premises sought to be partitioned. After answers and replica-

tions had been filed the cause was referred to a special master to take and report the evidence but not his conclusions.

James W. Bradsby was in his lifetime the owner of the land in controversy. He died testate May 4, 1866, leaving surviving him two sons, James A. Bradsby and William B. Bradsby, two daughters, Mary Wallace and Paulina North, and three grandchildren, who were the children of a deceased daughter of the testator. By his will James W. Bradsby divided his property among his children and grandchildren. The land in controversy was disposed of by the second clause of the will, and the rights of the parties to this suit in the land depend upon the construction to be given to that clause. So much of said clause as is necessary to an understanding of the question involved is as follows: "I give, devise and bequeath unto my son James <sup>541</sup> A. Bradsby the following described real estate, to wit (describing real estate,) . . . but should the said James A. Bradsby die leaving no heirs, then the said devised property above described to descend to William B. Bradsby, Mary Wallace and Paulina North." James A. Bradsby married but no children were born of the marriage, and he died in December, 1909. In 1889, by proceedings in the county court of St. Clair county, he adopted appellants, five in number. By virtue of said adoption they claimed to be the heirs of James A. Bradsby, and as such entitled to the land. Appellees claim that James A. Bradsby took a base fee, determinable upon his dying and leaving no children born to him in lawful wedlock; that he died leaving no persons of that description; that the devise overtook effect, and they are all heirs of William B. Bradsby, Mary Wallace and Paulina North, all three of whom are dead, except Chamberlain, who claims an interest by conveyance from two of the heirs of William B. Bradsby. On the hearing the court dismissed the cross-bill of appellants for want of equity, decreed partition among appellees and appointed commissioners to make partition. Complainants in the cross-bill have appealed from that decree to this court.

The construction of the second clause of the will was before this court on a former occasion, and will be found reported as *Bradsby v. Wallace*, 202 Ill. 239, 66 N. E. 1038. Appellants contend that the questions raised in this case were not involved in or decided in that case, while appellees contend that that case is *res judicata* of every question involved in this case. In our opinion neither of these contentions is correct. In the former case the bill was filed by James A. Bradsby to settle and quiet his title. The bill alleged that James A. Bradsby and his wife had no children, and had reached ages where there was no possibility of any children being born to them; that the heirs of William B. Bradsby, Mary Wallace and Paulina North, the latter all being dead, <sup>542</sup> claimed James



A. Bradsby's title was a life estate or a determinable fee, and that upon his death without children the fee would go to them. The bill alleged that James A. Bradsby desired to sell the land; that he was the owner of it in fee simple, and prayed a decree so finding and ordering. The bill under which that case was tried made no reference to the adoption of any children by James A. Bradsby, although they had been adopted long before the bill was filed, and the court was not informed of the adoption of appellants. The theory of the bill is stated by the court on page 244, as follows: "The question raised is whether the provision of the second paragraph, that if James A. Bradsby should die leaving no heirs, the property therein devised should descend to William B. Bradsby, Mary Wallace and Paulina North, was designed by the testator to prevent a lapse of the devise in case of the death of the devisee, James A. Bradsby, in the lifetime of the testator, and was intended as a provision for the substitution of William B. Bradsby, Mary Wallace and Paulina North upon the happening of such event, or whether it was operative as an executory devise to the testator's other children if James A. Bradsby should die leaving no children." In passing upon that question two questions involved in this case were decided and we think are not open for consideration now, viz., that the word "heirs" in the second clause of the will meant "children," and that the estate taken by James A. Bradsby under the will was a fee, determinable upon his death leaving no children. In affirming the construction placed upon the will by the trial court this court said (page 248): "We are of the opinion that the circuit court interpreted and construed the will of James W. Bradsby in accordance with his intentions, and that the will gave to James A. Bradsby a fee which would terminate if he should die without leaving children, in which event the fee simple title would vest in William B. Bradsby, Mary Wallace and Paulina North and their heirs." The <sup>543</sup> question whether the adopted children of James A. Bradsby come within the meaning of the will, or whether only such children as might be born to James A. Bradsby in lawful wedlock were intended by the testator, was not adjudicated in the former case, but is open for determination in this case, and we think it is the only question that can properly be determined by us. We therefore pass over the argument of counsel on both sides upon the questions as to the character of the estate James A. Bradsby took, and whether the word "heirs" meant "children" or "heirs generally."

Appellants contend that if the word "heirs" is construed to mean "children," it does not mean children by birth; that under our adoption act an adopted child is given all the rights to which a child born in lawful wedlock is entitled; that appellants would be included with children by birth of James A.

Bradsby under the law, in the absence of language showing a contrary intention. Appellees claim that only children of the body of James A. Bradsby were meant by the will; that children by adoption are not included, and that upon the death of James A. Bradsby leaving no persons answering the description in the will, the devise overtook effect and the title devolved upon them.

If the decision in *Bradsby v. Wallace*, 202 Ill. 239, 66 N. E. 1088, that the word "heirs" in the second clause of the will meant "children" is binding upon us now—and we think it is—we are to treat the will the same as if the word "children" had been written in it instead of "heirs." Very able briefs on both sides, citing, reviewing and distinguishing many authorities, have been filed, and we have examined them with the care that the importance of the case to the parties interested requires.

It is very forcibly argued by appellants that as by our statute of adoption an adopted child is "deemed for the purposes of inheritance . . . . and other legal consequences . . . . the child of the parents by adoption the same as if he had been born to them in lawful wedlock," <sup>544</sup> appellants, who have been lawfully adopted, are included in the second clause of the will whether the testator so intended or not, and it is said this construction is imperative unless the testator used language clearly indicating that he did not intend to include adopted children. *Butterfield v. Sawyer*, 187 Ill. 598, 79 Am. St. Rep. 246, 58 N. E. 602, 52 L. R. A. 75, is claimed to be decisive of the case, but we do not so consider it. In that case there was a conveyance by the father to his daughter, Adeline Butterfield, of a life estate, with remainder to her child or children living at her death, and in case there should be no such child or children at her death, "then to the heirs generally of the said Adeline Butterfield forever," except that no part was to go to her brother, George Butterfield. Adeline Butterfield married, but her husband died leaving her a widow with no child or children. After the death of her husband she adopted a child by proper proceedings in the county court of Cook county. Upon the death of the widow the adopted child claimed the premises and his claim was contested by relatives by blood of the widow, who contended they were entitled to the property as "heirs generally" of the widow, and that an adopted child was not embraced in this description of the persons who were to take at the death of said Adeline Butterfield leaving no child or children. The court held that "heirs generally" of the grantee, as used in the deed, meant the person upon whom the law impressed the character of heir of Adeline Butterfield at the time of her death; that by the statute an adopted child is heir of the adopting parent, and the adopted child took the fee to the

exclusion of collateral kin. It was said that there was nothing to indicate that the grantor in the deed used the language "heirs generally" in any other than its commonly accepted legal sense.

It will be noted that the instrument construed by the court in the Butterfield case was a deed, and less latitude is allowed in the construction of deeds than is allowed in the construction of wills. But the chief distinction between <sup>545</sup> that case and the one at bar is, that in the Butterfield case the word "heirs" was used in its general and comprehensive sense, while in the case at bar we are to treat the will the same as if it had used the term "children." The word "heirs" will include all who stand in a relation to the ancestor that will entitle them to inherit upon his death. This would include an adopted child, for the statute puts him on an equality with children by birth for the purpose of inheriting from the adopting parent. In other respects than the right of inheriting from the adopting parent the adopted child is unlike children by birth. By adoption he acquires no right to inherit from anyone else than the adopting parent: *Keegan v. Geraghty*, 101 Ill. 26. In that case it was said adoption creates an artificial relation between the parties to the transaction. "As we construe the statute, as between the parties to the transaction the adopted child is deemed, for the purpose of inheritance from the adoptive parents, their child, the same as if he had been born to them in lawful wedlock." It has been said in a number of cases that an adopted child is regarded, in law, as a child only for the purpose of inheritance from the adopting parent, and not the child, in fact, of such adopting parent: *Schaefer v. Eneu*, 54 Pa. 304; *Commonwealth v. Nancrede*, 32 Pa. 389; *Hockaday v. Lynn*, 200 Mo. 456, 118 Am. St. Rep. 672, 98 S. W. 585, 8 L. R. A., N. S., 117, 9 Ann. Cas. 775. In *McGunnigle v. McKee*, 77 Pa. 81, 18 Am. Rep. 428, the devise was to the testator's son, Thomas, "and his heirs and assigns," with a limitation over in case the son "should die without an heir." The son left an illegitimate daughter, who had been legitimized before his death by special act of the legislature, which provided that she should have all the rights and privileges, and be capable of inheriting any estate as fully as if she had been born in lawful wedlock. The court held that the legitimized daughter was an heir and entitled to the property. In *Johnson's Appeal*, 88 Pa. 346, property was devised to trustees in trust for a son during his life, and at his death <sup>546</sup> to be assigned and conveyed to such person or persons as would be entitled to it by law if he had died seised of a fee simple estate. It was held an adopted child took the property. In all three of the cases referred to the adopted child filled the description of "heir" as used in the deed or will, and the

grantor or testator left it to the law to determine who the heir was at the death of the first taker.

Other cases are cited and relied upon by appellants, but we do not consider them controlling in the decision of this case. In our opinion more aid in the construction of the will is to be derived from a resort to the fundamental rule that the intention of the testator is to be ascertained and given effect if not contrary to law, than is afforded by adjudicated cases. In determining the intention of the testator in the use of language capable of more than one construction, the circumstances and environment of the testator at the time of the execution of the will, including the state of the law at that time, may be considered. "In construing wills the court should always endeavor to read its provisions in the sense in which they were employed by the testator, and for this purpose may consider it in the light of the facts and circumstances surrounding the testator at the time the will was made": *Perry v. Bowman*, 151 Ill. 25, 37 N. E. 680. "The state of the law at the time of the execution of a will often affords material assistance in arriving at the intentions of the testator when they would otherwise be doubtful": *Carpenter v. Browning*, 98 Ill. 282. As the language of different wills is so varied and the circumstances surrounding the testators are so different, decisions in will construction cases are of less value as guides or authority than is the case upon almost any other subject of the law. Aside from settled general rules and principles, each will must be construed in the light of its own peculiar phraseology and the facts and circumstances surrounding the testator at the time of its execution. If James W. Bradsby had said in his will that he intended <sup>547</sup> the devise over should be defeated only in case James A. Bradsby left children born of his body, it would have been a valid provision and effect would have been required to be given to it. If such was his intention, and it clearly appears from the will itself and other circumstances entitled to be considered, it is as much entitled to be given effect as if the testator had expressed his intention in more explicit terms. Some of the things in James W. Bradsby's mind at the time he made his will are so clear from the language used by him as not to be the subject of controversy. He did not intend his son James A. Bradsby to have an absolute, unconditional estate in fee in the land devised by the second clause of the will. He did not intend to vest in his son an estate that would upon his death go by inheritance to his heirs in general. The fee was to become absolute only in the event the son left children, and children only could take it by inheritance from him upon his death. If he left no children, the testator directed that the title in fee should go to his other son and two daughters. Apparently he did not

intend the land to pass to strangers to his blood by the failure of James A. Bradsby to leave children by birth. At the time the will was executed and at the time the testator died there was no statute in existence, and never had been one in this state, authorizing the adoption of a child and giving it the right to inherit from the adopting parent. It would seem plain, then, the testator could not have had in mind any children of his son except such as might be born of his body. The importance of the circumstance that when the will was executed there was no adoption act in this state is not affected by the fact that it was held in the Butterfield case (187 Ill. 598, 79 Am. St. Rep. 246, 58 N. E. 602, 52 L. R. A. 75) that because the deed was made before there was any adoption act in existence constituted no valid objection to the adopted child taking the land. The distinction between that case and this one in that respect is obvious. In the Butterfield case the deed directed that if Adeline Butterfield died leaving <sup>548</sup> no child or children, the fee should go to and vest in her "heirs generally." The law fixes the persons who are to be considered heirs of a deceased person, and the grantor in the deed to Adeline Butterfield not indicating any intention to limit the estate to any particular class of heirs, his intention was construed to be that the land should go to anyone whom the law made an heir of Adeline Butterfield. In the case at bar there was no adoption statute when the will was made giving a man the right to adopt the child of someone else as his own child, and the possibility that such a thing might be done was not within the testator's reasonable contemplation. James W. Bradsby no doubt intended that the fee should become absolute if James A. Bradsby died leaving any children, but in the state of the law at the time he made his will he could only have intended children born of the body and not children who might be created by law.

We are of opinion the decree of the circuit court was correct, and it is affirmed.

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*If a Will Makes a Provision for a "Child or Children" of some other person than the testator, the adopted child of such person is not included, unless other language of the will makes it clear that it was so intended: Woodcock's Appeal, 103 Me. 214, 125 Am. St. Rep. 291, and see cases cited in the cross-reference note thereto. And where a testator gives a certain sum to his executor to pay the income therefrom to his nephew "during his life, and upon his death leaving a child or children surviving him to pay over the principal of said sum to such child or children," and in case of the nephew "leaving no children surviving him," the fund to "revert to and become a part of" the residuary estate, the expression "leaving a child or children" refers to the natural offspring of the life beneficiary and not to his adopted children: Matter of Leask, 197 N. Y. 193, 134 Am. St. Rep. 866.*

**WILLIAMS v. ELLIOTT.**

[246 Ill. 548, 92 N. E. 960.]

**WILL—Fee Limited by Subsequent Provision.**—A devise of an estate in fee simple may be limited by a subsequent valid provision that the estate shall go over to others upon the happening of a certain contingency. The estate, when so limited, is still a fee, for the reason that it will last forever if the contingency does not happen, but so long as it is possible that the contingency may happen, it is a base or determinable fee. (p. 256.)

**WILL—Fee Limited by Subsequent Provision.**—One of the conditions upon which a limitation of a prior devise in fee may lawfully rest is the death of the first devisee without issue, and so far as an executory devise depends on such death it is valid. (p. 256.)

**WILL—An Executory Devise cannot be Created** if the estate given to the first devisee is such that he can, by virtue of his ownership, alienate the estate in fee. An executory devise is indestructible by any act of the owner of the preceding estate. (p. 256.)

**WILL—Remainder.**—If There is an Absolute Power of Disposition in the first devisee, a limitation over is void as a remainder. (p. 256.)

**WILL—Executory Devises.**—If There is an Absolute Power of disposition in the first devisee, a limitation over is void as an executory devise. (p. 256.)

**WILL—Executory Devise.**—Where a Testator Makes a Devise to his niece in fee simple, subject to a life estate in his wife, a subsequent provision that in case the niece "shall not dispose of the said estate devised to her, by will or otherwise, before her death, and should die without issue, seized of said estate, then said estate" shall go to his daughters, is void as an attempted executory devise. (pp. 254, 257.)

Sheean & Sheean, for the plaintiff in error.

Ralph E. Eaton and Franklin J. Stransky, for the defendant in error.

<sup>549</sup> **CARTWRIGHT, J.** John Laughrin died on March 11, 1901, leaving a last will and testament, dated February 26, 1884, which was admitted to probate in the county court of Jo Daviess <sup>550</sup> county. By the will he devised about two hundred and sixty acres of land in said county to his wife, Margaret Laughrin, for life, and devised the remainder after the said life estate as follows: "Subject to the provisions of the said second clause of my will and the rights of my wife as therein specified, I give, devise and bequeath unto my niece, Phoebe W. Price, and unto my children, Mary Fitzsimmons, Montana Laughrin and Rachael Laughrin, share and share alike, all my estate, real, personal and mixed, of every name and kind and wherever situated, that exists after the decease of my wife, aforesaid, to have and to hold the same unto the said Phoebe W. Price, Mary Fitzsimmons, Montana Laughrin and Rachael Laughrin, and their heirs and assigns forever. But in case the said Phoebe W. Price



shall not dispose of the said estate devised to her, by will or otherwise, before her death, and should die without issue, seised of said estate, then said estate herein by this will devised to said Phoebe W. Price shall go to and vest in the said Mary Fitzsimmons, Montana Laughrin and Rachael Laughrin, share and share alike, to be held by them and their heirs and assigns forever." Rachael Laughrin, one of the daughters, became the wife of Alvin O. Elliott, and died on November 10, 1899, intestate, leaving her husband and her children, True Elliott and Edna Elliott, surviving her. The testator left surviving him Margaret Laughrin, his widow; Montana, his daughter, who had been married and whose name was then Montana Williams; Mary Fitzsimmons, his daughter; Edna Elliott and True Elliott, his grandchildren, and Phoebe W. Price, his niece, devisees under the will, the grandchildren taking the place of their mother by virtue of the statute. Phoebe W. Price died intestate in June, 1903, without having disposed, by will or otherwise, of the land devised to her, and she left her sister, Eliza Green, her only heir at law. Margaret Laughrin died on February 15, 1907, and her life estate terminated. On May 15, 1909, Montana Williams filed her bill in the circuit <sup>551</sup> court of Jo Daviess county, alleging that the title to said lands had become vested in herself and Mary Fitzsimmons, Edna Elliott and True Elliott in fee simple, making Eliza Green and all other parties interested defendants and praying for partition. Eliza Green answered, alleging that Phoebe W. Price became seised, by virtue of the will, of an estate in fee simple to an undivided one-fourth of the lands, subject to the life estate of the widow; that the limitation over in case she should die without issue, seised of the estate and not having disposed of the same by will or otherwise, was void, and that said estate was then vested in the said defendant, Eliza Green, as only heir at law of said Phoebe W. Price. Eliza Green also filed a cross-bill, making the same averments and praying for partition accordingly. The chancellor sustained exceptions to the said answer and a demurrer to the cross-bill, and ruled said defendant to file a sufficient answer instant. She stood by her answer and cross-bill and refused to answer further, whereupon the original bill was taken as confessed by her and the cause was referred to the master in chancery. Upon the coming in of the report of the master the chancellor found and decreed in accordance with the allegations and prayer of the original bill. Eliza Green sued out a writ of error from this court to bring the record here for review, and joined her codefendants with her as plaintiffs in error by virtue of the statute. The parties having all been brought into court, an order of severance was entered, and Eliza Green prosecutes the writ of error alone.

By the will the testator devised to his niece and his three daughters, and their heirs and assigns forever, the real estate in question in equal shares, subject to the life estate of his wife, Margaret Laughrin. This devise was in fee simple, but was followed by a provision that the estate devised to Phoebe W. Price should go to the three daughters in equal shares, in fee simple, if the said Phoebe W. Price should not dispose of said estate, by will or otherwise, <sup>552</sup> before her death, and should die without issue, seised of said estate. If the executory devise was valid, the plaintiff in error, Eliza Green, has no interest in the real estate, but if it was void, the undivided one-fourth descended to her as the heir at law of Phoebe W. Price.

Although an estate in fee simple is devised, it may be limited by a subsequent valid provision that the estate shall go over to others upon the happening of a certain contingency. The estate, when so limited, is still a fee, for the reason that it will last forever if the contingency does not happen, but so long as it is possible that the contingency may happen, it is a base or determinable fee. One of the contingencies upon which such a limitation may lawfully rest is the death of the first devisee without issue, and so far as the executory devise in this case depended upon the death of Phoebe W. Price without issue, it was valid; *Ackless v. Seekright*, Breese, 76; *Summers v. Smith*, 127 Ill. 645, 21 N. E. 191; *Smith v. Kimbell*, 153 Ill. 368, 38 N. E. 1029; *Strain v. Sweeny*, 163 Ill. 603, 45 N. E. 201; *Lombard v. Witbeck*, 173 Ill. 396, 51 N. E. 61; *Gannon v. Peterson*, 193 Ill. 372, 62 N. E. 210, 55 L. R. A. 701; *Johnson v. Buck*, 220 Ill. 226, 77 N. E. 163.

There is, however, an equally unquestioned rule of law that an executory devise cannot be created if the estate devised to the first devisee is such that he can, by virtue of his ownership, alienate the estate in fee simple. An executory devise is indestructible by any act of the owner of the preceding estate, and if the owner of a determinable fee conveys in fee, the determinable quality of the fee follows the transfer: 4 Kent's Commentaries, 10; *Smith v. Kimbell*, 153 Ill. 368, 38 N. E. 1029. It necessarily follows that if the first devisee has an estate which he can convey in fee simple so as to destroy an attempted limitation over, such limitation is void. If there is an absolute power of disposition in the first devisee, the limitation over is void as a remainder because of the preceding fee, since a remainder implies something left, and there can be nothing left after a devise in fee simple. It is also void as an executory devise because the limitation is inconsistent <sup>553</sup> with the absolute estate or power of disposition: 4 Kent's Commentaries, 270; 2 Redfield on Wills, 69; *Welsch v. Belleville Savings Bank*, 94 Ill. 191; *Hamlin v. United States Express Co.*, 107 Ill. 443; *Wolfer v. Hemmer*,

144 Ill. 554, 33 N. E. 751. The majority of the court in the case of *Burton v. Gagnon*, 180 Ill. 345, 54 N. E. 279, did not agree that a simple devise to the heirs at law of the testator, who were his two children, coupled with the limitation over, carried with it a power of alienation free from the limitation, as stated in the opinion filed, but the decision is authority for the doctrine that where there is an absolute power of disposition an attempted executory devise is void. By the will in this case Phoebe W. Price had an absolute power of disposition of the estate devised to her, by will or otherwise, as she might choose, freed from the limitation over, and the attempted executory devise was based upon the contingency that she should be seised of the estate at her death and should not have disposed of the same, by will or otherwise. The attempted executory devise was therefore void, and she was vested with an estate in fee simple in the lands, subject only to the life estate of the widow.

In the case of *Friedman v. Steiner*, 107 Ill. 125, there was a devise of the rest and residue of the estate to the testator's wife and unto her heirs and assigns forever, to the total exclusion of any and all person or persons whatsoever, but upon the condition that if she should die intestate and without surviving lawful issue, said estate should be converted into money by the executor and paid as directed by the will. The court recognized the rule that an executory devise is void where there is an absolute power of disposition given by the will, but adjudged that the widow had not only a determinable fee, but was clothed with unlimited power of alienation in fee simple, and by necessary implication from the language of the will had a power other than that incident to the ownership of a base or determinable fee. The court found in the will the power <sup>554</sup> annexed to the estate, and, of course, a power of sale added to an estate does not increase the estate: *Ducker v. Burnham*, 146 Ill. 9, 37 Am. St. Rep. 135, 34 N. E. 558; *Walker v. Pritchard*, 121 Ill. 221, 12 N. E. 336. In determining the estate of Mrs. Steiner the court held that one who is merely the owner of a base fee can convey no more but that she had power to convey in fee simple, or, declining to exercise the power, might convey the determinable fee which she held. Her power to convey in fee simple was not regarded as an incident of her ownership, but was a power distinct from the right of property. In *Orr v. Yates*, 209 Ill. 222, 70 N. E. 731, the court said that so far as the opinion in the *Friedman* case (107 Ill. 125) announced a doctrine different from the established one concerning the power of the owner of a determinable fee to make a conveyance, it had not been approved, and in the case then being considered it was held that the language, "if not disposed of by Mary Maria Yates," could not be construed to give her an

unqualified power of disposition or any power whatever, and that counsel in the case did not so contend. In the Friedman case, and perhaps other cases, an executory devise depending upon intestacy and the failure of issue has been considered valid, but there has been no one in which such a devise has been sustained if there was an absolute power of alienation in fee simple by the first devisee at his own discretion and as owner of the estate.

The decree is reversed and the cause is remanded to the circuit court, with directions to overrule the exceptions to the answer of the plaintiff in error, Eliza Green, to overrule the demurrer to her cross-bill and require an answer thereto, and to proceed further in accordance with the views expressed in this opinion.

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*An Executory Devise may be Limited After a Fee Simple;* but in such case the fee must be made determinable on some contingent event. It must be provided that the fee is to cease, and the executory devise to vest, on a contingency that must happen, if at all, within a life or lives in being, and twenty-one years and a fraction thereafter: *Combs v. Combs*, 67 Md. 11, 1 Am. St. Rep. 359. A disposition of property by will is never construed as an executory devise when it is possible to give it effect as a remainder: *Watson v. Smith*, 110 N. C. 6, 28 Am. St. Rep. 665.

*Where an Estate is Devised to One and His Heirs and Assigns Forever,* and there is added either by express words or by implication an absolute power of alienation, the limitation over is void; *Gannon v. Albright*, 183 Mo. 238, 105 Am. St. Rep. 471; *Jackson v. Littell*, 213 Mo. 589, 127 Am. St. Rep. 620, and see the cases cited in the cross-reference note thereto.

*A Devise of All His Property by the Testator to His Son,* with a provision that what remains at the latter's death shall go to other specified persons, does not cut down the son's interest to an estate for life pure and simple, nor a life estate with a power of disposal: *Galligan v. McDonald*, 200 Mass. 299, 128 Am. St. Rep. 421.

*Where a Man Devises All His Property to His Wife,* with power to convey, and in the clause following devises, upon her death, the estate that may be remaining to his heirs living at the time of his decease, the will creates a life estate in the wife with a vested remainder over to such heirs: *Farlin v. Sanborn*, 161 Mich. 615, 137 Am. St. Rep. 525.

## WAUGH v. GLOS.

[246 Ill. 604, 92 N. E. 974.]

**TORRENS LAW—Abstracts as Evidence—Constitutional Law.** The amendment to the Illinois Torrens law which authorizes the examiner to receive in evidence, without the sanction of an oath, abstracts of title, or certified copies thereof, made in the ordinary course of business by abstractors, is constitutional. (pp. 259, 260.)

**CONSTITUTIONAL LAW—Rules of Evidence.**—The legislature may prescribe rules of evidence and declare that a fact shall be prima facie evidence of another fact which it has a tendency to prove. (p. 260.)

**CONSTITUTIONAL LAW—Class Legislation.**—All laws are not required to be applicable to every case, but every law must apply uniformly to all cases in which it is applicable. A reasonable classification of cases to which a statute shall apply is permissible. (p. 260.)

**TORRENS LAW.**—The Legislature may Provide a Rule of Evidence for proceedings under the Torrens system of registration without extending the rule to all forms of actions in which the title to real estate is involved. (p. 261.)

**CONSTITUTIONAL LAW—Submitting Statutes to People.**—Statutes derive their force from the legislature—the constitutional authority—even though the legislature may require a favorable vote of the people before a particular statute takes effect. When it does take effect, it is still the act of the legislature, and is subject to repeal or amendment by that body without a vote of the people. (p. 261.)

**TORRENS LAW—Sufficiency of Evidence.**—In Applications under the Torrens system for the initial registration of titles in fee simple, it is not sufficient for the applicant to prove only such a title as would enable him to maintain a bill to remove a cloud; he must establish a title which is good against the world. But he is not required to show the invalidity of a tax deed held by the defendant; the burden of establishing its validity rests upon the holder. (pp. 261, 262.)

**TORRENS LAW—Costs.**—The Mere Fact That a Person Appears, introducing no evidence, and insists upon the applicant establishing her title by competent evidence, furnishes no reason for charging him with any part of the cost of the proceeding. (pp. 261, 262.)

**TORRENS LAW—Burden of Proof—Costs.**—Upon an application to register title the burden of proving the validity of his title is upon the holder of a tax deed. Neither the necessity for such a proceeding nor the cost of it is affected by a tender to the holder of a tax title who introduced no evidence, and the refusal of such tender, if made, is therefore no ground for charging the costs against the holder of such title. (p. 262.)

John R. O'Connor, for the appellants.

**DUNN, J.** This is an appeal from a decree of the circuit court of Cook county registering title to real estate. The appellants' case rests upon two abstracts of title which were admitted in evidence, over the appellants' objection, under the provisions of the amendment to section 18 of the Torrens act, adopted in 1907 (Hurd's Stats. 1909, p. 533), which

provides that the examiner may receive in evidence any abstract of title, or certified copy thereof, made in the ordinary course of business by makers of abstracts. The first abstract purported to have been made by Handy & Co., was dated December 30, 1889, and consisted of thirty-seven <sup>606</sup> printed pages, the only written words thereon being the signature at the end. This signature was identified, but there was no evidence as to when, where or under what circumstances the abstract was made. The only witness who testified about it said that he had no knowledge of when it was made, and had never seen it until it was offered in evidence. Moreover, the abstract itself purports to consist of copies of a number of distinct examinations of title made at different times, some of them by persons, other than Nandy & Co., not shown to be makers of abstract, whose examinations are not shown to have been made in the ordinary course of business. The other abstract was made by the recorder of Cook county, and a witness who was employed as an abstract maker by the recorder testified that it was made in due course of business. It appeared, however, from his testimony that he had nothing to do with the making of the abstract, that he knew nothing in regard to any order given for it, and that he testified merely from an examination of the abstract itself. The evidence was not sufficient to admit either of the abstracts in evidence.

The appellants contend that the amendment of 1907, which authorized the examiner to receive abstracts of title in evidence, was not within the power of the legislature, because such abstracts constitute evidence given without the sanction of an oath. No constitutional restriction upon the power of the legislature in this respect is referred to. The legislature may prescribe rules of evidence and declare that a fact shall be *prima facie* evidence of another fact which it has a tendency to prove: *People v. McBride*, 234 Ill. 146, 123 Am. St. Rep. 82, 84 N. E. 865, 14 Ann. Cas. 994; *Toledo etc. Ry. Co. v. Deacon*, 63 Ill. 91; *Rockford etc. R. R. Co. v. Rogers*, 62 Ill. 346. Private entries by third persons, made in the usual course of business, are in many cases competent evidence even without a statute: 1 *Greenleaf on Evidence*, secs. 115, 116, 120. We held <sup>607</sup> this provision free from constitutional objection in *Brooke v. Glos*, 243 Ill. 392, 134 Am. St. Rep. 374, 90 N. E. 751.

It is also insisted that the amendment violates section 29 of article 6 of the constitution, which provides that all laws relating to courts shall be general and of uniform operation. All laws are not required to be applicable to every case, but every law must apply uniformly to all cases in which it is applicable. A reasonable classification of cases to which a statute shall apply is permissible. The Torrens system of registration of land titles is different from the prevalent



method of recording; the manner of bringing lands under such system must be provided by statute; the proceeding is of a different nature from the ordinary action at law or suit in chancery; and we cannot say that the legislature acted unreasonably in providing for a rule of evidence applicable to the proceeding without extending it to all other forms of action in which the title to real estate is involved.

The contention is made that the amendment of 1907 never became operative because not submitted to a vote of the people. The amendment did not provide for its submission to a vote, but the claim is made that since the original act was required to be adopted by a vote of the people before it became effective, an amendment could be made effective only in the same way. No authority cited supports the proposition. The legislature, having the power to enact the statute, was not required to submit it to a vote of the people before it should become effective. Statutes in this state derive their force from the act of the legislature—the constitutional authority—even though the legislature may require a favorable vote of the people before a particular statute shall take effect. When it does take effect it is still the act of the legislature, and is subject to repeal or amendment by that body in the same way as any other statute.

<sup>608</sup> The decree directed the payment of a fee of twenty-five dollars for making the examiner's report and disposing of the objections to the same, to be paid by the applicant and recovered of the appellant Jacob Glos, and this is objected to. The statute (Hurd's Stats. 1909, sec. 108, p. 547) allows to the registrar a fee of fifteen dollars in full of all services up to the granting of the certificate of title, and provides that in proper cases the court may direct the payment of such further fees by the applicant or any defendant as it may determine. The fee of fifteen dollars is intended to cover the registrar's fees in ordinary cases, but an extraordinary allowance may be made in proper cases, and in such cases the court may direct by whom such additional allowance shall be paid. The court found the costs allowed were in addition to the costs ordinarily incurred in such causes, and were occasioned by the action of Jacob Glos in appearing before the examiner and defending, thus causing the taking of testimony and the making of a report on issues not ordinarily involved in proceedings of this character. In applications for the initial registration of title in fee simple it is not sufficient for the applicant to prove only such a title as would enable him to maintain a bill to remove a cloud. He must establish a title which is good against the world: *Glos v. Kingman & Co.*, 207 Ill. 26, 69 N. E. 632; *Glos v. Cessna*, 207 Ill. 69, 69 N. E. 634; *Brooke v. Glos*, 243 Ill. 392, 134 Am. St. Rep. 374, 90 N. E. 751. Jacob Glos introduced no evidence, and the mere fact that he ap-

peared and insisted upon the applicant establishing her title by competent evidence furnishes no reason for charging him with any part of the cost of the proceedings. Upon an application to register title the burden of proving the validity of his title is upon the holder of a tax deed. Neither the necessity for such a proceeding nor the cost of it is affected by a tender to the holder of a tax title who introduced no evidence, and the refusal of such tender, if made, is therefore no ground for charging the costs against the holder of such title.

<sup>609</sup> It is further argued that there is no proof of the invalidity of the appellants' tax deeds. In view of the fact that we have frequently decided that it is not incumbent upon the applicant to show the invalidity of a tax deed held by a defendant and that the burden of establishing its validity rests upon the holder, the point requires no further consideration: *McMahon v. Rowley*, 238 Ill. 31, 87 N. E. 66; *Glos v. Holberg*, 220 Ill. 167, 77 N. E. 80; *Glos v. Kingman & Co.*, 207 Ill. 26, 69 N. E. 632.

The decree is reversed and the cause remanded.

Vickers, C. J., Hand and Carter, JJ., dissenting.

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*The Constitutionality of Statutes Providing for Suits Against Unknown Owners* and to quiet title to land is discussed in the recent case of *Title etc. Restoration Co. v. Kerrigan*, 150 Cal. 289, 119 Am. St. Rep. 199; and in the note to *McClymond v. Noble*, 87 Am. St. Rep. 358. The constitutionality of the Torrens land act is recognized in *Robinson v. Kerrigan*, 151 Cal. 40, 121 Am. St. Rep. 90; *State v. Westfall*, 85 Minn. 437, 89 Am. St. Rep. 571; *People v. Simon*, 176 Ill. 165, 68 Am. St. Rep. 175; but denied in *State v. Guilbert*, 56 Ohio St. 575, 60 Am. St. Rep. 756.

*Section 18 of the Illinois Act Concerning Land Titles*, providing that "the examiner may receive in evidence any abstract of title or certified copy thereof, made in the ordinary course of business by makers of abstracts; but the same shall not be held as more than prima facie evidence of title, and any part or parts thereof may be controverted by other competent proofs," is constitutional: *Brooke v. Glos*, 243 Ill. 392, 134 Am. St. Rep. 374.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**IOWA.**

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**MARKLEY v. WESTERN UNION TELEGRAPH COM-  
PANY.**

[144 Iowa, 105, 122 N. W. 136.]

**NOTICE OF CLAIM—Proof of Service on Agent.**—A return of service of a claim for damages, reciting that the service was made on the duly authorized agent of the defendant corporation at a named place, is not inadmissible in evidence because involving a conclusion. (pp. 265, 266 )

**NOTICE OF CLAIM—Proof of Service by Direct Testimony.**—The service of a claim for damages may be proved by the direct testimony of the person who made the service. (pp. 265, 266.)

**NOTICE OF CLAIM—Proof of Agency of Person Served.**—The testimony of the plaintiff that he has frequently been at the defendant telegraph corporation's office, and there seen a certain person (to whom the plaintiff's claim for damages against the company has been presented) transacting telegraph business, is admissible to prove his agency. (p. 266.)

**TELEGRAMS—Notice of Claim—Time for Presenting.**—Where a telegram, sent on December 28th, is not delivered to the addressee until December 31st, but if it had been delivered on the 29th or 30th he would have sustained no injury, his presentation of a claim for damages on February 28th is a compliance with the statute that such claims must be presented within sixty days from the time the cause of action accrues. (pp. 266, 267.)

**TELEGRAMS—Notice of Claim—Time for Presenting.**—A provision indorsed on the back of a telegram that a claim for negligent delay must be presented within sixty days after the message is filed for transmission is not controlling if the written contract is not produced in evidence. (p. 267.)

**TELEGRAMS—Action in Tort by Sendee.**—The sendee of a telegram may bring his action in tort for a negligent delay in delivering the message. (p. 268.)

**TELEGRAMS—Notice of Claim—Time for Presenting.**—Where the sendee of a telegram sues in tort for its negligent delivery, a provision on the back of the telegram, that a claim for negligence must be presented within sixty days after the message is filed for transmission, is not controlling. (p. 268.)

**TELEGRAMS—Notice of Claim—Time for Presenting.**—A statutory provision that a claim for damages against a telegraph company must be presented within sixty days from the time the cause of action accrues, and that the cause may be continued in force by presenting a claim within sixty days as therein provided, cannot be qualified by an indorsement on the message that claims for damages must be presented within sixty days after the message is filed for transmission. (p. 268.)

Action for mental suffering occasioned by negligent delay in the delivery of a telegram. The court dismissed the case at the close of plaintiff's evidence, and entered judgment for costs against him. The plaintiff appeals.

George W. Bowen and J. B. McCrary, for the appellant.

Lee & Robb, for the appellee.

<sup>107</sup> EVANS, C. J. The plaintiff was a resident of Plattsmouth, Nebraska, at the time of the occurrences complained of herein. On December 28, 1906, at about 9:45 P. M., the plaintiff's brother filed with the defendant at Glidden, Iowa, the following prepaid message for immediate transmission to the plaintiff: "Mother not expected to live until morning. Come at once." This message was immediately transmitted to defendant's operator at Plattsmouth, but was not delivered to the plaintiff until 9 or 10 o'clock A. M. of December 31st. Thereupon the plaintiff took the first train, leaving his home at 5 P. M., on the same day, and arriving at the station nearest his mother's home at 11:30 P. M. Upon such arrival he learned that his mother had died at 4 o'clock that day. His petition averred that on February 27, 1907, he presented his claim in writing to the defendant company by serving written notice thereof upon one William Clement, its agent at Plattsmouth, Nebraska, and that he likewise presented his claim to the defendant on February 28, 1907, by serving written notice thereof on one Flansburg, the agent of the defendant company at Glidden, Iowa. The answer of the defendant was a general denial. The plaintiff offered evidence tending to support all the allegations of his petition. The trial court ruled out all evidence offered by him tending to prove the presentation of his claim on February 27th by serving written notice upon William Clement. That such claim was presented on February 28th by serving written notice upon Flansburg at Glidden was conceded at the trial. At the close of the evidence the trial court directed a verdict on the ground that the plaintiff had not proved a presentation of his claim within sixty days from the time his cause of action accrued, as required by section 2164 of the Code. The only controversy presented to us turns on this question.

1. The plaintiff attempted to prove by C. D. Quinton,  
<sup>108</sup> sheriff of Cass County, Nebraska, that he had served the

written notice pleaded by plaintiff upon defendant's agent at Plattsmouth. The written notice contained the following indorsement and return: "The foregoing notice came into my hands for service on the twenty-fifth day of February, 1907, and on the twenty-seventh day of February, 1907, I duly served the same upon the Western Union Telegraph Company by reading the same to William Clement, their duly authorized agent at Plattsmouth, Nebraska, and delivering to him a true copy thereof. All done on the day and at the place above written. C. D. Quinton, Sheriff Cass County, Nebraska." This return was not sworn to, and was therefore not a sufficient compliance with section 4681 of the Code, which provides that such proof of service may be made by affidavit within six months. To avoid the necessity of producing the sheriff as a witness, the plaintiff procured a stipulation from defendant's counsel, to the effect "that if C. D. Quinton, sheriff of Cass county, Nebraska, were present, he would testify that on the twenty-seventh day of February, 1907, he served the notice in question upon the Western Union Telegraph Company, defendant herein, by reading the same to William Clement, their duly authorized agent in Plattsmouth, Nebraska, and delivering him a true copy thereof. Said evidence to be subject to objections which the defendant may press at the time the exhibit is offered in evidence. The evidence to have the same force and effect as though the witness were present on the witness-stand, testifying to the above statements."

The plaintiff offered in evidence the written notice referred to, together with the stipulation of counsel in reference to the testimony of the sheriff. Thereupon the defendant objected to the evidence as incompetent, on the ground that the statement that "Clement is the duly authorized agent of the defendant" is a mere conclusion of the witness. This objection was sustained. Thereupon the <sup>109</sup> plaintiff was recalled, and the following questions were put to him by his counsel, each of which was ruled out by the court upon objection that the same was incompetent and a conclusion: "Q. Now, Mr. Markley, you said in your former examination that from the time you commenced to work for Mr. Espenberger to the time of receiving this telegram that you were frequently at the depot. I will ask you if you saw William Clement there? Q. What was this man doing? Q. Do you know who the operator at Plattsmouth was for the Western Union Telegraph Company? Q. Did you see any one outside of Mr. Clement working at the telegraph office designated on or about the 27th of February, 1907, and before and after? Q. Have you seen Mr. Clement sending telegrams or delivering telegrams from the office of the Western Union Telegraph Company, the latter part of February, 1907, at Plattsmouth, Nebraska?"

As already indicated, none of these questions were permitted by the court to be answered.

The trial court erred in the first instance in sustaining objection to the purported testimony of the sheriff. That such testimony involved a conclusion to some extent may be conceded. But it was such a conclusion as is usually, if not necessarily, involved in the general knowledge obtained by the public as to the identity of agents of corporations dealing with the public. Such knowledge is usually a matter of inference, arising from the apparent agency, and it is sufficient *prima facie* proof of such fact.

The purported testimony of the sheriff would have been sufficient in form to constitute an official return upon an original notice. It would have been sufficient as a return in this case if it had been verified by affidavit within six months, as required by section 4681. We can see no good reason why the same <sup>110</sup> form of statement could not properly be included in the form of direct testimony.

For the same reason the questions propounded to the plaintiff himself as a witness were proper, and he should have been permitted to answer them, in view of the then state of the record. The plaintiff had previously testified that he had worked for three months within one block of defendant's office at Plattsmouth. It was clearly competent for him to testify on the subject inquired about. The questions clearly disclosed their purpose, and their evident tendency was to prove that Clement was in charge of defendant's office at Plattsmouth. That would be sufficient *prima facie* proof of agency, and it was entirely immaterial whether the words "duly authorized" were included or not.

2. The theory urged by the defendant, and adopted by the trial court, was that plaintiff's cause of action accrued on December 28, 1906, and that the presentation of his claim on February 28, 1907, was too late to comply with the following provision of section 2164: "But no action for the recovery of such damages shall be maintained unless a claim therefor is presented in writing to such company, officer or agent thereof within sixty days from time cause of action accrues." If it were conceded that the defendant was negligent as a matter of law, in failing to deliver the message to the plaintiff on the night of December 28th, it would not necessarily follow that such negligence on that date resulted in the injury of which plaintiff complains. The plaintiff's claim for damages is confined to mental suffering by reason of his failure to see his mother before she died. It is manifest from the evidence that, if the message had been delivered on the 29th or even on the 30th, the plaintiff could have reached his mother's bedside in time to have seen her in life, and the particular injury for which he sues would have been <sup>111</sup> thus avoided,



notwithstanding negligent delay on the 28th or 29th. Indeed, for aught that appears in the evidence, if the telegram had been delivered a few hours earlier on the 31st, such injury would not have resulted. We know of no rule that would forbid the plaintiff from waiving the negligence of the first days, and basing his right of recovery upon the continuation of negligence, to that point of time which rendered it impossible for the plaintiff to reach his mother's bedside. Be that as it may, it is clear that the mere act of negligent delay on the part of the company would not give rise to a cause of action to the plaintiff until such negligent delay became the proximate cause of the injury complained of.

Taking the question from another point of view, it cannot be said that the defendant was negligent as a matter of law in failing to deliver the message on the night of December 28th. At most it was a question of mixed law and fact. A jury might well find that, if it had delivered the message on December 29th, it would not have been guilty of negligent delay. Upon that theory the presentation of plaintiff's claim on February 27th was within the statutory time.

But there is still a third view of the situation, which is quite as decisive against the defendant. Assuming the defendant to have been guilty of negligent delay in failing to make delivery on December 28th, its negligence was nevertheless a continuing negligence up to December 31st. Its identity was not lost by its persistent continuation. It will be noted that the only mental suffering for which the plaintiff claims damages was such as was caused by his failure to see his mother before death. For this particular injury he could not have sued on December 29th nor on December 30th, because on such days the opportunity was still open to him to reach the bedside. From whatever point we view the case, therefore, we think the jury could have found that plaintiff's<sup>112</sup> presentation of his claim was in time to comply with the requirements of section 2164.

3. The defendant directs our attention to the provisions of the contract, indorsed on the back of the blank form upon which the message was written. This alleged contract calls for a presentation of the claim "within sixty days after the message is filed with the company for transmission." It contends that this provision is controlling, and fixes the day from which the sixty days shall be computed. In support of this contention it cites *Albers v. Western Union Tel. Co.*, 98 Iowa, 51, 66 N. W. 1040. There are several reasons why this contention cannot be sustained. The first is that the contract was not introduced in evidence. The plaintiff gave oral evidence of the contents of the message, and no reference is made to such contract in his evidence. Exhibit "A" is referred to in the record, but neither party offered it.

A second reason is that the plaintiff was the sendee of the message, and brings his action in tort, and not on contract. This he had a right to do: *Cowan v. Western Union Tel. Co.*, 122 Iowa, 379, 101 Am. St. Rep. 268, 98 N. W. 281, 64 L. R. A. 545. In the *Albers* case (98 Iowa, 51, 66 N. W. 1040), the plaintiff, as sender, sued upon his contract. At the time that case was decided, the provision of section 2164, which we have already quoted, was not in effect.

Taking sections 2163 and 2164, and construing them together, they create a cause of action in favor of the plaintiff, notwithstanding "the provisions of any contract to the contrary." Under section 2164 such cause of action may be continued in force by presenting a claim within sixty days as therein provided. To give effect to the provision of the contract which is quoted by defendant would be to render this provision of the statute nugatory, and its enactment quite useless. It would also enable the defendant to deprive <sup>113</sup> the plaintiff of a part of the statutory time, by the same negligent delay which gives rise to his cause of action, and which would keep plaintiff in ignorance of such cause of action. We think it was the intent of the legislature to limit the right of the telegraph company in this respect to the statutory provision, and that it is not competent for the defendant to qualify such provision to the detriment of the plaintiff.

For the reasons pointed out, the judgment below must be reversed.

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*Telegrams.—As to the Validity of a Stipulation in a Contract for the transmission of a telegram that the company will not be liable for damages in any case if the claim therefor is not presented in writing within sixty days after the message is filed for transmission, see Hartzog v. Western Union Tel. Co., 84 Miss. 443, 105 Am. St. Rep. 459; Davis v. Western Union Tel. Co., 107 Ky. 527, 92 Am. St. Rep. 371, and cases cited in the cross-reference note thereto. In Arkansas etc. Ry. Co. v. Stroude, 77 Ark. 109, 113 Am. St. Rep. 130, it is affirmed that a stipulation in a telegram requiring notice of a claim for damages to be given within sixty days after sending the message as a condition precedent to recovery does not require that the addressee give such notice before he could, with reasonable diligence, ascertain that the telegraph company had failed to deliver the message. A statute requiring a claim against a telegraph company for an erroneous transmission or an unreasonable delay of the message to be presented within a certain time does not apply to a claim for sending a fictitious or forged message: Wells v. Western Union Tel. Co., 144 Iowa, 605, post, p. 317.*

## STATE v. DUFF.

[144 Iowa, 142, 122 N. W. 829.]

**ESCAPE OF PRISONER—Prosecution for Aiding—Evidence.—**

Where one on trial for aiding the escape of a prisoner from jail offers evidence that the prisoner said that he would have his wife bring him tools with which to cut the bars, the state may show by her that she did not deliver him any tools. (p. 269.)

**APPEAL.—An Objection to Evidence**, if it does not appear in the record, does not require consideration on appeal. (p. 270.)

**ACCOMPLICE—Rule for Determining Who is.**—A general rule for determining whether a witness was an accomplice in a crime is to determine whether he could be indicted and convicted of the same offense. (p. 270.)

**ACCOMPLICE.—A Prisoner is not an Accomplice of a Person** outside the jail who assists him to escape. (p. 270.)

**CRIMINAL LAW.—An Indeterminate Sentence Law is not Unconstitutional** in providing that a person convicted of crime shall be sentenced for a period not exceeding the maximum statutory penalty for the crime. (p. 271.)

**CRIMINAL LAW.—The Constitutionality of an Indeterminate Sentence Law** is not affected by the fact that the board of parol may lessen the term of imprisonment by a parol. (p. 271.)

**CRIMINAL LAW—Indeterminate Sentence.—The Parol of Prisoners** under the provisions of the indeterminate sentence law does not infringe the constitutional right of the governor to grant pardons and reprieves. (p. 272.)

The defendant was convicted of the crime of assisting a prisoner to escape, and appeals.

E. R. Acres and M. J. Carter, for the appellant.

H. W. Byers, attorney general, and Charles W. Lyon, assistant attorney general, for the state.

<sup>143</sup> **SHERWIN, J.** The evidence tended to show that the defendant delivered to one Frank H. Curb, who was lawfully detained in the jail of Winneshiek county, four steel saws, with which said Curb attempted to effect his escape from said jail. The defendant offered evidence to the effect that Curb had said to a witness by the name of Riley that he would have his wife bring him saws with which to cut away the bars that detained him. In rebuttal the state was permitted, over the defendant's objection, to show by Mrs. Curb, the wife of Frank H. Curb, that she had not delivered any saws to her husband while he was in jail. Her evidence on this subject was clearly competent in rebuttal of any inference which the jury might have drawn from the relation existing between the witness and Frank H. Curb, and from the testimony offered by the defendant above referred to.

John Biaess, who was deputy sheriff of the county, testified as to a conversation that he had had with Duff, and in con-

nection with his testimony, as we understand the record, a notice in writing to the defendant, stating that one Kenyon would be introduced as a witness against him, and relating the substance of the testimony that would be given by him, was offered and received in evidence. Complaint is made of this, but as no objection to the testimony or exhibit appears in the record, it requires no further consideration.

The court gave no instruction on the subject of an <sup>144</sup> accomplice, and the defendant makes the claim that there was error in neglecting to so instruct; his position being that Curb and he were accomplices in assisting Curb to escape. A general rule for determining whether a witness is an accomplice or not is to determine whether he could have been indicted and convicted of the same crime. It will be remembered that Curb was the party in jail whom the indictment charged the defendant with having unlawfully assisted to escape, and it is very evident to us that Curb could not have been tried on a charge of having assisted himself to break jail. While it is true that section 4898 of the Code makes it a crime to break jail, and provides punishment therefor, the crime for which the defendant was indicted and convicted was an entirely separate and distinct one, defined and made punishable by section 4894 of the Code.

It is undoubtedly true that if Curb had assisted some other prisoner confined in the jail to escape, and at the same time had himself escaped, he would be an accomplice with the party whom he assisted, but it is the general rule, we think, that where a prisoner is aided to escape by an outside person, the prisoner is not an accomplice of the person, or persons, who assisted him in making his escape. Such is the holding in *Ash v. State*, 81 Ala. 76, 1 South. 558; *Peeler v. State*, 3 Tex. App. 533, and the same doctrine is announced in 12 Cyc. 448. We are of the opinion, therefore, that no instruction on the subject of accomplice was required.

The trial court sentenced the defendant to a term in the penitentiary under the indeterminate sentence statute, and as the punishment provided by law for the crime of which the defendant was convicted is not to exceed ten years in the penitentiary, that term was the maximum punishment which could be inflicted. The defendant says that the statute <sup>145</sup> under which the defendant was sentenced is unconstitutional and void, "first, because it takes away the power vested in the courts, and vests it in officers appointed by the governor; second, it delegates the power of pardon and commutation of sentence vested by the constitution in the governor to other persons." The defendant says "that the statute under which the defendant was sentenced not only forced the district judge to pass sentence for ten years, but forced him to hand the defendant over to the control of three men, who

may deprive the defendant of his liberty and citizenship for many years." We are unable to see the force of this contention. That the legislature has the power to fix the punishment for crime, with the limitation only that it be not cruel or excessive, will hardly be seriously questioned. And if the legislature has such power, it may surely fix a definite and certain term of imprisonment for any particular crime, and this without placing any discretion in the hands of the court whose duty it is to carry out the legislative mandate. Thus the legislature may undoubtedly provide that murder in the first degree shall be punishable with death, or with life imprisonment, as is provided by our own Code, and if this may be done, it must necessarily follow that the indeterminate sentence statute violates no constitutional right of the defendant, and violates no constitutional guaranty of the state in providing that a prisoner convicted of crime shall be sentenced to the penitentiary for a period not exceeding the maximum statutory penalty for the crime. In *State v. Perkins*, 143 Iowa, 55, 120 N. W. 62, 21 L. R. A., N. S., 931, we held that while the trial court has the power under the law to imprison in the penitentiary by the terms of the indeterminate statute, it is denied the power to fix the term of imprisonment, and that such term is the maximum term provided for the punishment of the crime. This holding is in accord with the general trend of authority, and we have no disposition to recede therefrom: See cases cited in *State v. Perkins*, 153 Iowa, 55, 120 N. W. 62, 21 L. R. A., N. S., 931. <sup>146</sup> That there is no uncertainty in the sentence is manifest from the fact that it is for the maximum term, and of this the defendant cannot complain if the legislature has the power to fix such term. The fact that the board of parol may lessen this term by a parol under the terms of the statute does not, in our judgment, affect the constitutionality of the act. But even if it did, the defendant is in no position to complain, because any act of the board in his behalf must necessarily lessen the maximum punishment provided by the statute. If the legislature may fix a definite punishment for any crime, it must logically follow that the indeterminate sentence statute no more deprives the court of the power vested in it by the constitution than does any other statute fixing a definite punishment; for if, as in the case of murder, the trial court is bound by the statute to impose the death penalty under certain conditions, it may just as certainly and constitutionally be compelled to obey the mandate of the statute in any other given case: *State v. Hockett*, 70 Iowa, 442, 30 N. W. 742.

Nor is there any merit in the appellant's contention that the statute under consideration delegates the power to grant reprieves, commutations and pardons to the board of parol in

violation of the constitution granting such power to the governor. Section 5718-a18, Code Supplement of 1907, provides that the board of parol shall have power to establish rules and regulations under which it may allow prisoners within the penitentiaries, other than specific ones, to go upon parol outside of the penitentiary buildings, but to remain while on parol in the legal custody of the wardens of the penitentiaries, and under the control of the board of parol, subject at any time to be taken back and confined within the penitentiary. Section 5718-a19 authorizes the board to institute inquiries in regard to any prisoner, or application for pardon, final discharge, or parol, and section 5718-a20 authorizes the board of parol to recommend to the governor the discharge of <sup>147</sup> any prisoner from further liability under his sentence. There is nothing in the statute conferring power upon the board of parol to reprieve, pardon or commute the sentence of any man confined in the penitentiary, and in addition to this section 5718-a21 of the supplement expressly provides that nothing in the act "shall be construed as impairing the power of the governor, under the constitution, to grant a reprieve, pardons or commutations of sentence in any case." That the parol of prisoners under the provisions of the indeterminate sentence law does not infringe the constitutional right of the governor to grant pardons, reprieves, etc., is supported by the undoubted weight of authority: See *State v. Peters*, 43 Ohio St. 629, 4 N. E. 81; *Miller v. State*, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109; *People v. Warden*, 39 Misc. Rep. 113, 78 N. Y. Supp. 907; *People v. Madden*, 120 App. Div. 338, 105 N. Y. Supp. 554; *People v. Mallary*, 195 Ill. 582, 88 Am. St. Rep. 212, 63 N. E. 508; *Murphy v. Commonwealth*, 172 Mass. 264, 70 Am. St. Rep. 266, 52 N. E. 505, 43 L. R. A. 154.

We find no error in the record, and the judgment is therefore affirmed.

#### WHO IS AN ACCOMPLICE.

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#### I. Introductory Remarks.

In criminal trials it often happens that the only testimony on which the prosecution can rely for a conviction is that of a witness who, in some manner, was concerned with the commission of the crime charged, either by taking a leading part in its commission; or (2) by counseling, advising, aiding or abetting the defendant to commit it; or (3) by some act or omission becoming, legally, particeps criminis after the crime was committed. The witness, therefore, is, in strict legal propriety, either a principal, or an accessory before or after the fact: Bouvier's Law Dictionary, tit. "Accomplice," ed. 1897, p. 62; 1 Bishop's New Criminal Procedure, par. 1159; People v. Josselyn, 39 Cal. 363; Cross v. People, 47 Ill. 152, 95 Am. Dec. 474; Dunn v. People, 29 N. Y. 523, 86 Am. Dec. 319; Watson v. State, 9 Tex. App. 237.

In order that the defendant's legal right to a "fair and impartial trial" may be fully protected, and his attorney be satisfied in his own mind that the testimony against his client is that of a witness who, in some manner, was concerned with the crime for which the accused is being tried, it devolves upon him to urge upon the court the fact that the witness is an "accomplice." For in the many states there are statutory provisions to the effect that a conviction cannot be had on the testimony of an "accomplice," unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the crime: People v. Lynch, 122 Cal. 501, 55 Pac. 248; State v. Smith, 102 Iowa, 656, 72 N. W. 279; and, in those states wherein the common law prevails, the judges generally caution juries against convictions upon the uncorroborated testimony of accomplices: 4 Elliott on Evidence, par. 2786; Bouvier's Law Dictionary, tit. "Accomplice"; Commonwealth v. Holmes, 127 Mass. 424, 34 Am. Rep. 391.

It is therefore apparent that the point urged upon the court to take cognizance of the fact that the witness is an accomplice is solely for the purpose of forcing the prosecution to introduce corroborative testimony connecting or tending to connect the defendant with the crime; and, in the event that corroborative testimony is not introduced, to move for the dismissal of the indictment and the discharge of the defendant: Chapman v. State, 112 Ga. 56, 37 S. E. 102; State v. Lawlor, 28 Minn. 216, 9 N. W. 698; State v. Clements, 82 Minn. 434, 85 N. W. 229; People v. Ogle, 104 N. Y. 511, 11 N. E. 53; House v. State, 15 Tex. App. 522.

## II. Definition of Accomplice.

In criminal law an "accomplice" is one who is concerned in the commission of a crime; and the term in its fullness includes in its meaning all persons who have been concerned in its commission, whether they are considered in its strict legal propriety as principals or merely as accessories before or after the fact: *Cross v. People*, 47 Ill. 152, 95 Am. Dec. 474; *State v. Reader*, 60 Iowa, 527, 15 N. W. 423; *Commonwealth v. Follansbee*, 155 Mass. 274, 29 N. E. 471; *People v. McGuire*, 135 N. Y. 639, 32 N. E. 146; *Smith v. State*, 37 Tex. Cr. 488, 36 S. W. 586.

"An accomplice is any person who has participated in the commission of a crime, whether as principal offender or accessory, or in any other manner which makes him *particeps criminis*": *Ortis v. State*, 18 Tex. App. 282. He "is a person who either as principal or accessory is connected with a crime by unlawful act or omission on his part, transpiring either before, at the time, or after the commission of the offense; and whether or not he was present and participated in the crime": *Schwartz v. State*, 38 Tex. Cr. App. 26, 40 S. W. 976. "An accomplice is one of many equally concerned in a felony": *Cross v. People*, 47 Ill. 152, 95 Am. Dec. 474.

## III. General Rule for Determining Who is an Accomplice.

a. **Statement of Rule.**—In the states wherein the statutes are explicit, it is not difficult for the courts to determine whether a particular witness in a particular case is or is not an "accomplice," but wherever the statutes are silent upon the subject, the courts have been called upon to decide the point. It has been uniformly recognized that the general rule to determine whether a witness is or is not an accomplice is the question: "Could the witness himself have been indicted for the same offense, either as principal or accessory?" *State v. Jones*, 115 Iowa, 113, 88 N. W. 196. To the same effect, see *Stone v. State*, 118 Ga. 705, 98 Am. St. Rep. 145, and note, 45 S. E. 630; *State v. Duff*, 144 Iowa, 142, ante, p. 269, 122 N. W. 829, 24 L. R. A., N. S., 625; *Levering v. State*, 132 Ky. 666, 136 Am. St. Rep. 192, 117 S. W. 253.

b. **Evidence to Show One an Accomplice.**—Only a preponderance of evidence is necessary to show that a witness for the prosecution comes within the rule of accomplice testimony: *State v. Smith*, 102 Iowa, 656, 72 N. W. 279; *Herring v. State* (Tex. Cr. App.), 42 S. W. 301; *Moore v. State*, 47 Tex. Cr. 410, 83 S. W. 1117; *Williams v. State* (Tex. Cr. App.), 85 S. W. 1142.

## IV. Persons Standing in Particular Relation to Crime.

a. **Principals or Accessories Before or After the Fact.**—The term "accomplice" is used principally in the law of evidence, not, however, as denoting any particular degree of guilt or any special connection with the crime. The term is generally applied to those who are admitted to give evidence against their fellow-criminals for the furtherance of justice: *Cross v. People*, 47 Ill. 152, 95 Am. Dec. 474.

The common law made a distinction between principals of the first and second degree, and between accessories before and after the fact: 2 Cooley's Blackstone, 4th ed., p. 1240. This distinction, however, by statute, in most states, has been abolished; so that all who participate in the commission of a crime are equally guilty, and this,

whether they do so as principals, aiders and abettors, or as accessories: *Hudspeth v. State*, 50 Ark. 534, 9 S. W. 1; *People v. Hoagland*, 138 Cal. 338, 71 Pac. 359; *Gatlin v. State*, 40 Tex. Cr. 116, 49 S. W. 87.

Nearly all authorities agree that everyone who participates in the commission of a crime, whether as principal or as accessory before the fact, is an accomplice within the rules of accomplice testimony; but the authorities are not agreed whether an accessory after the fact is an accomplice. It should be remembered that the phraseology of the statutes providing for the degree of relationship of fellow-criminals, and the effect of their testimony, varies considerably; and we believe that the disagreement among the authorities regarding accessories after the fact is due to statutory phraseology.

Some courts hold that one who knows that a crime has been committed and harbors the criminal is an accomplice, whose testimony must be corroborated: *Polk v. State*, 36 Ark. 117; *Gatlin v. State*, 40 Tex. Cr. 116, 49 S. W. 87; but the contrary view, namely, that an accessory after the fact is not an accomplice and his testimony need not be corroborated is taken in *Lowery v. State*, 72 Ga. 649; *Allen v. State*, 74 Ga. 769; *State v. Jones*, 115 Iowa, 113, 88 N. W. 196; *State v. Umble*, 115 Mo. 452, 22 S. W. 378; *State v. Phillips*, 18 S. D. 1, 96 N. W. 171, 5 Ann. Cas. 760; *People v. Chadwick*, 7 Utah, 134, 25 Pac. 737.

In *Leavering v. Commonwealth*, 132 Ky. 666, 136 Am. St. Rep. 192, 117 S. W. 253, holding that an accessory after the fact is not an accomplice whose testimony must be corroborated, the court says: "The words 'accomplice,' 'accessory,' and 'aider and abettor,' are often used indiscriminately and interchangeably by courts and text-book writers on criminal law. But an 'accomplice' may be one of the principal actors, or an aider and abettor, or an accessory before the fact. The word includes in its meaning all persons who participate in the commission of a crime, whether they so participate as principals, aiders and abettors, or accessories before the fact: *Miller v. Commonwealth*, 78 Ky. 15, 39 Am. Rep. 194; *Elliott on Evidence*, sec. 2785; 1 *Russell on Crimes*, sec. 26. It is commonly applied, as in the Code of Criminal Practice, to a witness, and is not so often used in describing a person accused of crime. Usually when persons are spoken of by courts in connection with the commission of an offense, they are mentioned as principals, accessories, or aiders or abettors, although the word 'accomplice' would be equally as appropriate. But if, in the course of the trial, either of these persons is put upon the witness-stand, and a question comes up as to the necessity of corroborating his testimony, he will be spoken of as an accomplice, although he may in fact be a joint principal, or an accessory, or an aider and abettor. And so it is that the Criminal Code of Practice (Section 241), following the precedents in this respect, speaks of an accomplice as a witness. But to constitute one either a principal, an accessory, an aider and abettor, or an accomplice, he must do something; must take some part; must perform some act, or owe some duty to the person in danger. . . . The prevailing and better practice, and the one we approve, is that an accessory after the fact is not an accomplice requiring corroboration of his evidence."

b. *Persons Feigning Crime to Detect Others.*—It is an elementary principle that criminal intent is a necessary ingredient of crime,

and is essential to render one an accomplice; hence it follows that when this element is lacking, a witness is not an accomplice. Thus, a detective who enters into communication with criminals for the purpose of discovering and making known their crimes, and who acts throughout with that original purpose, is not an "accomplice": *People v. Bolanger*, 71 Cal. 17, 11 Pac. 799, 801; *State v. McKean*, 36 Iowa, 343, 14 Am. Rep. 530; *State v. Douglas*, 26 Nev. 196, 99 Am. St. Rep. 688, 65 Pac. 802. If the prosecuting witness in a trial of theft of cattle had the consent of the owner thereof to join in the theft, this constituted him merely a detective, and not an accomplice: *Sanchez v. State*, 48 Tex. Cr. 591, 122 Am. St. Rep. 772, 90 S. W. 641. And a person buying a lottery ticket for the purpose of detecting and punishing a vendor, where the sale is prohibited, is not an "accomplice": *People v. Noelke*, 94 N. Y. 137, 46 Am. Rep. 128.

c. **Persons Coerced into Committing Crime.**—A child who participates in a criminal offense under threats and coercion is not an "accomplice": *People v. Miller*, 66 Cal. 468, 6 Pac. 99; nor is one an "accomplice" who, through fear of immediate danger to life or member, conceals the commission of a crime: *Green v. State*, 51 Ark. 189, 10 S. W. 266; *Burns v. State*, 89 Ga. 527, 15 S. E. 748; *Webb v. State* (Tex. Cr. App.), 60 S. W. 961.

d. **Person Having Belief or Knowledge of Crime.**—Moreover, mere knowledge or belief, that a crime is about to be, or has been, committed, and the concealment of such fact by a witness, does not render him an accomplice of the defendant. It must be shown that he had some guilty connection with the crime: *Martin v. State*, 47 Tex. Cr. App. 29, 83 S. W. 390.

In a prosecution for murder, the only witness who was present when the killing was done, and who was in jail, not as a defendant, but as a witness, told the defendant where the deceased was concealed. The witness made no effort to prevent the killing, and concealed the murder until he was arrested. He also denied that he was present at the time of the murder to defendant's attorney, claiming to have done so under threats. It was held that the facts were sufficient to raise the issue as to whether he was or was not an accomplice: *Mosely v. State* (Tex. Cr. App.), 67 S. W. 103.

In *State v. Jones*, 115 Iowa, 113, 88 N. W. 196, a witness testified that the defendant called him into a room and said, "I have got the old man's money, and I give you your share." The witness never talked with the defendant about committing a crime, nor did he know at the time he received the money what it was for. He supposed from what the defendant said when he gave him the money that it was in the nature of "hush money." When, however, the witness was arrested for the crime, he returned the money to the defendant. Subsequently, on the advice of his attorney, the witness pleaded guilty to an indictment for receiving stolen property. The indictment against the defendant was for larceny from the person. The court held that, in view of the fact that the witness could not have been indicted for larceny, he was not an accomplice of the defendant.

In *Campbell v. State*, 42 Tex. Cr. App. 27, 57 S. W. 288, the witness testified that he took the defendant to his place of business, and there stated to him that if he would bring back the goods, he

would let him go, but if not, he would hand him over to the sheriff; that the defendant was told what had been stolen, and he said he would go and bring them back, and he did so. It was held that the failure of the trial court to charge that the witness was an accomplice, and as to the law of accomplice testimony, was reversible error, because the witness could have been indicted for compounding the criminal offense.

**a. Person Concealing Crime.**—If a witness conceals a crime for his own safety, but not to shield the criminal, he is not an accomplice of the defendant: *McFalls v. State*, 66 Ark. 16, 48 S. W. 492; *Parker v. State*, 40 Tex. Cr. 119, 49 S. W. 80; *Prewett v. State*, 41 Tex. Cr. 262, 53 S. W. 879; *Webb v. State* (Tex. Cr. App.), 60 S. W. 961; *Martin v. State*, 44 Tex. Cr. 279, 70 S. W. 973; *Jenkins v. State*, 49 Tex. Cr. 457, 122 Am. St. Rep. 812, 93 S. W. 726. Mere silence in the presence of a crime, or mere failure to inform the officers of the law when one has learned of the commission of a crime, does not make one an accomplice: *Butt v. State*, 81 Ark. 173, 118 Am. St. Rep. 42, 98 S. W. 740.

The fact that children are present when their father is killed by their mother and her father, and that they say nothing about the crime, does not make them accomplices: *Martin v. State*, 44 Tex. Cr. 279, 70 S. W. 973.

**f. Persons Morally Guilty.**—A participant in an offense, however morally guilty he may be, whose participation in the offense does not render him liable to indictment, is not regarded as an accomplice: *Springer v. State*, 102 Ga. 447, 30 S. E. 971; *Harless v. United States*, 1 Ind. Ter. 447, 45 S. W. 133; *State v. Smith*, 99 Iowa, 26, 61 Am. St. Rep. 219, 68 N. W. 428; *Short v. Commonwealth*, 25 Ky. Law Rep. 451, 76 S. W. 11; *People v. Hendrickson*, 53 Mich. 525, 18 N. W. 169; *State v. Douglas*, 26 Neb. 196, 99 Am. St. Rep. 688, 65 Pac. 802; *Smart v. State*, 112 Tenn. 539, 80 S. W. 586; *Sanchez v. State*, 48 Tex. Cr. 591, 122 Am. St. Rep. 722, 90 S. W. 641.

## V. Participation in Particular Crimes.

**a. In Abortion.**—The courts of most states strictly adhere to the general rule to determine whether a particular witness in a particular crime is or is not an "accomplice," namely, "could the witness have been indicted for the same offense, either as principal or accessory"? Subdivision III, ante. Hence they hold that a woman, although consenting to the commission of an abortion upon herself, cannot be regarded as an "accomplice": *State v. Smith*, 99 Iowa, 26, 61 Am. St. Rep. 219, 68 N. W. 428; *Peoples v. Commonwealth*, 87 Ky. 487, 9 S. W. 509, 910; *Commonwealth v. Follansbee*, 155 Mass. 274, 29 N. E. 471; *Dunn v. People*, 29 N. Y. 523, 86 Am. Dec. 319; *People v. Vedder*, 98 N. Y. 630; *Ferguson v. Moore*, 98 Tenn. 342, 39 S. W. 341; *Smart v. State*, 112 Tenn. 539, 80 S. W. 586.

In California and Ohio, however, the courts have expressed the contrary view, namely, that a woman who consents to the commission of an abortion upon herself is an accomplice: *People v. Joselyn*, 39 Cal. 393; *State v. McCoy*, 52 Ohio St. 157, 39 N. E. 316. These decisions appear to be governed by the express terms of statutes existing in the respective states.

In the case of *People v. Balkwell*, 143 Cal. 259, 76 Pac. 1017, it was held that a woman friend of the one who submitted to an operation for an abortion, who at all times dissuaded her from having the operation performed, did not, merely by accompanying her to the house of the one who performed the operation, become an "accomplice."

In the case of *People v. McGonegal*, 136 N. Y. 62, 32 N. E. 616, it was held that the material witness for the prosecution, who had been an intimate companion of the woman desirous of having an operation performed upon herself to bring about a miscarriage, and who knew of the latter's pregnancy as well as desire to bring about a miscarriage, but did not aid nor advise, nor was present in the room when the operation was performed, did not become an "accomplice" of the defendant, even though the witness did accompany her friend to his house.

In order to constitute a third person an "accomplice," he must have knowledge of the object of the person whom he assists or encourages to seek criminal relief (*Commonwealth v. Adams*, 127 Mass. 15), and knowledge of the object of the person who renders the criminal relief, that is, performs the crime: *Commonwealth v. Follansbee*, 155 Mass. 274, 29 N. E. 471.

A father testified that the defendant on trial for an attempt to produce a criminal miscarriage told him of his daughter's pregnancy, and suggested that he (defendant) could give her a drug that would remove it. The father thereupon replied, "All right; anything to save my child." It was held to be sufficient encouragement to render the father an "accomplice" of defendant: *Watson v. State*, 9 Tex. App. 237.

b. In *Adultery and Fornication*.—The opinions of the courts are unanimous that a man and woman guilty of illicit sexual intercourse with each other are accomplices of one another, when the woman freely and voluntarily consents to the act: *State v. Scott*, 28 Or. 331, 42 Pac. 1; *Merritt v. State*, 12 Tex. App. 203; *Spencer v. State*, 31 Tex. 64; *Townser v. State*, 58 Tex. Cr. 453, 137 Am. St. Rep. 976, 126 S. W. 572.

It should be borne in mind, however, that there are instances when the woman neither freely nor voluntarily consents to the act of illicit intercourse, as, for instance, in case of seduction under promise of marriage, rape and incest, in which event she is not an accomplice: *State v. Henderson*, 84 Iowa, 161, 50 N. W. 758; *Schwartz v. State*, 65 Neb. 196, 91 N. W. 190; *Mullinix v. State* (Tex. Cr. App.), 26 S. W. 504.

A noteworthy decision regarding accomplices in adultery is *State v. Ean*, 90 Iowa, 534, 59 N. W. 898. It appeared that the defendant, a married man, and one O. procured two rooms opening into each other, and they were visited by two women. The defendant and one of the women occupied one of the rooms most of the night. It was held that O. was not an accomplice of the defendant. Mr. Justice Kinne said: "O. may have been guilty of a crime himself, independent of defendant; but, however that may be, O. had no part in inducing or assisting the defendant in committing the crime of adultery."

c. In *Bribery and Compounding Crime*.—It may be stated as a general rule, that a person offering, giving or paying a bribe is as



accomplice of the person who receives it, particularly wherever the statutes make it a crime for a person to offer, give or pay, and a crime for a person to receive a bribe: *People v. Bissert*, 75 N. Y. Supp. 630, affirmed in 172 N. Y. 643, 65 N. E. 1120; *State v. Carr*, 29 Or. 389, 42 Pac. 215; *Ruffin v. State*, 36 Tex. Cr. App. 565, 38 S. W. 169. But wherever the statutes are silent, either as to the person who offers, gives or pays the bribe, or as to the person who receives, the one is not an accomplice of the other: *State v. Quinlan*, 40 Minn. 55, 41 N. W. 299; *Chenault v. State*, 46 Tex. Cr. 351, 81 S. W. 971.

In a prosecution for bribery it was charged that the defendant, a state senator, paid another state senator money to vote for a bill. A witness for the state testified that early in the session of the legislature the defendant, himself (the witness) and other senators were together, and one of them suggested that they combine to make money by selling their votes for or against the passage of bills. The defendant made a memorandum of these senators whom he thought he could induce to or would voluntarily join in such scheme, and the witness left the room and did not return. It was held that the witness was not an accomplice: *Butt v. State*, 81 Ark. 173, 118 Am. St. Rep. 42, 98 S. W. 723.

All parties who participate in forging a deed are accomplices of each other: *Preston v. State*, 40 Tex. Cr. 72, 48 S. W. 581. An inmate of a disorderly house cannot be indicted for keeping one, hence she is not an accomplice of the keeper thereof: *Stone v. State*, 47 Tex. Cr. 575, 85 S. W. 808.

d. In *Burglary and Robbery*.—In *Johnson v. State*, 92 Ga. 577, 20 S. E. 8, it was held that "where there was no evidence connecting the accused with the alleged burglary, except the testimony of two witnesses who admitted that they were accomplices in the burglary, and the state sought to corroborate the accomplices by showing that a garment found on the person of the accused recently after the commission of the offense was a part of the goods taken from the broken building by the burglars, evidence which fails to identify the garment as such, with reasonable certainty, is not sufficient corroboration; the owner of the goods having testified as a witness in behalf of the state, and the record showing no reason or explanation why he failed to testify to the identity, or to a description by which the identity might appear. In consequence of this failure to corroborate the accomplices the evidence was insufficient to warrant the verdict, and it was error not to grant a new trial."

In *Parker v. State*, 40 Tex. Cr. App. 119, 49 S. W. 80, a robbery case, it appears that one of the witnesses, named Carley, in behalf of the state, testified that he was in jail when the defendant was put in jail, and he continued to be in jail up to the time of the defendant's trial. While in jail, the witness stated that the defendant confessed to him that he had shot and killed the victim for the purpose of robbery; that he got some two thousand eight hundred dollars from him, which he had buried in a particular spot, which he described to the witness, and gave him a diagram by which he could find the place where the money was buried; that the information was imparted to the witness with the understanding that when he got out of jail he was to find the money and take

a portion of it for his trouble, and give the balance to the wife of the defendant. The witness also stated that they took one Wilson, who was also in jail, into their confidence who was to assist in getting the money. The witness proved that he never procured or received any of the money, and never went to the place where it was said to have been hidden; that he did not tell anybody but Wilson about it; and that he would not have told anybody. Do the facts stated constitute the witness an accomplice? "We understand," said the court, "the term 'accomplice' to mean some person connected with the crime by unlawful act or omission on his part, transpiring either before, at the time of, or after the commission of the offense; and the general rule requires that he be either a principal, accomplice, or accessory, technically speaking. There is no pretense here that the witness Carley knew anything of the offense until after it was committed. He was in jail at the time of its commission, so that there can be no claim that he was either a principal or an accomplice; that is, one who, before the act, advises or encourages the principal to do the act. Was he an accessory? The record tends to show that the homicide was committed for the purpose of robbery, and it is no offense, by our statute, to receive property taken in the perpetration of robbery, as it is in theft. So that there could be no conspiracy to commit the offense of receiving property acquired by means of robbery, as there could be in the case of theft. Nor did the witness agree to do or perform any act, in aid of the defendant, to evade a trial, which would have made him a technical accessory in the original offense of murder; and the fact is that he did nothing, either by himself or by another. No money is shown to have been discovered by anyone, much less by witness, in the place where defendant, according to the witness, stated it had been concealed, nor in any other place. In our opinion the witness Carley was not an accomplice."

If upon a prosecution for burglary it appears that the prosecuting witness informed the accused that he would not prosecute him if he would return the goods taken, but did not promise him immunity in the sense that he would testify falsely for him, or would do any act for the purpose of concealing him or suppressing the crime, such prosecuting witness is not an accomplice, so as to exclude him from giving corroborative testimony: *Holley v. State*, 49 Tex. Cr. 306, 122 Am. St. Rep. 810, 92 S. W. 422.

c. In Escape of Prisoner.—One who uses tools taken to a jail for the aid of his fellow-prisoner to escape is not necessarily an accomplice in the conveyance of such tools within the rules of accomplice testimony: *Peeler v. State*, 3 Tex. App. 533. Nor is a prisoner an accomplice of a person whom he procures to convey into the jail an instrument to facilitate the escape of the prisoner: *Ash v. State*, 81 Ala. 76, 1 South. 558. But it is held that a prisoner who assists the defendants to liberate others from confinement, and himself escapes, though the original plan did not contemplate his escape, is an accomplice in the rescue, who must be corroborated: *Hillian v. State*, 50 Ark. 523, 8 S. W. 834. Parties who aid the principal in a crime to elude punishment, but not to evade capture or escape, are not accomplices: *People v. Dunn*, 53 Hun. 381, 6 N. Y. Supp. 805.

Where a prisoner gave another prisoner tools by means of which the latter effected his escape, and taking advantage of the avenues of escape other prisoners freed themselves, it was held that the witnesses who were not concerned in the making of the avenues of escape were not accomplices of the one furnishing the tools: *Veal v. State*, 56 Tex. Cr. 220, 120 S. W. 178.

A prisoner is not an accomplice of a person outside the jail who assists him to escape: *State v. Duff*, 144 Iowa, 142, ante, p. 269, 122 N. W. 829.

**f. In Gambling and Wagering.**—The question sometimes arises, in cases of gambling and wagering, whether a witness for the state is or is not an accomplice. In some states the courts have held that participants in gambling are accomplices, and hence no convictions can be had on their sole testimony: *Davidson v. State*, 33 Ala. 350; *State v. Davis*, 38 Ark. 581; *State v. Light*, 17 Or. 358, 21 Pac. 132. But in Kentucky it has been decided that players at an unlawful game of cards are each guilty of a separate offense, hence not accomplices of each other: *Commonwealth v. Bossie*, 100 Ky. 151, 37 S. W. 844. And in Texas it has been affirmed that persons who engage in the same games of faro, monte, pool, or the like are several and not joint offenders, hence not accomplices of each other: *Stone v. State*, 3 Tex. App. 675.

One who joins in the game of tempins, but is in no way interested in the betting or the result, is not an accomplice: *Bass v. State*, 37 Ala. 469. And one who takes no part in a game of cards, but is in partnership with one of the betting players, is an accomplice: *English v. State*, 35 Ala. 428.

Police officers who frequent gambling resorts for the purpose of securing evidence are not accomplices as a matter of law. They must be regarded as feigned accomplices: *Commonwealth v. Baker*, 155 Mass. 287, 29 N. E. 512.

One who is a stakeholder cannot be regarded as an accomplice in the offense of betting on the result of an election: *Schwartz v. State*, 38 Tex. Cr. 26, 40 S. W. 976.

**g. In Incest.**—The crime of incest is generally regulated by statute; and wherever the statute requires corroboration of an accomplice's testimony before a conviction can be had, the courts have unanimously decided that, if a woman freely and voluntarily consents, and is of legal age when consenting, to incestuous intercourse, she is an accomplice of the man, and hence her testimony must be corroborated: *Solomon v. State*, 113 Ga. 192, 38 S. E. 332; *Yother v. State*, 120 Ga. 204, 47 S. E. 555; *Whidby v. State*, 121 Ga. 588, 49 S. E. 811; *State v. Streeter*, 20 Nev. 403, 22 Pac. 758; *State v. Kellar*, 8 N. D. 563, 73 Am. St. Rep. 776, 80 N. W. 476; *State v. Jarvis*, 20 Or. 437, 23 Am. St. Rep. 141, 26 Pac. 302; *State v. Mungeon*, 20 S. D. 612, 108 N. W. 552; *Shelley v. State*, 95 Tenn. 152, 49 Am. St. Rep. 926, 31 S. W. 492; *Dodson v. State*, 24 Tex. App. 514, 6 S. W. 548; *Stewart v. State*, 35 Tex. Cr. 174, 60 Am. St. Rep. 35, 32 S. W. 766; *Clark v. State*, 39 Tex. Cr. 179, 73 Am. St. Rep. 918, 45 S. W. 576; *Clifton v. State*, 46 Tex. Cr. 18, 108 Am. St. Rep. 983, 79 S. W. 824; *Wadkins v. State*, 58 Tex. Cr. 110, 137 Am. St. Rep. 922, 124 S. W. 959; *State v. Dana*, 59 Vt. 614, 10 Atl. 727.

In the event, however, that the woman is not of legal age or has not freely and voluntarily consented to the incestuous relation, but,

on the contrary, the man resorted to force or threats, or by duress, fraud or undue influence subjugated her to his will, she must be regarded as a victim rather than an accomplice: *Smith v. State*, 108 Ala. 1, 15 Am. St. Rep. 140, 19 South. 306; *Gaston v. State* (Ark.), 128 S. W. 1033; *People v. Stratton*, 141 Cal. 604, 75 Pac. 166; *State v. Chambers*, 87 Iowa, 1, 43 Am. St. Rep. 349, 53 N. W. 1090; *State v. Kouhns*, 103 Iowa, 720, 73 N. W. 353; *Schwartz v. State*, 65 Neb. 196, 91 N. W. 190; *Bridges v. State*, 80 Neb. 91, 113 N. W. 1048; *Mercer v. State*, 17 Tex. App. 452; *Mullinix v. State* (Tex. Cr. App.), 26 S. W. 504; *State v. Aker*, 54 Wash. 342, 103 Pac. 420, 18 Ann. Cas. 972; *Porath v. State*, 90 Wis. 527, 48 Am. St. Rep. 954, 63 N. W. 1061.

Where no statute exists requiring corroboration of an accomplice's testimony, and a jury gives sufficient weight and relies upon the credibility of the witness, a conviction of the defendant for incest may be upheld, even though she was an accomplice: *Brown v. State*, 42 Fla. 184, 27 South. 869; *State v. Aker*, 54 Wash. 342, 103 Pac. 420; 18 Ann. Cas. 972.

In the case of *Ingram v. State* (Tex. Cr. App.), 75 S. W. 304, it was held that testimony of a sister of the woman with whom the defendant had incestuous intercourse was not that of an accomplice. The testimony of the witness was to the effect that, while lying in bed with her sister, she was awakened by defendant's presence, and saw him sitting on her sister's side of the bed.

Where the woman made no active resistance to the incestuous intercourse, but did not engage with the same intent and purpose as the defendant, it was held that she was an accomplice: *Gillespie v. State*, 49 Tex. Cr. 530, 93 S. W. 556; *Pate v. State* (Tex. Cr. App.), 93 S. W. 556.

In a prosecution for incest, the woman, although an accomplice, may testify to establish the crime: *Brown v. State*, 42 Fla. 184, 27 South. 869. But the evidence of the woman who has been proven to be an accomplice should be received with caution: *Myers v. State*, 43 Fla. 500, 31 South. 275.

**h. In Larceny, Theft, and Receiving Stolen Goods.**—The courts are not agreed whether a witness is or is not an accomplice in cases coming under the head of larceny, the receiving of stolen goods, or theft. It should be noticed, however, that each of these crimes is regulated by statute, and so also is the matter of accomplice testimony. Hence the reason for the conflicting decisions may be due to the language of the respective statutes and the interpretation given by the courts: See the note to *Stone v. State*, 98 Am. St. Rep. 174. It has been affirmed that the one who steals is not an accomplice of the one who receives the stolen goods: *Springer v. State*, 102 Ga. 447, 30 S. E. 971; *Miller v. State*, 165 Ind. 566, 76 N. E. 245; *State v. Kuhlman*, 152 Mo. 100, 75 Am. St. Rep. 438, 53 S. W. 416; *State v. Rachman*, 68 N. J. L. 120, 53 Atl. 1046. A thief is not an accomplice of the receiver of the goods within the meaning of the provision of the Code of Georgia, providing that an accused may not be convicted on the uncorroborated testimony of an accomplice: *Springer v. State*, 120 Ga. 447, 48 S. E. 329.

In Kentucky a witness will not be regarded as an accomplice of the defendant in larceny, even though in receiving and selling goods at the request of the defendant the circumstances should have ap-

prised him that the latter stole them: *Short v. Commonwealth*, 25 Ky. Law Rep. 451, 76 S. W. 11.

"A person who steals property and one who afterward receives it from him knowing it to be stolen are guilty of separate offenses, and unless more than this be shown, neither is an accomplice in the offense of the other": *State v. Scott*, 136 Iowa, 152, 113 N. W. 758. This rule was upheld and confirmed in *State v. Gordon*, 105 Minn. 217, 117 N. W. 483, 15 Ann. Cas. 897. In some states, however, the opposite view has been taken: *State v. Greenburg*, 59 Kan. 404, 53 Pac. 61; *Walker v. State* (Tex. Cr. App.), 37 S. W. 423; *Young v. State* (Tex. Cr. App.), 44 S. W. 835.

The fact that one saw a defendant kill a cow and afterward bought a part of the beef will not constitute him an accomplice, if no evidence was introduced to show that he knew the cow had been stolen: *Unsell v. State* (Tex. Cr. App.), 45 S. W. 902.

A person who receives property from a defendant after it was stolen and conceals the theft for some time is an accessory to the crime, and hence an accomplice: *Richard v. State*, 49 Tex. Cr. Rep. 192, 90 S. W. 1017.

A woman for the prosecution in a larceny case testified that she was in company of the person who committed the theft, and as to everything she saw the person do during the night of the theft as well as to what he said. She also testified that she had received some part of the moneys which were the proceeds of the theft. It was held that she was an accomplice: *Shilling v. State*, 52 Tex. Cr. 326, 106 S. W. 357.

A witness for the state testified that he bought a mule from defendant in the open market, at which time various parties stood near by; that he rather suspicioned that the defendant had stolen the animal, because of the low price he paid the defendant for it. It was held that the testimony did not suggest that he was an accomplice: *Greathouse v. State*, 53 Tex. Cr. 218, 109 S. W. 165.

1. **In Perjury and False Swearing.**—The rule for testing whether a witness is an accomplice applies in perjury and subornation of perjury as in other crimes; and it is held that one guilty of subornation is not an accomplice of one who commits perjury: *Stone v. State*, 118 Ga. 705, 98 Am. St. Rep. 145, 45 S. E. 630; *State v. Renswick*, 85 Minn. 19, 88 N. W. 22; *United States v. Thompson*, 12 Saw. 438, 31 Fed. 331. See, further, the note to *Stone v. Stone*, 98 Am. St. Rep. 175, 176.

Three persons, pursuant to a conspiracy, falsely swore to a case of self-defense for one accused of murder. Subsequently, one of them informed the prosecuting attorney that his testimony was false, and also admitted it on the trial of the defendant for perjury. It was held that witness was an accomplice: *Conant v. State*, 61 Tex. Cr. 610, 103 S. W. 897.

Where a statute makes it a felony to swear falsely before a superintendent of elections, and certain electors swore that they did not reside where the defendant swore they resided, and where they were falsely registered, it was held that they were not accomplices as to the defendant: *People v. Ellenbogen*, 114 App. Div. 182, 99 N. Y. Supp. 897.

An officer who knows that the contents of an affidavit are false, and does not refuse to administer the oath, is not an accomplice of the one who swears falsely: *Wilson v. State*, 49 Tex. Cr. 496, 93 S. W. 547.

The fact that an officer might have prevented the commission of perjury by refusing to administer the oath does not make him an accomplice: *Wilson v. State*, 49 Tex. Cr. App. 496, 93 S. W. 547.

**j. In Rape.**—In most criminal cases the evidence of an accomplice does not satisfy the honest judgment beyond a reasonable doubt. Therefore corroboration of his testimony in material matters is, either by statute or by rule of court, required; but in some crimes the ends of justice would be defeated if corroboration of an accomplice's testimony should be insisted upon. The courts, therefore, have decided that, in the absence of an express statute requiring it, corroboration of the testimony of the prosecutrix in a rape case is not essential to warrant a conviction of the accused: *Barnett v. State*, 83 Ala. 40, 3 South. 612; *Burby v. Territory*, 4 Ariz. 371, 42 Pac. 953; *Frazier v. State*, 56 Ark. 242, 19 S. W. 838; *People v. Stewart*, 90 Cal. 219, 27 Pac. 200; *State v. Lattin*, 29 Conn. 389; *Doyle v. State*, 39 Fla. 155, 63 Am. St. Rep. 159, 22 South. 272; *Coney v. State*, 108 Ga. 773, 36 S. E. 907; *State v. Anderson*, 6 Idaho, 706, 59 Pac. 180; *Johnson v. People*, 197 Ill. 48, 64 N. E. 286; *People v. Miller*, 96 Mich. 119, 55 N. W. 675; *Monroe v. State*, 71 Miss. 196, 13 South. 884; *State v. Harris*, 150 Mo. 56, 51 S. W. 481; *State v. Peres*, 27 Mont. 358, 71 Pac. 162; *State v. Knighten*, 39 Or. 63, 87 Am. St. Rep. 647, 64 Pac. 866; *Keith v. State* (Tex. Cr. App.), 56 S. W. 628; *State v. Roller*, 30 Wash. 692, 71 Pac. 718; *Lamphere v. State*, 114 Wis. 163, 89 N. W. 128; *Tway v. State*, 7 Wyo. 74, 50 Pac. 188.

In some states, by express statute, corroboration of a ravished woman's testimony is necessary before a conviction of the man can be had: *State v. Wheeler*, 116 Iowa, 212, 93 Am. St. Rep. 236, 89 N. W. 978; *People v. Page*, 162 N. Y. 272, 56 N. E. 750.

A woman under the legal age of consent cannot be regarded as an accomplice of the man who ravishes her: *Bridges v. State*, 80 Neb. 91, 113 N. W. 1048; *Hamilton v. State*, 36 Tex. Cr. 372, 37 S. W. 431.

**k. In Sale of Intoxicating Liquors.**—The sale of intoxicating liquors on the Sabbath, election days, and other prohibited days, is largely regulated by statute; and a sale on prohibited days is usually made a misdemeanor. The law of accomplice is not applied as rigidly in misdemeanor as in felony cases; therefore, the one who purchases intoxicating liquors on prohibited days is not generally regarded as an accomplice of the one who sells it: *State v. Teahan*, 50 Conn. 92; *Commonwealth v. Downing*, 70 Mass. (4 Gray) 29; *State v. Baden*, 37 Minn. 212, 34 N. W. 24; *People v. Smith*, 28 Hun, 626; *Sears v. State*, 35 Tex. Cr. 442, 34 S. W. 124; *Terry v. State*, 44 Tex. Cr. 411, 71 S. W. 968; *Walker v. State* (Tex. Cr. App.), 72 S. W. 401.

Evidence to prove that one sold intoxicating liquors in violation of law is generally obtained by what are known in the law as "feigned accomplices"; hence courts hold that they are not such as to necessitate corroboration of their testimony: *Evanston v. Meyers*, 172 Ill. 266, 50 N. E. 204; *Commonwealth v. Murphy*, 155 Mass. 284, 29 N. E. 469; *People v. Rush*, 113 Mich. 539, 71 N. W. 863. But a contrary view has been expressed by the courts of Colorado, on the ground of public policy: *Walton v. Canon City*, 14 Colo. App. 352, 59 Pac. 840.

**L. In Seduction.**—The prosecutrix in seduction is sometimes spoken of as an accomplice of the defendant: *McCullar v. State*, 36 Tex. Cr. 213, 61 Am. St. Rep. 847, 36 S. W. 385; *How v. State*, 51 Tex. Cr. 174, 102 S. W. 409. But this, manifestly, is not the law. She is the victim



of the accused, and not his accomplice: *Keller v. State*, 102 Ga. 506, 31 S. E. 92; *Washington v. State*, 124 Ga. 423, 52 S. E. 910. In many jurisdictions, however, her testimony must be corroborated in order to warrant a conviction of the man: *Ferguson v. State*, 71 Miss. 805, 42 Am. St. Rep. 492, 15 South. 66; note to *Stone v. State*, 98 Am. St. Rep. 179.

Whenever the defense can prove that the woman freely and voluntarily submitted to the intercourse to gratify her own passion, or for hire, and not because of any alleged promises of marriage, or wiles or arts of the man, the courts have held that he cannot be convicted on her uncorroborated testimony: *State v. Fitzgerald*, 63 Iowa, 268, 19 N. W. 202; *People v. De Fore*, 64 Mich. 693, 8 Am. St. Rep. 863, 31 N. W. 585; *State v. Reeves*, 97 Mo. 668, 10 Am. St. Rep. 349, 10 S. W. 841; *People v. Nelson*, 153 N. Y. 90, 60 Am. St. Rep. 592, 46 N. E. 1040; *Mrons v. State*, 31 Tex. Cr. 597, 37 Am. St. Rep. 834, 21 S. W. 764; *McCullar v. State*, 36 Tex. Cr. 213, 61 Am. St. Rep. 847, 36 S. W. 385.

m. *In Unnatural Crimes*.—Where a participant in the crime of nature consents to the act, he is regarded as an accomplice, and in some jurisdictions his uncorroborated testimony is insufficient to convict the other party: *Territory v. Mahaffey*, 3 Mont. 112; note to *Stone v. State*, 98 Am. St. Rep. 178. In other jurisdictions, however, the rule prevails that the unsupported testimony of the accomplice or prosecuting witness is sufficient to sustain a conviction: *Houselman v. People*, 168 Ill. 172, 48 N. E. 304; *Kelly v. People*, 192 Ill. 119, 85 Am. St. Rep. 323, 61 N. E. 425.

### ABEGG v. HIRST.

[144 Iowa, 196, 122 N. W. 838.]

**GIFT.**—Where a Husband Purchases a Note and mortgage with his own money, has them assigned to himself and wife jointly, and retains possession of them and receives the interest until his death, this amounts to a gift of one-half interest therein to the wife. (p. 287.)

Cornell & Gillies, A. W. Enoch and W. A. Blagg, for the appellants.

W. W. Epps, for the appellees.

<sup>197</sup> **McCLAIN, J.** It appears without conflict in the evidence that William Hirst, during his lifetime, purchased from William Abegg, his banker, who is now administrator of his estate, a note and mortgage of one McMillen for two thousand eight hundred and sixty-two dollars, and that by the direction of Hirst this note and mortgage were by Abegg formally assigned to "William and Jane Hirst." The money paid for the note and mortgage <sup>198</sup> was the money of William Hirst, and the assignment was made in this form because, as William

Hirst stated to Abegg, "That is what we have to live on." The note and mortgage, with this assignment indorsed thereon, were delivered to William Hirst, and retained in his possession until his death. While he lived the interest was paid to him at his request. There is no evidence that Jane Hirst had any knowledge of the transaction with Abegg, or of the possession by her husband of the note and mortgage thus assigned to him and her jointly. The sole question, therefore, is whether the assignment of the note and mortgage to William Hirst and his wife jointly, and the delivery of the instruments to him, and the subsequent retention thereof in his possession during his lifetime, accompanied by the collection of interest thereon apparently in his own right, show a gift of one-half interest therein to the wife.

It is not contended that the wife, as survivor, became entitled to the entire interest in the note and mortgage. By our statute (Code, sec. 2923) a conveyance of real estate to two or more in their own right creates a tenancy in common, unless a contrary intent is expressed. Whether this rule should be applied also to transfers of personal property we have no occasion now to determine. The sufficiency of the acts of the owner of personal property, who expresses an intention to make a gift thereof, to show a consummation of such gift so as to pass present title has often been the subject of controversy in this and in other courts, but there are peculiarities of this case which take it out of the rules usually announced as determining the consummation of the gift. The note and mortgage, although procured with the money of William Hirst, were by his direction assigned to himself and wife, and this assignment indicated, we think, an intention that his wife should have in her own right an interest therein. Had the assignment been to the wife, accompanied by delivery to a trustee to hold for the wife until her husband's death, collecting the <sup>100</sup> interest in the meantime for the benefit of William Hirst, there would have been no doubt as to the complete consummation of the gift; for knowledge of such a gift, purely beneficial, need not be shown to have been brought home to the donee during the lifetime of the donor, and it is immaterial that there is a postponement of the time of enjoyment of the property until after the donor's death: *Hogan v. Sullivan*, 114 Iowa, 456, 87 N. W. 447; *Larimer v. Beardsley*, 130 Iowa, 706, 107 N. W. 935. And the donor may have himself constituted the trustee of the property for the donee: *Tallman v. Cooke*, 39 Iowa, 402; *Newton v. Bealer*, 41 Iowa, 334; *Arrington v. Arrington*, 114 N. C. 116, 19 S. E. 278.

The general rule announced by the cases is that, where something remains to be done in carrying out the donor's intent, no matter how unequivocal the intent itself may be, the gift is not complete; for so long as the contemplated

action is not taken, it is to be presumed that the donor intends to retain the title. But here nothing remained for him to do. The assignment was absolute and unconditional. He, as one of the joint assignees, was entitled to the possession of the instruments. His possession thereof was not in any way inconsistent with the complete vesting of title to a one-half interest in his wife, for delivery to either one in pursuance of the assignment was a complete execution of such assignment. From the time of the delivery to him of the instruments the transaction vesting the title thereto in common in himself and wife was complete. The title of his wife's half interest did not come to her through him, but came to her directly by his procurement from the assignor. There was no occasion for him to deliver the instrument to his wife in order to perfect a transfer of such interests as she acquired directly from the assignor by the assignment. The delivery by the assignor to complete the assignment was sufficient: *McElroy v. Albany Sav. Bank*, 8 App. Div. 46, 40 N. Y. Supp. 422; *Sanford v. Sanford*, 45 N. Y. 723. The case of *In re Brown's Estate*, 113<sup>200</sup> Iowa, 351, 85 N. W. 615, seems to be quite in point. There the question was whether the wife of the donor acquired any interest in certificates of deposit taken by him in a bank, and made payable to himself and wife, and the court held that by such a transaction the wife acquired a one-half interest, although no delivery of the certificates to her as her own was ever made.

We reach the conclusion that the court erred in holding that a one-half interest in the note and mortgage did not vest in Jane Hirst, and in sustaining the objection to the administrator's report, in which William Hirst's estate was credited with only one-half of the amount of the note and mortgage. Reversed.

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*To constitute a Gift Inter Vivos*, two essential elements must combine: An intention to make the gift then and there, and such an actual or constructive delivery at the same time to the donee as divests the donor of all dominion over the subject and invests the donee therewith: *Organized Charities Assn. v. Mansfield*, 82 Conn. 504, 135 Am. St. Rep. 285; *Reese v. Philadelphia etc. Ins. Co.*, 218 Pa. 150, 120 Am. St. Rep. 880. See, also, *Stevenson v. Earl*, 65 N. J. Eq. 721, 103 Am. St. Rep. 790; *Shugart v. Shugart*, 111 Tenn. 179, 102 Am. St. Rep. 777; *Waite v. Grubbe*, 43 Or. 406, 99 Am. St. Rep. 764. The acceptance of a gift may be presumed: *Sparks v. Hurley*, 208 Pa. 166, 101 Am. St. Rep. 926. And the delivery need not be manual or by actual tradition from hand to hand; it may be constructive: *Waite v. Grubbe*, 43 Or. 406, 99 Am. St. Rep. 764; *Opitz v. Karel*, 118 Wis. 527, 99 Am. St. Rep. 1004.

*Where a Husband Pays the Consideration* for real property and the title thereto is taken in the name of his wife, the presumption arises that the conveyance is intended as a gift or advancement: See the note to *Stonecipher v. Kear*, 127 Am. St. Rep. 254.

**ANDERSON v. FIRST NATIONAL BANK OF  
CHARITON.**

[144 Iowa, 251, 122 N. W. 918.]

**CERTIFICATE OF DEPOSIT—Interest Agreement on Back.**—A printed statement on the back of a certificate of deposit, "This certificate will draw three per cent interest per annum if left six months; no interest if drawn before six months," is not, as a matter of law, a part of the agreement between the depositor and the bank. (p. 290.)

**CERTIFICATE OF DEPOSIT.—The Presentment and Notice of Nonpayment** of a certificate of deposit must be made within a reasonable time after its issue, or indorsers will be discharged. (p. 291.)

J. A. Pennick, for the appellant.

Stuart & Stuart and W. W. Bulman, for the appellees.

<sup>252</sup> **WEAVER, J.** On July 24, 1907, the First National Bank of Chariton was engaged in business under the national banking act at Chariton, Iowa. At the same time, and for some time thereafter, the Russell Bank was a partnership engaged in the conduct of a private banking business at Russell, Iowa. F. R. Crocker, the cashier and manager of said national bank, was also a partner with one Brandon in the ownership and control of the Russell Bank; Brandon, with the assistance of employees, having the immediate charge of the business. On the date above named, as was subsequently revealed, the national bank had been subjected to great loss and depletion of its assets by the defalcation and fraud of Crocker, but this condition was concealed, and did not become public until about October 31, 1907, when Crocker committed suicide, and the bank's insolvency was made known. On the date name J. A. McKlveen, having no knowledge or notice of the true condition of said bank, and believing it to be sound and solvent, deposited therein the sum of one thousand dollars, receiving therefor a certificate in the following form: "The First National Bank of Chariton. Not subject to check. Chariton, Ia., July 24, 1907. Certificate of deposit. Dr. J. A. McKlveen has deposited in this bank one thousand dollars, payable to his order on demand, upon the return of this certificate properly indorsed. \$1,000. No. 90,483. W. B. Beem, Assistant Cashier." On the back of this instrument there appears a printed paragraph or statement in the following form: "Interest Agreement. This certificate will draw three per cent interest per annum if left six months; no interest if drawn before six months. No deviation in any case from <sup>253</sup> the above will be made. Chariton National Bank. State Savings Bank. First National Bank." On August 28, 1907, the payee indorsed and transferred said certificate to the firm of McKlveen & Eikenberry, by whom it was indorsed

and transferred to the Russell Bank on August 29, 1907, said firm receiving credit therefor upon its account with said last-named bank. As we have already noted, the insolvency and failure of the national bank resulted in the closing of its doors on or about October 31, 1907, and the fortunes of the Russell Bank were so bound up with those of the first-named institution, or of its cashier, that its failure soon followed, and a receiver was appointed to wind up its affairs. No presentation of the certificate of deposit for payment, or demand for the payment thereof, was made until November 25, 1907, when it was presented to, and demand made of, the receiver in charge of said national bank, but no presentment was made to the bank itself until January 25, 1908, and payment was in each instance refused, notice of which was at once given to J. A. McKlveen and McKlveen & Eikenberry. Thereafter this action at law was instituted by the plaintiff as receiver of the Russell Bank, who seeks to charge the said McKlveen and McKlveen & Eikenberry as indorsers of the certificate of deposit.

The indorsers admit the facts as hereinbefore stated, but deny liability on two grounds: First, that said certificate is an instrument payable on demand; that to charge the indorsers thereof presentment and demand of payment and notice of nonpayment were required to be made within a reasonable time after the date thereof, and that said Russell Bank and its receiver did not make such presentment and demand, or give the indorsers notice of the nonpayment of the certificate within a reasonable time; and, second, that the Russell Bank and its receiver are estopped to assert any claim, because the partnership owning and controlling said Russell Bank was charged with notice of the failing condition of the national bank, and of the necessity of the <sup>254</sup> prompt presentation of such certificate of deposit to avoid loss thereon, but, having such notice, failed to act, and withheld such paper, without demand of payment or attempt to collect until long after said national bank had closed its doors in hopeless bankruptcy. On the issues thus joined a jury was waived and the cause tried and submitted to the court, which found for the defendant on both propositions: First, that the certificate of deposit was not presented for payment within a reasonable time, thereby releasing the indorsers from liability; and, second, that the defendant's plea of estoppel is sustained by the record. The receiver appeals.

1. The appellant takes issue upon the proposition that the instrument in controversy was not presented within a reasonable time. It is not denied that the instrument is, in fact, payable on demand, but it is contended that, by virtue of the printed matter on the back of the instrument, to which we

have already adverted, the holder of the certificate was entitled to refrain from demand for a period of six months, and thereby be entitled to receive interest, and that a delay of less than that period must be said, as a matter of law, to be not unreasonable. There might be some force in this contention if we could say, as a matter of law, that the printed matter on the back of the paper is a part of the contract between the depositor and the bank. But this we are not prepared to do. In the case cited and relied upon by appellant, *Kirkwood v. First Nat. Bank*, 40 Neb. 484, 42 Am. St. Rep. 683, 58 N. W. 1016, 24 L. R. A. 444, the certificate contained an express stipulation that, if the deposit was left in the bank six months, interest would be paid thereon. Such is not the case here. There is no agreement or suggestion as to time of payment or interest expressed in the certificate in suit. Upon the back is a printed paragraph which purports to be an "interest agreement," signed by the printed signatures of three different banks, including the First National, to the effect that an allowance of three per <sup>255</sup> cent interest would be made on deposits left undrawn for six months. Its effect would seem to be that of a species of "gentlemen's agreement" for the repression of undue competition. No reference is made to it in the body of the instrument, and, so far as the evidence shows, it was not called to the attention of the depositor, nor any discussion had on the subject of interest. Indeed, on the appellant's objection, all evidence tending to develop the facts in this respect was excluded.

But, even if we concede appellant's contention that this printed matter is a part of the contract between the depositor and the bank, we still think it was competent for the trial court to find, under the circumstances of this case, that the delay in making presentment for payment was unreasonable. That this is an instrument payable on demand, see Code Supplement of 1907, section 3060-a7. Under the same act, the presentment of such an instrument, in order to charge indorsers, must be made within a reasonable time "after its issue": Code Supp. 1907, sec. 3060-a71. And in determining whether the time is reasonable regard must be had not only to the nature of the instrument, but also "to the facts of the particular case": Code Supp. 1907, sec. 3060-a193. Among the facts of this particular case are the close relations existing between the two banks, and the inference which may fairly be drawn of their more or less intimate knowledge of each other's affairs; the position with each occupied by Crocker; the fact that these months of 1907 marked the culmination of a widespread panic in financial affairs, prompting every holder of bank paper to increased vigilance to avoid loss thereon; and the delay of a month after the national bank closed its doors before any demand was made on the receiver,



and nearly three months before any presentment was made to the bank—and these, with all other circumstances developed in the record, make up such a case that we cannot say that the trial court erred in holding <sup>256</sup> that the demand of payment and notice of nonpayment were not duly made, and that the indorsers were thereby discharged. The primary question thus presented was one of fact, and not of law, and the finding of the trial court thereon has the force and effect of a jury verdict, with which we cannot properly interfere.

It is due to counsel that we advert to his suggestion that, as we have held in *Elliott v. Capital City State Bank*, 128 Iowa, 275, 111 Am. St. Rep. 198, 103 N. W. 777, 1 L. R. A., N. S., 1130, that the statute of limitations does not begin to run upon an ordinary certificate of deposit until demand and refusal of payment, it follows of logical necessity that the liability of the indorser of such certificate continues in full force until the paper is matured by such demand. But we cannot concede the correctness of the analogy or of the deduction sought to be made. The holder of such paper may delay the demand unreasonably as respects the rights of the indorser, whose liability is contingent only while the delay in no manner prejudices the maker, whose liability is original and absolute. For the protection of the former the statute, as we have seen, provides that presentment and notice of nonpayment of such paper, in order to bind him, must be made within a reasonable time after "its issue." The holder must act within that limit if he wishes to retain the benefit of the indorsement.

2. The conclusion reached in the preceding paragraph of this opinion renders it unnecessary to discuss or pass upon the alleged errors as to the findings and rulings of the trial court on the issue of estoppel. The question as to the extent to which the Russell Bank and its receiver are bound by the knowledge of Crocker is one not in all respects easy of solution; and, there being no present necessity for entering that field of inquiry, we shall not attempt it.

For reasons stated in the first paragraph of the opinion the judgment of the district court is affirmed.

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*Certificates of Deposit* are discussed in the notes to *Hillsinger v. Georgia R. R. Bank*, 75 Am. St. Rep. 43; *O'Neill v. Bradford*, 42 Am. Dec. 576. A certificate of deposit is in legal effect a promissory note transferable by indorsement: *First Nat. Bank v. Stapf*, 165 Ind. 162, 112 Am. St. Rep. 214. The owner of a certificate of deposit or other evidence of money in the custody of a solvent bank is as effectually invested with the control and dominion of such money as though there had been a manual delivery thereof to him: *Paxton v. State*, 59 Neb. 460, 80 Am. St. Rep. 689.

A *Certificate of Deposit*, payable to the order of the depositor on its return properly indorsed, does not mature until so returned, and it has been adjudged that a suit thereon cannot be maintained without demand: *Tobin v. McKinney*, 15 S. D. 257, 91 Am. St. Rep. 694.

## STATE v. HARDIN.

[144 Iowa, 264, 120 N. W. 470.]

**CONSPIRACY—Whether Object must be Criminal.**—To constitute an indictable conspiracy, it is not essential that the object of the combination or the means to attain it should be criminal under the statutes. (pp. 293, 296.)

**CONSPIRACY—Preventing Witnesses from Attending Trial.**—An arrangement between two or more persons to take witnesses beyond the jurisdiction of the court and there maintain them until the trial terminates is an indictable conspiracy. (p. 297.)

**CONSPIRACY—Preventing Witnesses from Attending Trial.**—An allegation, in an indictment for spiriting witnesses beyond the jurisdiction of the court, that the "witnesses had been duly and legally subpoenaed," is by way of inducement to the substance of the charge. (pp. 297, 298.)

**CONSPIRACY—Preventing Witnesses from Attending Trial.**—Where two or more persons confederate to induce witnesses to go beyond the jurisdiction of the court until the trial is terminated, they transgress the law, although the service of the subpoenas may have been defective. (p. 298.)

**CONSPIRACY—Preventing Witnesses from Attending Trial.**—While an arrangement to induce witnesses to go beyond the jurisdiction of the court must, to constitute an indictable conspiracy, be made with a fraudulent or malicious intent, an instruction is sufficient that it must appear that the persons in concocting the plan intended to obstruct the administration of justice, although the jury is not told that such intention must have been malicious. (p. 298.)

**WITNESS—Privilege.**—It is No Part of the Duty of Counsel on the other side to advise witnesses as to their privilege in the matter of incriminating testimony, and it is not error for the court to suppress his effort in that direction. (p. 298.)

Bowen & Brockett, for the appellants.

H. W. Byers, attorney general, Charles W. Lyon, assistant attorney general, and Lawrence De Graff, county attorney, for the state.

<sup>265</sup> LADD, J. One S. E. Carter had been indicted, and the cause was assigned for trial December 2, 1907. Some time prior thereto, November 25, 1907, the county attorney caused notice to be served on said Carter that Jack Blades and Wm. Stallsworth would be called as witnesses, and subpoenas were issued for their appearance to give testimony. The subpoena for Blades requiring him to attend court December 2d as a witness was left with his wife on November 28th or 29th, and upon its receipt he read it. The subpoena requiring the attendance of Wm. Stallsworth was placed in the hands of his brother, who delivered him a copy November 29th, and made return thereon. Both Blades and Stallsworth were aware their attendance as witnesses was exacted at the trial of Carter at 2 o'clock on the day named in the subpoenas, but neither of them responded. On the contrary, in

pursuance of an arrangement between the defendants, Will Carter and Eli Hardin, the latter escorted Blades and Stallworth to St. Joe, Missouri, and entertained them, beyond the jurisdiction of the court, at the expense of the former, until the trial <sup>206</sup> of S. E. Carter had terminated. That the defendants concocted this plan of preventing the witnesses' attendance on said trial, and executed it, was conclusively proven; and, though it is earnestly contended that Hardin was not aware of the issuance of the subpoenas, the circumstances were such that the jury might well have found otherwise. Several errors are assigned which may be considered in the order presented.

1. The statutes of this state do not denounce the inducing or taking of witnesses in violation of the commands of a subpoena beyond the jurisdiction of the court as a crime, and as the means adopted were not unlawful, counsel for appellants contend that the crime of conspiracy was neither charged in the indictment, nor proven by the evidence adduced on the trial. Whether the position is sound necessarily depends on the construction to be given our statute defining the crime of conspiracy: "If any two or more persons conspire or confederate together with the fraudulent or malicious intent wrongfully to injure the person, character, business, property or rights in property of another or to do any illegal act injurious to the public trade, health, morals or police, or to the administration of public justice, or to commit any felony, they are guilty of a conspiracy, and every such offender and every person who is convicted of a conspiracy at common law, shall be imprisoned in the penitentiary not more than three years." Certainly no warrant for the position of counsel is to be found in the language quoted. In denouncing a penalty against conspiracies at common law the notion that the object of the combination or the means to attain it necessarily must be criminal under our statutes is distinctly refuted. Moreover, the definition in its scope seems to cover practically all the subjects of the conspiracy at the common law. And in *State v. Loser*, 132 Iowa, 419, 104 N. W. 337, it was held that the above statute "expressly recognizes <sup>207</sup> common-law conspiracies; and we must look to the common law for the definition of such offenses, and for the rules governing the same," and "to conspire to commit unlawful acts in a foreign jurisdiction," as this was a crime at common law and was declared to be such under the section of the Code quoted. That a combination of two or more to commit an unlawful act not criminal, or to commit a lawful act by means which were unlawful, though not criminal, might constitute a criminal conspiracy at the common law seems to be conceded by those decisions which most strenuously combat the propriety of the rule.

In *State v. Rickey*, 9 N. J. L. 293, it was "laid down as a settled rule that an indictment will not lie for a conspiracy to commit a civil injury of any description that is not in itself an indictable offense," but later, in *State v. Norton*, 23 N. J. L. 33, that case was distinctly overruled, the court saying that: "The great weight of authority, the adjudged cases no less than the most approved elementary writers, sustain the position that a conspiracy to defraud individuals or a corporation of their property may in itself constitute an indictable offense, though the act done, or proposed to be done, in pursuance of the conspiracy, be not in itself indictable." To the same effect see *State v. Younger*, 12 N. C. 357, 17 Am. Dec. 571, where a combination of "two to cheat a third person by making him drunk, and playing falsely at cards with him," was held to be indictable, for that such combination to do an unlawful act, or one prejudicial to another, was indictable at common law. In *Commonwealth v. Hunt*, 4 Met. 111, 38 Am. Dec. 346, Chief Justice Shaw, after a review of the English cases, reached a conclusion that, "a conspiracy must be a combination of two or more persons by some concerted action to accomplish some criminal deed, unlawful purpose, or to accomplish some purpose <sup>265</sup> not itself criminal, but unlawful, by criminal or unlawful means. We use the terms 'criminal' or 'unlawful' because it is manifest that many acts are unlawful which are not punishable by indictment or other public prosecution, and yet there is no doubt, we think, that a combination to do them would be an unlawful conspiracy, and punishable by indictment. Of this character was a conspiracy to cheat by false pretenses, without false tokens, when a cheat by false pretenses only, by a single person, was not a punishable offense." Other instances are mentioned in the opinion.

In *State v. Gannon*, 75 Conn. 206, 52 Atl. 727, the theory on which the law proceeds is well stated: "Two elements, therefore, enter into the crime of conspiracy: That of wrongful combination, and that of criminal attempt. The combination of numbers to accomplish a wrongful act has a special danger to public morals, rights of property, and public peace, and for this reason is treated as an independent offense whenever it is the first step toward the commission of the crime. It is then an attempt to commit a crime; but a joint attempt to commit a crime cannot be punished as a conspiracy, unless there is a combination of such a nature as to increase the danger to the public from the attempt. It is the special danger to the public from wrongful acts that are accomplished through the force of combination which has induced the courts to treat an attempt to accomplish such acts through the force of combination as a criminal attempt, although the acts may not be criminal when committed or attempted otherwise than through the wrongful combination for that purpose." *State*

v. Buchanan, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534, is a leading case in this country, and, after an exhaustive review of the cases, reached the conclusion that, as stated by Mr. Carson in Wright on Criminal Conspiracies, 98: <sup>269</sup> "(1) A conspiracy to do an act that is criminal per se is an indictable offense at common law. (2) A conspiracy to do an act, in itself innocent, by means which are indictable is indictable at common law. (3) An indictment will also lie at common law: (a) For a conspiracy to do an act not illegal nor punishable if done by an individual, but immoral only; (b) for a conspiracy to do an act neither illegal nor immoral in an individual, but to effect a purpose which has a tendency to prejudice the public; (c) for a conspiracy to extort money from another, or to injure his reputation by means not indictable if practiced by an individual, as by verbal defamation, and that, too, whether it be to charge him with an indictable offense or not; (d) for a conspiracy to cheat and defraud a third person, accomplished by means of an act which would not in law amount to an indictable cheat, if effected by an individual; (e) for a malicious conspiracy to impoverish or ruin a person in his trade or profession; (f) for a conspiracy to defraud a third person by means of an act not per se unlawful, and though no person be injured thereby; (g) for a bare conspiracy to cheat and defraud a third person, though the means of effecting it should not be determined on at the time." See, also, as sustaining this view, State v. Burnham, 15 N. H. 396; Smith v. People, 25 Ill. 17, 76 Am. Dec. 780; State v. Cardoza, 11 S. C. 195; 2 Bishop on Criminal Law, secs. 178, 181; McClain's Criminal Law, sec. 594.

There are authorities to the contrary, however, which, notwithstanding the convincing character of the decisions referred to, and others too numerous for citation, have deduced the rule that "an indictable conspiracy must be a corrupt confederation to promote an evil purpose in some degree criminal, or to effect some wrongful end by means having some degree of criminality": See 3 Greenleaf on Evidence, 13th ed., sec. 90; Commonwealth v. Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; Alderman v. People, 4 Mich. 414, 69 Am. Dec. 321; State v. Keach, 40 Vt. <sup>270</sup> 113; State v. Ripley, 31 Me. 386. This was the view expressed in State v. Jones, 13 Iowa, 269, where the indictment charged a combination to cheat and defraud one Durham of a large sum of money by impleading him in a civil action, and attempting to procure a judgment on a fictitious instrument. The court held the indictment bad, in that the words "cheat and defraud" did not alone imply a crime at common law or under the statute unless accompanied by some false pretenses or tokens, and that the means alleged were not criminal, declaring that: "It should appear on the face of the indictment that the object of the conspiracy is a

criminal one, or else, if the purpose thus disclosed does not import a crime, then other facts should be alleged and set forth, so as to show that the means to be employed are criminal, thereby withdrawing the crime of conspiracy from the limitless field of wrongful acts, where the old authorities had allowed it to go, to the more circumscribed range of the Criminal Code, either as a means or an end. This brings both elements of this compound offense, to wit, the combination and the injury contemplated, under the clear and more certain control of the courts."

It is said, in *State v. Potter*, 28 Iowa, 554, that the above conclusion was reached after a full examination of the English and American authorities. If so, the opinion does not disclose the fact, for of the cases cited *Hartman v. Commonwealth*, 5 Pa. 60, announces no such doctrine, *State v. Rickey*, 9 N. J. L. 293, had been overruled, and *State v. Burnham*, 15 N. H. 396, is directly to the contrary, while *Lambert v. People*, 9 Cow. 578, was determined by the casting vote of the president of the court. In *State v. Potter*, 28 Iowa, 554, the indictment charged a combination to defeat the enforcement of the prohibitory law with many and various unlawful means, and it was held bad for not more specifically specifying the means, the court observing that "to do an act that is not an offense, <sup>271</sup> by means that are not unlawful, cannot constitute crime. Neither can a combination of two or more to do such act in the same manner be criminal. If such a combination would amount to an offense, we would have a strange and absurd result of an intention being criminal when the act intended, if done would be no offense. In the case, then, of the conspiracy to do an act that is not criminal, the gist of the offense is the illegal means. It is plain under the statutory provisions above cited that the acts constituting these means which are the particular circumstances of the offense must be specifically charged and set out." The rule as announced in the *Jones* case (13 Iowa, 269) has been repeated several times since, though in no instance was its adoption essential to a decision: See *State v. Stevens*, 30 Iowa, 391; *State v. Savoye*, 48 Iowa, 562; *State v. Eno*, 131 Iowa, 619, 109 N. W. 119, 9 Ann. Cas. 856. In *State v. Loser*, 132 Iowa, 419, 104 N. W. 337, attention was directed to great weight of authority to the contrary. See, also, the review of English and American authorities in *Wright's Criminal Conspiracies*.

The design of this discussion has not been to discredit previous decisions of this court, save in pointing out the narrowness of the holdings, and to say that, in view of the authorities generally, the doctrine approved therein should not be extended by holding that the end or means of a combination must be indictable under the statutes of this state in order to constitute a crime. Such was not the conclusion in the *Jones*



case (13 Iowa, 269), for the above statute was not alluded to, and attention was especially directed to the fact that the object of the alleged combination was not criminal "neither at common law nor under our statutes." Nor have the decisions since touched the subject until *State v. Loser*, 132 Iowa, 419, 104 N. W. 337, where it was distinctly asserted that a criminal conspiracy at the common law was such under our statute. At the common law to spirit away witnesses, or in some other manner prevent their attendance on court, was an indictable offense: *State v. Keyes*, <sup>272</sup> 8 Vt. 57, 30 Am. Dec. 450; *State v. Carpenter*, 20 Vt. 9; *Commonwealth v. Reynolds*, 14 Gray, 87, 74 Am. Dec. 665; *Martin v. State*, 28 Ala. 71; *State v. Ames*, 64 Me. 386. In the first of the above cases, the court said, speaking through Redfield, J.: "The essence of the offense is obstructing the due course of justice. This has always been held indictable as a misdemeanor at common law. Whether the witness had been served with a subpoena or not cannot be esteemed very material. The effect of the act and intent of the offender is the same, whether the witness has been, or is about to be, served with a subpoena, or is about to attend in obedience to a voluntary promise. Any attempt, in either case, to hinder his attendance, is equally criminal, and equally merits punishment. . . . The question is not whether the witness has been guilty of a contempt in disobeying the process of the court, but whether there has been a corrupt attempt to obstruct the due course of public justice by 'spiriting' away or preventing the attendance of a witness. If the person induced to absent himself knew of his being a witness, and was induced to absent himself, the offense was complete in him. If the respondent knew of his being a witness, and about to be compelled, in due course of law, to attend the trial, and endeavored to dissuade and hinder him therefrom, in the language of the indictment, his offense is complete."

A conspiracy thus to injure or obstruct the administration of justice was an indictable offense at the common law: See *State v. Ripley*, 31 Me. 386; *State v. De Witt*, 2 Hill (S. C.), 282, 27 Am. Dec. 371; *State v. Harris*, 38 Iowa, 242. And a conspiracy to persuade and prevent witnesses from attending a trial was also a punishable offense, and is within the definition of the statute quoted: *Rex v. Steventon*, 2 East, 362. It follows that the court rightly held the facts charged to constitute criminal conspiracy.

2. The indictment alleged that the witnesses had <sup>273</sup> been "duly and legally subpoenaed," and it is said that, as they were not served by delivering a copy of the subpoena and shown the original, there was a fatal variance between the indictment and the proof. Section 5493 of the Code declares that "service is made by delivering a copy and showing the

original." The evidence disclosed that a copy of the subpoena duly issued had been placed in the hands of each witness, and that each understood that he was required to attend court as a witness at the time and place indicated therein. Such information was the prime object of the service, and it was not open to the accused to draw nice distinctions as to the sufficiency of service, especially as, save for the allegation in the indictment, it was immaterial whether the witnesses had been subpoenaed at all. Even though the service may have been defective, the accused were transgressing the law in combining to induce the witnesses to disregard the command of the court, of which said witnesses were fully advised. The allegation as to the legality of the service of the subpoenas was by way of inducement to the substance of the charge, and no more was necessary to be proven than essential to make out the offense alleged: See *State v. Judd*, 132 Iowa, 296, 109 N. W. 892, 11 Ann. Cas. 91; *Commonwealth v. Reynolds*, 14 Gray, 87, 74 Am. Dec. 665.

3. The combination, if formed, must have been with a fraudulent or malicious intent. Appellants contend that such a finding was not exacted by the instructions, for that, though the jury was advised that it must appear that defendants in concocting the plan intended to obstruct the administration of justice, they were not told that such intention must have been malicious. Had any explanation been given inconsistent with an evil motive, there might be some ground for this criticism. But none was offered, and the intent, if any there was, was to obstruct the administration of justice by spitting away the witnesses so <sup>274</sup> as to prevent them from giving testimony. This characterization of the intent, in the light of the evidence adduced, stamped it as malicious, and such was the purport of the instruction.

4. Blades was called as a witness for the state. After his examination had begun, counsel for defendants said: "If the court please, I do not know whether this witness has been apprised that the testimony he is giving, or may give, might be used to convict him of—" Here the county attorney interrupted with the assertion: "I will take care of the witness. You don't need to make any pleas of that kind." Counsel objected to this statement, and submitted that it "was proper practice for any one connected with the case to call the witness' attention to such things." The Court: "That is the privilege of the witness, not of either counsel. It is not your privilege at all to put anything into the head of the witness. I will take care of the witness if he gets into trouble." Appellants insist that this was prejudicial, but how is not explained. Certainly it was no part of counsel's duty to advise the witness: *Wigmore on Evidence*, sec. 2196. His suggestion could not well have had a purpose other than that

of obviating the introduction of the witness' testimony. The court did not err in suppressing the effort, and the manner of doing so cannot be said to have been prejudicial. Some other rulings are criticised, but none require discussion in their approval.

The record is without error, and the judgment is affirmed.

*An Attempt to Deter a Witness from Attending a Trial* of a public prosecution is punishable as a crime, although made before service of the subpoena. and although it proves unsuccessful: *State v. Keyes*, 8 Vt. 57, 30 Am. Dec. 450. The offense is indictable at common law, and if it is not punishable by statute, the concluding words of the indictment "contrary to the form of the statute" may be rejected as surplusage: *Commonwealth v. Reynolds*, 14 Gray, 87, 74 Am. Dec. 665.

*It is a Contempt of Court to Remove a Witness* from the county of his residence, where he is under subpoena to attend upon the trial of a cause pending, for the purpose and effect of preventing his appearance upon the day of trial, as it is a wrongful act obstructing the administration of justice: *Hale v. State*, 55 Ohio St. 210, 60 Am. St. Rep. 691. According to *In re Nickell*, 47 Kan. 734, 27 Am. St. Rep. 315, a party cited for contempt in compelling and inducing witnesses to absent themselves from the court and to disobey a subpoena is thereby charged with a statutory crime, in addition to a contempt of court, and cannot be compelled as a witness to prove the contempt, and thus criminate himself as to the other crime.

*As to What Constitutes an Indictable Conspiracy*, see the notes to *Spies v. People*, 3 Am. St. Rep. 474; *People v. Richards*, 51 Am. Dec. 82.

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## CEDAR RAPIDS GAS LIGHT COMPANY v. CEDAR RAPIDS.

[144 Iowa, 426, 120 N. W. 966.]

**GAS RATES.**—A Municipality has Power to Regulate the rates to be charged for gas, if it does not reduce them so as to deny the company a fair return. (p. 303.)

**GAS RATES.**—The Act of a Municipality in Fixing Gas Rates is presumed to be reasonable, and a court can declare it otherwise only upon finding that the rate is so low that its adoption will operate as a confiscation of the company's property without due process. (p. 303.)

**GAS RATES—Manner of Determining Reasonableness.**—To ascertain whether gas rates fixed by a municipality will operate as a confiscation of property, it is essential to determine the fair value of the plant at the date of the enactment of the ordinance, and the amount and cost of the gas then being furnished to consumers. (p. 303.)

**GAS RATES—Municipal Regulation.**—The Value of a Gas Plant cannot be determined by the mere addition of the several values of its component parts, nor from the cost alone, nor from what it formerly might have been sold, nor from what it might cost to replace it; but the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construc-

tion, the probable earning capacity under the prescribed rates, the operating expenses, and perhaps other matters should be considered. (pp. 303, 304.)

**GAS RATES—Municipal Regulation—Value of Plant.**—Aside from the intangible element of goodwill, the fact that a gas plant is in successful operation constitutes an element of value. (p. 305.)

**GAS RATES—Municipal Regulation.—The Value of a Gas Plant** completed and earning a present income is the criterion for determining its value for the purpose of fixing rates; but in so far as influenced by income, the computation must be made on the basis of reasonable charges. (p. 305.)

**GAS RATES—Municipal Regulation.—The Goodwill of a gas company** which is granted a monopoly is not to be taken into account in ascertaining the value of the plant for the purpose of fixing rates. (p. 305.)

**GAS RATES—Municipal Regulation—Value of Property.**—The fact that a gas company is in possession of land beyond high-water mark, although it cannot acquire title thereto by the operation of the statute of limitations, should be considered in ascertaining the value of its property. (p. 306.)

**GAS RATES—Municipal Regulation.—The Value of Property of a gas company** which will not be used in its business for some years to come should not be considered in estimating the value of its plant for the purpose of fixing rates. (p. 306.)

**GAS RATES—Municipal Regulation—Value of Plant.**—Discarded purifiers, forming no part of a gas plant, should not be considered in estimating the value of the plant. (pp. 306, 307.)

**GAS RATES—Municipal Regulation.—In Estimating the Value of the mains and pipes of a gas company,** the cost of pipe, the prices at which it ordinarily has sold, in connection with present prices, should be considered, in connection with depreciation by decay. (p. 307.)

**GAS RATES—Municipal Regulation.—The Whole Cost of a high-pressure pipe,** used for the most part to carry gas to consumers beyond the city limits, should not be included in determining the value of the gas plant for the purpose of fixing rates within the city. (p. 307.)

**GAS RATES—Municipal Regulation.—In Ascertaining the Value of a gas plant,** including pipes that were laid in a street which has since been paved, the worth of a new plant of equal capacity and durability, with proper discount for defects in the old and depreciation for use, should be the measure of value, rather than the cost of exact duplication. (pp. 307, 308.)

**GAS RATES—Municipal Regulation.—In Estimating the Value of a gas plant for the purpose of fixing rates,** nothing can be allowed for the promotion and organization of the company. (p. 308.)

**GAS RATES—Municipal Regulation.—In Estimating the Value of a gas plant** the owners should not be excluded from the advantage of prudence and foresight in its development, nor should they be relieved of the consequences of mistakes and errors of judgment. (p. 309.)

**GAS RATES.—An Ordinance Fixing a Level Price for gas** is not objectionable because it eliminates a discount for prompt payment and will entail an expense for collecting gas bills. (p. 309.)

**GAS COMPANIES.—A Gas Corporation may Adopt Rules and regulations** for the transaction of its business, but they must be reasonable and not impose an undue burden on consumers. (p. 309.)

**GAS COMPANIES—Rule Requiring Payment in Advance.**—Gas companies may establish a rule exacting payment in advance in reasonable amounts, or the deposit of security. (p. 310.)

**GAS RATES—Municipal Regulation—Cost of Production.**—In ascertaining the cost of manufacturing gas, that used to accomplish this should be computed at the cost only. (p. 312.)

**GAS RATES—Municipal Regulation—Cost of Production.**—Taxes on property owned by a gas company which will not be used by it in its business for some years to come should be excluded in estimating the cost of producing gas. (p. 312.)

**GAS RATES—Municipal Regulation—Cost of Production.**—In determining the cost of producing gas, an allowance should be made for depreciation in the value of the property of the company. (p. 312.)

**GAS RATES—Municipal Regulation—Cost of Production.**—A gas company is entitled to earn enough, not only to meet the expenses of current affairs, but also to provide means for replacing parts of the plant when they can no longer be used. (p. 312.)

**GAS RATES—Reasonableness—Legislative Function.**—The fixing of gas rates by a municipality is a purely legislative function, and the duty of a court ends when it has found that the rates are not so low as clearly to be confiscatory. (p. 314.)

**GAS RATES—Reasonableness—Five Per Cent Income.**—It will not do for courts to say that the income, above all expenses, including taxes, on property devoted to the public service, must necessarily much exceed five per cent to avoid the charge of being confiscatory. (p. 316.)

**GAS COMPANIES—Reasonableness of Rates—Usual Earnings.**—What gas plants usually earn, unless based on reasonable charges, cannot be accepted as a criterion for determining the reasonableness of rates. (p. 316.)

Suit to enjoin the enforcement of an ordinance fixing gas rates. The petition was dismissed and the plaintiff appeals.

John N. Hughes, Grimm & Trewin, Frank C. Byers and Redmond & Stewart, for the appellant.

J. W. Good, J. W. Jamison and H. E. Spangler, for the appellees.

<sup>429</sup> LADD, J. On September 17, 1871, the city council of Cedar Rapids granted W. H. Whitta & Co. the exclusive privilege for a period of twenty years of laying pipes for the conveyance of gas in all streets and alleys within its corporate limits; and, in consideration thereof, gas was required to be furnished at five dollars per one thousand cubic feet until the consumers numbered two hundred, when it should be reduced fifty cents, and, upon the increase of customers to four hundred, one dollar per one thousand cubic feet should be deducted, and then to remain at four dollars per one thousand cubic feet until the expiration of the grant, unless, owing to some discovery or improvement, the cost of production should be decreased, in which event a corresponding decrease should be made in the price. Early in 1872 the plaintiff company

was incorporated with a nominal capital of \$150,000 and stock issued at par value of \$100 per share. This was divided equally among the members of the firm, W. N. Whitta, George F. Wright, and A. E. Swift. Nothing was paid for this stock save the assignment of the franchise obtained under the ordinance. In July of that year the purchase of ground upon which to place buildings was authorized, and also the issuance of bonds to the amount of \$25,000, bearing interest at ten per cent per annum, and on January 17, 1873, the ground having been bought, the purchase was approved, and a sale of the bonds at not less than eighty-five cents on the dollar directed. Out of the fund derived from this sale and other bond issues, in all not exceeding \$75,000, and the income derived from the manufacture and sale of gas, the plant has been constructed at an expense, as plaintiff alleges, of \$267,500. An annual dividend of one per cent was declared in 1877 and the three years following, then a dividend of two per cent in <sup>430</sup> 1881 and 1882, one per cent in 1883, four per cent in 1884, four per cent in 1896, and in 1897 six per cent, the next year seven per cent, and from that time on an annual dividend of eight per cent has been declared. This was not accomplished, however, by the original promoters. In 1874 A. T. Averill and associates acquired one-half the stock for \$16,000, out of which the sellers paid \$15,000 of the bonds, and the Higley Bros. owned the other one-half. In 1877 Averill bought one-fourth of the stock of one of the Higleys, discharged the superintendent, and took personal charge of the plant "with the determination to either make it pay or blow it into the river," and to the efficiency of his management may be attributed in large measure, as the record before us clearly indicates, the results achieved; but the city afforded the opportunity for building up the enterprise, which during much of its growth has paid a substantial income on stock consisting at the outset of nothing but water. In May, 1896, the city council by ordinance extended the company's franchise for a period of a few days less than twenty years, with the condition that gas be furnished at one dollar and eighty cents per one thousand cubic feet, with a discount of twenty cents to consumers for prompt payment and other discounts for large amounts and to the city. The company voluntarily had reduced the price to one dollar and fifteen cents per one thousand cubic feet with ten cents additional in event of failure to make prompt payment, and was selling as low as ninety cents per one thousand cubic feet to a consumer of large quantities by December 21, 1906, when the city council enacted the ordinance of which complaint is now made, in words following:

"Section 1. Any person, firm or corporation supplying gas to the inhabitants of the city of Cedar Rapids shall charge



not to exceed ninety cents (90c) per thousand cubic feet therefor, and no person, firm or corporation shall charge, exact or receive in excess of ninety cents <sup>431</sup> (90c) per thousand feet for gas supplied by them to any inhabitant of said city.

"Sec. 2. Any person, firm or corporation, violating any of the provisions of this ordinance shall, upon conviction thereof, be punished by fine of not less than ten dollars (\$10.00) or more than one hundred dollars (\$100.00).

"Sec. 3. This ordinance shall be effective from and after January 1, 1907.

"Sec. 4. All ordinances or parts of ordinances in conflict herewith, are hereby repealed."

This action was instituted promptly, praying that the city be enjoined from enforcing the ordinance. A temporary writ of injunction was issued, but, on hearing, it was dissolved, and upon appeal a restraining order entered by this court on condition that all moneys exacted above the rate fixed be deposited with a designated trustee to bide the final decision.

1. The power of the municipality to regulate the rates to be charged for gas, save that these may not be so reduced as to deny to the company a fair return upon the property used in the service of the public, is not questioned. The sole inquiry is whether the ordinance, if enforced, will operate to deprive the company of fair compensation for the services to be rendered. The act of the municipality, in fixing rates, is purely legislative, and, as it is by virtue of authority given by the legislature, is presumed to have been in the proper exercise of the power conferred: *City of Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. Rep. 148, 53 L. ed. 371. For this reason the rate established by the ordinance assailed is presumed to be reasonable, and this court, in inquiring whether this is true in fact, can only declare it otherwise upon finding that it is so low that its adoption will operate as a confiscation of plaintiff's property without <sup>432</sup> due process of law: *Cedar Rapids Water Co. v. City of Cedar Rapids*, 118 Iowa, 234, 91 N. W. 1081.

To enable us to ascertain whether such will be the effect of this ordinance it is apparent that three findings of fact are primarily essential as a basis for calculation: (1) What was the fair value of the company's plant at the date the ordinance was enacted? (2) How much gas was then being furnished consumers? (3) What was the cost per thousand cubic feet of gas, at that time, manufactured and distributed to consumers? With this data as a basis we shall be able to estimate the profits the plant will be likely to yield from sales of gas at the rate fixed in the ordinance, and, by comparison of these with the value of the property, determine as near as may be whether the return for the services rendered the public are so

inadequate as to prove destructive of the company's investment.

2. The parties differ widely as to the value of the plant. These differences arise from estimates by witnesses, as well as from the inclusion or exclusion of various elements which are said to affect values. There is no controversy, however, if we understand counsel rightly, but that the company is entitled to have its property appraised at its fair value in December, 1906. What such an enterprise was then worth cannot be determined by the mere addition of the separate values of its component parts, nor from the cost alone, nor from what it formerly might have been sold at if such price were influenced by excessive rates, nor from what it might cost to replace alone, for this, in view of its use, would involve mere estimates of depreciation and contingencies incident to construction; but as was said in *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. Rep. 418, 42 L. ed. 819: "The original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present, as <sup>433</sup> compared with the original, cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be extracted from it for the use of a public highway than the services rendered by it are reasonably worth." This was said with reference to fixing rates for common carriers, but evidently is applicable to cases of this character and was applied in determining the reasonableness of water rates in *Cedar Rapids Water Co. v. City of Cedar Rapids*, 118 Iowa, 234, 91 N. W. 1081. Any person or corporation contemplating the purchase of such a property quite naturally would inquire into its history, the character of its management in the past, and the amount expended in its construction. The several items of dispute may be considered separately.

The witnesses for the company estimated that \$25,000 would be required as working capital, aside from the supplies ordinarily carried, which included one thousand tons of coal and ten thousand gallons of oil, but were unable to sustain their opinion save by dealing in probabilities for its use, in the main speculative. It appears that collections for gas sold are made monthly, and, as these amount to about \$8,000 per month, it is evident that, after the first month, enough would be on hand to meet current expenses. As supplies on hand

were sufficient for immediate use, and for some months in the future, about all essential would be enough to take care of the pay-roll for the first month, and \$2,500 would be ample for that purpose and other possible contingencies. Even this much <sup>434</sup> appears to be more than the company in its experience has found it necessary to reserve. Also the sum of \$100,000 was included by these witnesses as enhancement of value by reason of being a "going concern." As previously intimated, the value of the plant is to be estimated in its entirety, rather than by the addition of estimates on its component parts, though the latter course will materially aid in determining the value. Advantages have accrued through the sagacity of its management as contended by appellant. So, too, there are the inevitable mistakes which would not be likely in the construction of a new plant; but to put a new plant in profitable operation time would be required, and, aside from the intangible element of good will, the fact that the plant is in successful operation constitutes an element of value.

As said, the value of the system as completed, earning a present income, is the criterion. In so far as influenced by income, however, the computation necessarily must be made on the basis of reasonable charges, for whatever is exacted for a public service in excess of this is to be regarded as unlawful.

Save as above indicated, the element of value designated a "going concern" is but another name for "goodwill," which is not to be taken into account in a case like this, where the company is granted a monopoly: *Cedar Rapids Water Co. v. City of Cedar Rapids*, 118 Iowa, 234, 91 N. W. 1081; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. Rep. 192, 53 L. ed. 382. The witnesses for plaintiff took into account "goodwill" in giving their opinion of the enhancement in value because of being a going concern, and we have no means of separating these so as to ascertain their estimate of the separate advantage of completion so as to earn a present income.

The buildings of the company are located on fractional block 9 divided into five lots, and lots 1 and <sup>435</sup> 2 in fractional block 10. All these lots front on First street and border the Cedar river. The government meander line seems to have been from thirty-three to fifty-seven feet from First street, though the high-water mark was about one hundred feet nearer the river. The company, by the construction of riprap work on made ground at the bottom of the stream, has added about fifty feet more. Two of these lots cost the company \$3,000 in 1902, and the others prior to that, as needed, \$4,200. Of course, the company has not acquired title to the portion

of the lots beyond the high-water mark, for, though long in occupancy, the statute of limitations does not run against the state: *Park Commissioners v. Taylor*, 133 Iowa, 453, 108 N. W. 927; *Carr v. Moore*, 119 Iowa, 152, 97 Am. St. Rep. 292, 93 N. W. 52; *Tomlin v. Dubuque B. & M. Ry. Co.*, 32 Iowa, 106, 7 Am. Rep. 176. But the company is in possession, and this was of value, especially as none save the state might challenge its right thereto. Without determining precisely where the high-water mark is, or reviewing the conflicting opinions of witnesses, we are inclined to think the evidence fairly shows this property worth between \$15,000 and \$20,000.

Across the street from the plant are lots 1 to 5 in block 9, known as the "Annex," and on which there are thirteen small houses, rented by the company. The cost of these lots was \$6,500 some eight years prior to the trial. The plaintiff estimated that their value has increased to \$16,500. On the other hand, the city contends that they should not be considered at all in determining the value of the plant. The evidence is all but conclusive that they will not be required for the immediate expansion of the work, even though the officers of the company may have had this in contemplation. A witness for plaintiff testified that, with little more machinery, the present plant could be made to manufacture more than three times as much gas as now sold. Another justified his conclusion that the annex should be included <sup>436</sup> by saying that the purchase was a wise precaution, and that, in view of the past growth of the city, these lots likely would soon be needed. The lots or others may be required some time, but no man can determine the contingencies of the future, and it will not do to burden the patrons of to-day in order to provide for possible needs of those of five or ten years hence, at least when this is conceded not to be necessary in order to provide for equal facilities when demanded. This property should not be included.

The estimates concerning the value of the buildings varied from slightly more than \$30,000 down to something less than \$21,000. Witnesses called by plaintiff had enjoyed a larger experience, while those produced by the defendant entered into greater detail. A comparison of the evidence in connection with proof of the age of the buildings has led to the conclusion that \$25,000 is not far from their true valuation. We are of opinion that plaintiff's real estate, excluding the annex, was fairly worth not to exceed \$40,000 to \$45,000, or \$15,000 or \$20,000 less than estimated by the witnesses of plaintiff.

But little controversy has arisen in estimating the value of other property, for, save certain items, the estimates of plaintiff's witnesses have been accepted by the city. Some purifiers were included which had been discarded. They were

appraised at \$1,600. These formed no part of the plant. If they were subsequently exchanged for something needed, this was long after the enactment of the ordinance.

In estimating the value of the cast-iron mains and pipes computation was made in behalf of the company at thirty-two dollars and fifty cents per ton; a reduction being allowed from the price of December, 1906, of five dollars and fifty cents per ton for depreciation. The record indicates that the price taken was the highest at which mains and pipes had ever sold, and that these ranged in previous years down as low as eighteen dollars per ton. The <sup>437</sup> pipes were not available for the market, and, in estimating their value in the ground, the price of iron on the particular day the ordinance was enacted ought not to be seized upon as the criterion of value, whether it were the highest or lowest price. No one in calculating on the value of a similar plant would adopt such a rule. The cost of the pipe, the prices at which it ordinarily had sold, in connection with present prices, should be considered in connection with depreciation by inevitable decay. An examination of the record has convinced us that outside figures have been made by plaintiff's expert, and that his estimate on the value of pipes and mains is several thousand dollars too high.

The company extended its activities so as to furnish gas to the people of Kenwood Park and Marion in 1905, and to do this laid a high-pressure pipe from the holder to these places. The cost of this pipe to the city limits was \$5,483, and was originally charged to the Marion line. The evidence is to the effect that the pressure from this pipe somewhat reinforces the system, and that a few residents of the city are furnished gas therefrom; but its principal use is to carry gas to the consumers beyond the city limits, and no more than one-fourth its value should be included in the appraisalment.

The sum of \$43,580 was added owing to the alleged increase of value of pipes and mains because of being underneath the pavement. The company had laid them before the paving was done, but it is argued that, as the value of the mains and pipes are to be estimated when in the ground, what it would now cost because of the pavement to put them there should be included in determining present value. If so, the contingency of having to remove them at the expiration of the franchise also should be taken into account. Moreover, the fact that most of the paved streets are paralleled by unpaved alleys or parkings in which pipes might be <sup>438</sup> laid without removing the pavement, and possibly with less danger from electrolysis, is entitled to consideration. Nor is it to be forgotten that pavements yield to the ravages of time, and that with new pavements new pipe may be laid. Undoubtedly the values of the pipes are somewhat enhanced because of their location, but the entire immediate cost of opening and re-

placing the pavement is not the criterion for value which should be adopted. The contention illustrates how inequitable would be a rule arbitrarily fixing the value as that for which a system might be replaced. Aside from this being impractical it may safely be said that there is hardly an enterprise of this character, which, were it destroyed, would be restored as it was before. In ascertaining values in this way, the worth of a new plant of equal capacity, efficiency and durability, with proper discounts for defects in the old and depreciation for use, should be the measure of value rather than the cost of exact duplication.

Included in plaintiff's estimate of values are: Interest on capital during construction, \$22,415; promotion and organization, \$14,943.69; and engineering, \$18,679.61. These are mere estimates of what might be expended for these purposes in the construction of a new plant. Of course, all the money required would not necessarily remain idle during construction, and the witness admitted that the only expense for promotion and organization he could think of would be attorney's fees in preparing proper papers. The expense for engineering was said to be the percentage taken into consideration by those contemplating such enterprises. Manifestly these estimates are largely speculative. Nothing can be allowed for the promotion and organization of the company, for it is immaterial by whom the plant may be owned in estimating its value.

Some other matters are discussed which do not require special attention. The plaintiff's chief expert estimated <sup>439</sup> the physical properties to be worth \$365,564.41, and the petition alleged these to be \$368,000. The defendant conceded the value of the plant to be \$278,621.60. It had cost but \$267,500. It had been assessed for taxation on the sworn statements of its president in 1903 at \$99,020, in 1905 at \$95,300 and in 1907 at \$175,000, raised to \$250,000 by the board of equalization, from which the company appealed as to any valuation above \$108,000. In the five years prior to 1907, the company had charged off its books \$65,500 for depreciation in value. And yet, notwithstanding the small value of the land, relatively, how marvelously has this property, consisting of machinery, pipes, mains, and the like, advanced in value notwithstanding the constant depreciation due to the combined forces of adolescence, obsolescence, inadequacy, and decay. An examination of the record has convinced us that the witnesses of the plaintiff have overlooked nothing which might tend to enhance their estimates of the value of the plant, and that in many instances their estimates are exaggerated.

Undoubtedly, risks have been incurred, and possibly mistakes have been made. Doubtless the purpose in fixing the high rates in the first ordinance was to compensate for these



risks. Owners of such property, on the one hand, ought not to be excluded from the advantage of the prudence and foresight in its development, nor, on the other, should they be relieved of the consequences of mistakes and errors of judgment. At best, what a thing is worth is peculiarly a matter of opinion, and opinions of this kind ordinarily are as numerous as the witnesses who express them. A careful review of the entire record, which has been repeated, has led to the conclusion that a fair valuation of the entire plant is somewhere between \$300,000 and \$350,000. This is largely in excess of its cost, but, according to the record, the value of material as well as the cost of labor has <sup>440</sup> greatly increased since much of the plant was constructed. On the other hand, to put the value above the limit mentioned would require us to ignore the depreciation due to age, decay, inadequacy, and the like, on account of which defendant has been charging off its books large sums, and which the proof shows should be taken into account.

3. In 1905, the company sold 76,782,600 cubic feet of gas, in 1906, 91,173,200 cubic feet, and in 1907, 103,079,190 cubic feet. The evidence is to the effect that reduced prices increase the consumption, so that the last amount safely may be assumed as the minimum amount that will likely be sold hereafter. This, computed at ninety cents per thousand cubic feet, gives the gross annual income as \$92,771.10. Undoubtedly some deductions should be made for bad debts, but according to the evidence an allowance of \$.008 per thousand cubic feet will cover this item. The amount collected from each of the four thousand consumers of gas is relatively small. Under the former ordinance ten cents per thousand cubic feet was exacted in event of failure to pay by the 10th of the month.

The ordinance assailed fixes a level price, and appellant contends that the elimination of the discount for prompt payment will entail an expense of five cents per thousand cubic feet for collecting gas bills. This assumes that an equally efficient method of inducing payment may not be adopted by the company. That such corporations may adopt rules and regulations for the transaction of their business is well settled by authority: *Shepherd v. Gaslight Co.*, 6 Wis. 539, 70 Am. Dec. 479; *Tacoma Hotel Co. v. Tacoma Water Co.*, 3 Wash. 316, 28 Am. St. Rep. <sup>441</sup> 35, 28 Pac. 516, 14 L. R. A. 669; *Harbison v. Knoxville Water Co.* (Tenn. Ch.), 53 S. W. 993; *Williams v. Mutual Gas Co.*, 52 Mich. 499, 50 Am. Rep. 266, 18 N. W. 236.

In each of these cases a rule requiring security or deposit of money in advance was approved. Of course, such rules must be reasonable and not impose an undue burden on the consumer. In *People v. Manhattan Gaslight Co.*, 45 Barb.

136, a rule that the company would refuse to furnish gas to one who had failed to pay his past-due bill was held to be reasonable, but in *Crumley v. Watauga Water Co.*, 99 Tenn. 420, 41 S. W. 1058, it seems to have been held that a water company may not refuse to furnish water on the ground that the applicant is indebted for a previous supply for which he is unable or refuses to pay. To the same effect, see *Gaslight Company of Baltimore v. Colliday*, 25 Md. 1. In *American Waterworks Co. v. State*, 46 Neb. 194, 50 Am. St. Rep. 610, 64 N. W. 711, 30 L. R. A. 447, the rule required water rents to be paid on the first days of January and July of each year in advance at the company's office, and "if not paid within thirty days after they fall due, the water will be turned off and not turned on until all back rents are paid, increasing the charge by one dollar for turning water on and off." The court, while conceding the power of the company to make all reasonable regulations, held that that part of the rule exacting one dollar as a condition precedent to turning on again unreasonable and void: See, also, *State v. Nebraska Tel. Co.*, 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237. In *Rockland Water Co. v. Adams*, 84 Me. 472, 30 Am. St. Rep. 368, 24 Atl. 840, a rule that users of water liable for rent for the whole year, whether actually used for that length of time, but not requiring them to pay in advance, was held to be unreasonable. In *Shephard v. Gaslight Co.*, 6 Wis. 539, 70 Am. Dec. 479, the court held that the company might not attach a penalty for the violation of its rules. *State v. Butte City Water Co.*, 18 Mont. 199, 442 56 Am. St. Rep. 574, 44 Pac. 966, 32 L. R. A. 697, decided that payment in advance might be exacted, but that the company could not refuse to furnish water to others than owners of property. In *Miller v. Wilkesbarre Gas Co.*, 206 Pa. 254, 55 Atl. 974, a rule that supply be stopped unless all arrearages be paid, whether owing by tenant in possession or his predecessor, was approved but held not to be binding in the absence of notice. In *Owensboro Gaslight Co. v. Hildebrand (Ky.)*, 42 S. W. 351, a rule requiring the deposit of twenty dollars in advance was declared reasonable. To the same effect, see *Northern Colorado etc. Co. v. Richards*, 22 Colo. 450, 45 Pac. 423. See, also, *Thornton on Oils and Gas*, section 541, where decisions are collected relating to the reasonableness of amounts required to be deposited in advance. The company may not base a rule on the theory that the people as a whole are dishonest, but it has the right to adopt a rule which, while giving the honest citizen what he pays for, will prevent the dishonest from getting that which he will never pay for: See *Harbison v. Knoxville Water Co. (Tenn. Ch.)*, 53 S. W. 993. That the company may establish a rule exacting payment in advance in reasonable amounts, or the deposit of security, at least is fully settled by

the authorities, and it would seem that the requirement of security or deposit of money in advance would be quite as effective in enforcing prompt payments and more so in avoiding bad debts than an increase in price upon failure to pay by a time stated, and it does not appear that collecting through such method or some other reasonable method that may be devised not obnoxious to the ordinance would entail greater expense on the company than under that of allowing discounts. At any rate, we cannot assume in advance that consumers will not comply with such reasonable rules for the security of the company as may be embodied in their contracts, nor, in the absence <sup>443</sup> of satisfactory proof, that unusual expense will be incurred in collecting the price of the gas sold.

4. What does it cost to manufacture and distribute gas per thousand cubic feet to the consumer? The witnesses have estimated these separately, in the first including the expenses up to storing in the holder, and in the last all other items in delivering to and collecting the price from the consumer. They do not differ very materially on the cost of the several items, but are not entirely agreed as to what shall be included. Several persons of large experience testified on the subject but necessarily where the business of a company is well managed, and its accounts fairly kept, these furnish the best evidence of the cost of service rendered the public. The representatives of two accountant companies examined the books of plaintiff, the Audit Company of Illinois represented by George P. Kellogg for it, and the Marwick & Mitchell Company of Chicago represented by J. W. Hall for the city. They agreed that the books were fairly kept, and there was little difference between them in their deductions therefrom, save in the items making up the account. The one included \$10,000 for depreciation in 1905 and \$13,000 for 1906, while the other computed depreciation at \$.05 per thousand cubic feet of the gas made, being \$4,431.71 for 1905, and \$5,330.82 for 1906. Their computations were made by including all the expenses for the year, including depreciation as above, and deducting therefrom the amount received for residuals, such as coke and tar, and dividing the difference by the number of thousand cubic feet of gas manufactured less leakage. The quotient, of course, would be the cost of manufacturing and delivering one thousand cubic feet of gas. In this way plaintiff's accountant found that the cost per thousand cubic feet in 1905 was \$.756, and in 1906, \$.799. According to the defendant's accountant the cost for 1905 was \$.6745 per thousand cubic feet, and for 1906, \$.6812. As <sup>444</sup> said, these different conclusions as to 1905 and 1906 resulted from some differences in the items included, to which attention is now directed.

The cost of mixed gas (that is, of coal and water gas) in the holder for 1905 was found by plaintiff's accountant to be \$.394, and in 1906, \$.415 per thousand cubic feet, while defendant's accountant made such cost \$.3868 in 1905, and \$.4111 in 1906. This slight difference is mainly due to the charge of plaintiff's accountant of one dollar per thousand cubic feet for gas used at the works, while defendant's accountant allowed the actual cost. The latter was correct, for in ascertaining the cost of manufacture that used to accomplish this should be computed at the cost only. The defendant's accountant very properly excluded any allowance for taxes on the annex.

It appears that the company had charged off its books as depreciation in the value of its property due to use the following sums: \$10,000 in 1902, \$20,000 in 1903, \$12,000 in 1904, \$10,000 in 1905, \$13,000 in 1906. In computing the expense of distribution, the plaintiff's accountant, as said, included these items, while the defendant's accountant allowed for depreciation of property \$.05 per thousand cubic feet of gas manufactured. This would make a difference in manufacturing and distributing gas sold in 1905 of \$.0714 per thousand cubic feet, and in 1906 of \$.0816. There can be no doubt as to the justice of some allowance for depreciation. A public service corporation is under no obligation to sacrifice its property for the public good. Nor is it bound to see its property gradually wasted by wear and decay without making provision for its replacement. It is entitled to earn enough not only to meet the expenses of current repairs, but also to provide means for replacing the parts of the plant when these can no longer be used. "It is entitled to see that from its earnings the value of <sup>445</sup> the property is kept unimpaired, so that at the end of any given term of years the original investment shall remain as it was at the beginning. It is not only the right of the company to make such provision, but it is its duty to its bond and stockholders and, in the case of a public service corporation at least, its plain duty to the public. If a different course were pursued, the only method of providing for displacement of property which has ceased to be useful would be the investment of new capital and the issue of new bonds or stock. This course would lead to a constantly increasing variance between present value and bond and stock capitalization—a tendency which would inevitably lead to disaster either to the stockholders or to the public, or both." This situation ought not to be brought about either by the payment of excessive dividends or the omission to exact proper prices for the output: *Mayor etc. of Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. Rep. 148, 53 L. ed. 371.

There is a wide divergence of opinion as to the amount that should be set aside for depreciation, but all the witnesses

concede that their estimates are without data as a foundation, though the elements to be taken into account are enumerated. As contended, scarcely two parts of the plant will cease to be useful at the same time. Some will last but a brief period, while others may be serving their purposes for more than a century to come. Some stress is put on the possibility of enlargement and of the necessity of replacing parts with others adequate to meet increased demands, but there is no reason to think that the income will not keep pace with the extensions or enlargements. In other words, profits on the additional sales of gas will in all probability yield an adequate income on the amounts expended for the expansion of the plant. Should replacement of some of the machinery now in use prove necessary because of new inventions, this in all probability will be owing to the economy which may be effected thereby <sup>446</sup> in production, and again the saving may be expected to yield a fair return for the new investment. Moreover, the rate fixed by this ordinance is not necessarily perpetual, but subject to such changes by the governing board of the city as shall be essential to meet the contingencies of the future. The expert accountant who testified in behalf of defendant allowed five cents per thousand cubic feet of gas manufactured for depreciation, and another, who had made a study of the durability of different material, testified that if one and seven-tenths per cent of the value of the plant were put into a sinking fund drawing annual interest at four per cent per annum, this would produce enough to replace the plant in thirty years. The amount allowed by the accountant approximates this percentage of the value, and we are of opinion that in view of the evidence adduced it will prove adequate for replacement of the different portions of the plant when this shall become necessary. Appellee insists that the average cost during the past five years should be adopted. This, including depreciation, would be \$.6404 per thousand feet. Another item is not to be overlooked, and that is the probability that in the future the company, in view of this investigation, will be required to pay its just portion of the burdens of taxation. What the increase shall be cannot be told in advance, but it is likely to be enough to offset any decrease in the cost of fittings. The cost of gas production during the years 1905 and 1906 was much higher than for the years previous. This was not owing to the increased cost of fuel. The accountant of defendants testified that the cost of manufacturing and distribution, including allowance for depreciation, was \$.57 per thousand cubic feet in 1902, \$.5935 in 1903, \$.6375 in 1904. This increase in cost was due in large part to the increase in the fittings account, such as installing stoves, meters, and the like. In 1902 there was a profit in this account of \$283.99, in 1903, an expense of \$972.80, in 1904

an expense of <sup>447</sup> \$39.60, in 1905 of \$6,758.89, and in 1906 of \$5,943.83. This increase of expense of fittings, etc., over profits on the sale of stoves, etc., is not satisfactorily explained. There is no reason for thinking so large an outlay as in the last two years will be required in the future, and the probable increase therein may safely be allowed to offset probable increase in taxes. Upon an examination of the entire record, we are satisfied that the cost of manufacturing, distribution, and of making collections should not exceed \$.6812 per thousand cubic feet at the time the ordinance was enacted.

5. The expense involved in the manufacture and sale of gas in 1907, including depreciation then, was \$70,217.54. This deducted from the receipts leaves a net profit for the year of \$22,553.56. This is \$1,153.56 above eight per cent on the cost as alleged by the company. It is \$1,553.36 in excess of seven per cent, if the plant be estimated at the valuation of \$300,000, or a like sum above six per cent if it is worth \$350,000. If to these several margins be added the difference in the rates mentioned and that paid on the \$75,000 of bonded indebtedness, the first of these will be increased by \$2,250, the second by \$1,500, and the third by \$750. In other words, if the interest on the money borrowed be deducted from the profits, there will remain \$18,803.56 net income realized on a net investment of \$192,500 or on a net value of \$225,000 to \$275,000, or a return of seven or eight per cent per annum on the value of the plant over the encumbrance. It may be that the margin is not large in view of the contingency of increased cost of collections and the risks incident to all enterprises of this kind, but we are not fixing the rates. That is purely a legislative function. The court's duty ends when it has found that the rates are not so low as clearly to be confiscatory in character. "Judicial interference should never occur unless <sup>448</sup> the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use": *San Diego Land & Town Lot Co. v. National City*, 174 U. S. 739, 19 Sup. Ct. Rep. 804, 43 L. ed. 1154.

What compensation will be reasonable is a question of fact to be determined in the light of the evidence in each particular case. No court of last resort has undertaken to say what per cent on the value such an investment should yield its owners in all cases. In *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa, 234, 91 N. W. 1081, the court said: "The net earnings upon this showing, if not large, are substantial. The court cannot undertake to guarantee the company any fixed or certain return upon its investment. The exercise of such a power would work an utter destruction of the legisla-



tive right to regulate rates of water companies and other corporations operating works of public utility. We think the decisions have already gone to the verge of safety in nullifying legislative acts of this character; and to go further, and say that the courts will not only preserve property from confiscation and destruction by legislative power, but will also assure to its owners a definite and fixed rate of profit upon their investment, would be an act of judicial usurpation." In that case the value of the plant was estimated from \$400,000 to \$500,000, and rates yielding an income of five and one-half per cent on the former sum or four and one-half per cent on the latter were held not to be confiscatory; the court remarking that the "estimate of earnings may be very materially reduced, or the estimate of the value of the plant be very materially increased before the court will be justified in saying that plaintiff's property is being exposed to destruction or confiscation by an unprofitable schedule of rates." In *Mayor etc. of City of Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. Rep. 148, 53 L. ed. 382, the court, after reviewing former opinions, concluded that: "Under any aspect of the evidence the company is certain to obtain a substantial net revenue under the operation of the ordinance. The net income, in any event, would be substantially six per cent, or four per cent after an allowance of two per cent for depreciation: See *Stanislaus County v. San Joaquin etc. Irr. Co.*, 192 U. S. 201, 24 Sup. Ct. Rep. 241, 48 L. ed. 406. We cannot know clearly that the revenue would not much exceed that return. We do not feel called upon to determine whether a demonstrated reduction of income to that point would or would not amount to confiscation. Where the case rests, as it does here, not upon observation of the actual operation under the ordinance, but upon speculation as to its effect, based upon the operations of a prior fiscal year, we will not guess whether the substantial return certain to be earned would lack something of the return which would save the effect of the ordinance from confiscation. It is enough that the whole case leaves us in grave doubt." In *Stanislaus County v. San Joaquin etc. Irr. Co.*, cited, it was remarked concerning an irrigation canal that: "Much of the capital was invested between twenty and thirty years ago, and to be able still to realize six per cent upon the money originally invested is more than most people are able to accomplish in an ordinary investment and more than is necessary in order to give just compensation for property at the time it is used for the public purpose originally intended." In *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. Rep. 192, 53 L. ed. 382, the court, after observing that "there is no particular rate of compensation which must in all cases and in all parts of the country be regarded as sufficient for capital invested," con-

curred in the finding of the trial court that, in view of the facts proven, "complainant is entitled to six per cent on the fair value of its property devoted to public use."

<sup>450</sup> When government bonds bearing two per cent annual interest are selling at a premium, and those issued by state or municipalities at little if any more than double such rate are in demand, and when the current rate of interest on "gilt-edge" securities on real estate or public service corporations rarely exceeds five per cent, it will not do for the courts to say that the income, above all expenses, including taxes, on property devoted to the public service, must necessarily much exceed the last-mentioned rate to avoid the charge of being confiscatory. What such plants usually earn, unless they be based on reasonable charges, cannot be accepted as a criterion, for usually the rates fixed are all the tariff will bear. Possibly the plant should earn a return equal to the interest paid in the community on investments equally permanent in character, but what this was is not disclosed by the record. The rates fixed by the ordinance are likely to yield enough above six per cent per annum on the present value of the plant to cover contingencies which may not have been taken into account, and, in view of the fact that effect of the ordinance is largely speculative, we are not inclined to interfere with its operation. If upon a fair trial it shall appear that under the new schedule the rates are not sufficiently remunerative, a remedy may be applied. The function of fixing compensation for public services should be exercised with a keen sense of justice on the part of the regulating body. The company should aid therein by a frank and full disclosure of its affairs. When so approached on either side, it would seem that rates might be settled upon which, on the one hand, would not dampen the zeal to furnish the best service and extend the plant as the needs of an advancing municipality shall require, nor, on the other hand, extract from the people more than fair compensation for the service received. Should the ordinance, after being put in operation and given a fair test, be found to deprive plaintiff of a fair return on its investment, <sup>451</sup> it ought not to be deprived of the opportunity of again presenting the matter in court.

For this reason the petition will be dismissed, without prejudice to such action.

As so modified, the judgment is affirmed.

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*The Business of Supplying Gas to meet the demands of a community is subject to public regulation in the matter of fixing rates of compensation. And one of the conditions for the exercise of the privilege of conducting a gas business under legislative grant is that in the absence of legislative prescription restricting the rate of compensation for the service rendered, the grant carries by implication the obligation to furnish it at a reasonable rate and price: Madison v.*

**Madison Gas etc. Co.**, 129 Wis. 249, 116 Am. St. Rep. 944. As to the reasonableness of rates charged by a public service corporation, see **Brooklyn Union Gas Co. v. City of New York**, 188 N. Y. 334, 117 Am. St. Rep. 868; **Poole v. Paris Mt. Water Co.**, 81 S. C. 438, 128 Am. St. Rep. 923. As to the elements to be considered in fixing rates, see **San Diego Water Co. v. City of San Diego**, 118 Cal. 556, 62 Am. St. Rep. 261; **Twitchell v. Spokane**, 55 Wash. 86, 133 Am. St. Rep. 1021. Whether existing or prescribed rates and charges for service by a public service corporation afford a reasonable compensation is said to be a judicial question: **City of Madison v. Madison Gas etc. Co.**, 129 Wis. 249, 116 Am. St. Rep. 944. But the judiciary should not interfere with the means of collecting gas rates established under legislative sanction, unless they are plainly in violation of law: **State v. Board of Water etc. Commrs.**, 105 Minn. 472, 127 Am. St. Rep. 581.

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## **WELLS v. WESTERN UNION TELEGRAPH COMPANY.**

[144 Iowa, 605, 123 N. W. 371.]

**COURTS—Law of Case—Federal and State Courts.**—The opinion on appeal in a federal court, reversing a judgment for the plaintiff and remanding the cause, is conclusive on the trial federal court in further proceedings therein, but it will not sustain a plea of former adjudication in a subsequent action by the plaintiff in the state court after dismissing the action in the federal court without prejudice. (p. 321.)

**REMOVAL OF CAUSE—Colorable Assignment of Claim.**—Where there is nothing but the barest inference that a cause of action was assigned to prevent a removal to the federal courts, the maintenance of the action in the state court is not thereby defeated. (p. 321.)

**TELEGRAM—Forged Message—Notice of Claim.**—A statute requiring a claim against a telegraph company for an erroneous transmission or an unreasonable delay of a message to be presented within a certain time does not apply to a claim for sending a fictitious or forged message. (p. 322.)

**TELEGRAM—Forged Message.—No Presumption of Negligence** arises against a telegraph company in sending a forged message. (p. 322.)

**ELECTION OF REMEDIES—Suit by Undisclosed Principal.**—The fact that the sendee of a forged telegram permits an undisclosed principal to sue the telegraph company in the federal courts does not constitute an election which prevents the sendee or his assignee, upon the plaintiff dismissing the case without prejudice before final judgment, from suing in a state court. (p. 323.)

**ESTOPPEL—Permitting Suit by Undisclosed Principal.**—The sendee of a forged telegram, who permits an undisclosed principal to sue the telegraph company in a federal court, and in response to the subpoena gives testimony on the trial, is not thereby estopped to sue in a state court after a dismissal of the action in the federal court before final judgment. (p. 323.)

**LACHES—Action not Barred by Statute of Limitations.**—The doctrine of laches does not apply to an action brought before it is barred by the statute of limitations. (p. 323.)

**TELEGRAM.**—Where a Forged Telegram Containing a Promise to Honor a certain check is sent to a bank, and the bank, relying thereon, pays the check to an insolvent, the bank may maintain an action against the telegraph company, if it was negligent in sending the message, for the resulting loss. (p. 324.)

**TELEGRAM.**—Liability for Sending Forged Message.—A telegraph company cannot be a party to an actionable fraud in sending a forged telegram, without submitting itself to liability for the injury. (p. 325.)

**TELEGRAM.**—The Addressee of a Telegram, although having no direct contract relations with the company, may recover damages sustained by him through the erroneous transmission or negligent delay of the message. (p. 325.)

**TELEGRAM.**—Liability for Sending Forged Message.—To render a telegraph company liable for sending a forged message, it is not necessary that the exact damages should have been foreseen. (pp. 325, 328.)

**TELEGRAM.**—Liability for Sending Forged Message.—To render a telegraph company liable to a person injured through its sending a forged telegram, it is not necessary that the message should have been addressed to him directly, if he is one of the persons interested in its correct transmission and delivery. The company may be liable to an undisclosed principal of the sendee who parts with value on the faith of the telegram. (pp. 325, 328.)

**TELEGRAM.**—Liability for Sending Forged Message.—To render a telegraph company liable for sending a forged message, it is not necessary that it should have knowledge of all the details of the business to which the message relates; it is enough if the results likely to follow may be gathered in a general way from the sending of the telegram. And it is not essential that the parties must have contemplated the amount of the actual damages which ought to be allowed. (p. 326.)

**BANKING.**—Acceptance of Draft.—A Telegram by which one bank promises another to honor a certain draft amounts in law to an acceptance of the draft from which the bank cannot recede. (p. 327.)

**TRIAL.**—Admission of Counsel.—Direction of Verdict.—Where the court overrules the motion of the defendant for a directed verdict, and the defendant in open court concurs in the view of the court that there are no disputed facts, the court is justified in determining both the facts and the law of the case. (p. 330.)

Action against a telegraph company for damages occasioned by transmitting a forged telegram. A verdict was directed for the plaintiff, and the defendant appealed.

George H. Fearons, H. D. Estabrook and Wright, Call & Sargent, for the appellants.

Kelleher & O'Connor and Senneff & Bliss, for the appellee.

**608 DEEMER, J.** Plaintiff is a resident and citizen of New York, and defendants are the Western Union Telegraph Company and B. G. Lyman, its one time operator at the town of Denison, in this state. As assignee of Schriver Bros., a co-partnership doing business in this state, and of the Commercial Bank of Britt, Iowa, each alleged to be the owner of a claim or cause of action against the telegraph company and its agent,

Lyman, plaintiff, brought this action to recover damages for defendants' negligence in sending to the Bank of Britt a forged and fictitious telegram reading as follows: "March 14, 1902. To Commercial Bank, Britt, Iowa. We will honor Barnes draft for eighty-nine hundred seventy-two dollars. [Signed] Bank of Denison." While several grounds of negligence are charged, they may all be epitomized for the purposes of this appeal, into one, and that is that Lyman, the telegraph operator, knew, or in the exercise of ordinary care and prudence should have known, that the message was false, fictitious and forged, and that the sender thereof, one Barnes, had no authority to send it, and that he knew, or should have known, that the message was unauthorized by the Bank of Denison, and that it was sent with intent to defraud the addressee thereof or some person who would be justified in relying thereon. Defendants filed an answer <sup>600</sup> in which, among other things, is pleaded (1) a former adjudication: (2) that plaintiff's assignment is and was without consideration, colorable and fictitious, and made with the sole purpose and intent of defeating a removal to the federal courts; (3) that plaintiff, as assignee of the Bank of Britt, could not recover because no notice was given to defendant as provided by sections 2163 and 2164 of the Code; and (4) that plaintiff, as assignee of Schriver Bros., cannot recover, because his assignor being an undisclosed principal, could not have done so. The answer also denied any negligence on the part of the telegraph operator. The trial court sustained a demurrer to that part of defendants' answer pleading a former adjudication, and of this complaint is made. It is also contended that the trial court erred in directing a verdict for plaintiff for reasons which will appear during the further consideration of the case.

It appears from the undisputed testimony that the firm of Schriver Bros. sold a lot of cattle to one Barnes for \$8,972, and took his check upon the Bank of Denison for the amount. They, however, refused to surrender the cattle without some guaranty that the check would be paid, and they then agreed that Barnes should have the Bank of Denison transmit such a guaranty by telegram. Schriver Bros. requested that the telegram be sent to the Bank of Britt. Barnes lived at Denison, and had been engaged in the livestock business for some time. He had transacted a great deal of business with the telegraph company through its agent, Lyman. After the agreement with Schriver Bros. with reference to the telegram, Barnes returned to Denison, and there, over the telephone, dictated to Lyman the dispatch heretofore set out. The agent testified that he knew this message, although signed in the name of the Bank of Denison, was being dictated by Barnes, the man who drew the draft or check to Schriver Bros.; tes-

tified that he knew it was Barnes who called <sup>610</sup> over the phone, and that, after giving the substance of the message, he, Barnes, said, "Sign it 'Bank of Denison.' " Lyman made no inquiry of the bank about the matter, but sent the message as it had been dictated. The charge for sending the message was not made to the bank, but, as we understand it, to Barnes. Indirectly, Lyman also testified that he knew that the telegram as sent had reference to Barnes' livestock business. The draft or check to which it referred had been left with the Commercial Bank of Britt by the Schriver Bros. pursuant to an arrangement whereby credit was to be given to the Schriver Bros. upon receipt of the guaranty, and, although the cattle had been shipped, they were not to be released to Barnes until the receipt of such a message. The message was delivered to the Commercial Bank in due season, and it directed the release of the cattle to Barnes, who immediately disposed of them. The Commercial Bank upon receipt of the spurious telegram gave Schriver Bros. credit for the amount of the check or draft upon its books, and forwarded said draft in due course for collection. When the draft reached Denison, the bank upon which it was drawn refused to accept or honor it, repudiated the telegram as false and spurious, and allowed the same to go to protest. When the draft was returned to the Bank of Britt, it demanded that Schriver Bros. make the same good, and thereupon they executed to the said bank their notes for the amount thereof. These notes are worthless, however, for the reason that Schriver Bros. are insolvent, and they were indorsed to plaintiff in this action, who now holds them as part of his claim under his assignments. It appears that Schriver Bros. brought suit against the Western Union Telegraph Company alone in the federal court for the northern district of Iowa, which suit went to trial and judgment in that court in favor of the said Schriver Bros. for the full amount claimed. Upon appeal to the United States circuit court of appeals, the judgment was <sup>611</sup> reversed: See 129 Fed. 344, 64 C. C. A. 96. The reversal was for error in one of the instructions. Upon remand to the trial court it was again heard before Honorable Henry T. Reed and a jury, resulting in a verdict for plaintiff in the case for the same amount as before. Again an appeal was taken and again a reversal was had: See 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A., N. S., 678. The reversal on the second appeal was largely upon the ground that, as Schriver Bros. were the undisclosed principals of the Bank of Britt, they could not recover. The case was thereupon remanded without any judgment having been entered to the federal trial court. When the case reached that court on the second remand, plaintiffs dismissed the same without prejudice, and thereafter they assigned their claim to plaintiff herein, who is a resident and citizen of the state of New York.



1. Defendant's plea of former adjudication is bottomed upon these proceedings in the federal courts. It is manifest from this statement that there never was any final judgment against Schriver Bros. in those courts. True, several opinions have been rendered therein which for the purpose of final trial at nisi would constitute the law of the case for those courts; but it is idle to say that there has, in fact, been a former judgment adjudicating the right of plaintiff's assignor to recover. It is said, however, that these opinions settled the law of the case, and are binding as such. This is true in part. They do settle the law of the case for all purposes of trial in the federal courts, the opinion on appeal being conclusive on the trial courts in further proceedings had therein; but, as no further proceedings were had, these decisions are of no more weight with us than if they had been rendered by any other court of a foreign jurisdiction in cases to which these litigants were not parties. There cannot well be much doubt about this proposition on principle, and the <sup>612</sup> authorities seem to point to but one conclusion: *Hooper v. Atlanta etc. R. R. Co.*, 107 Tenn. 712, 65 S. W. 405; *Foley v. Cudahy Packing Co.*, 119 Iowa, 246, 93 N. W. 284; *Gardner v. Michigan Cent. R. R. Co.*, 150 U. S. 349, 14 Sup. Ct. Rep. 140, 37 L. ed. 1107; *Spring Valley Co. v. Patting*, 210 Ill. 342, 71 N. E. 371. The trial court correctly sustained the demurrer to that part of the answer pleading a final adjudication.

2. It is argued that the assignments to plaintiff were without consideration, colorable and fictitious, and made for the sole purpose of preventing a removal of the suit, or suits, to the federal court. There is no testimony to support this claim. The evidence introduced by the defendant itself shows that plaintiff purchased the claims and took the assignments, and that he paid three thousand dollars therefor. There is nothing but the barest inference that this was done to prevent a removal to the federal courts. The case in this respect is ruled by *Vimont v. Chicago & N. W. R. R. Co.*, 64 Iowa, 513, 17 N. W. 31, 21 N. W. 9, 69 Iowa, 296, 22 N. W. 906, 28 N. W. 612; *Stryker v. Crane*, 123 U. S. 527, 8 Sup. Ct. Rep. 203, 31 L. ed. 194; *Jahn v. Champagne Lumber Co. (C. C.)*, 157 Fed. 407; *Everett v. Central Iowa Ry. Co.*, 73 Iowa, 442, 35 N. W. 609; *Hawley v. Chicago B. & Q. Ry. Co.*, 71 Iowa, 717, 29 N. W. 787. Of course, if the assignments were without consideration and merely colorable, as defendants contend, that would defeat the action, but the record does not support such a claim. As tending to support these views, see *Provident Savings etc. Soc. v. Ford*, 114 U. S. 635, 5 Sup. Ct. Rep. 1104, 29 L. ed. 261; *Oakley v. Goodnow*, 118 U. S. 43, 6 Sup. Ct. Rep. 944, 30 L. ed. 61.

3. Again, it is said that, as assignee of the Bank of Britt, plaintiff has no right to maintain the action, for the reason that neither he nor the bank served any notice of their claim for damages, as provided in sections 2163 and 2164 of the Code. These sections, so far as material, read as follows: Code, section 2163: <sup>613</sup> "The proprietor of a telegraph or telephone line is liable for all mistakes in transmitting or receiving messages made by any person in his employment, or for any unreasonable delay in their transmission or delivery, and for all damages resulting from failure to perform the foregoing or any other duty required by law, the provisions of any contract to the contrary notwithstanding." Code, section 2164, provides: "In an action against any telegraph or telephone company for damages caused by erroneous transmission of a message, or by unreasonable delay in delivery of a message, negligence . . . shall be presumed; . . . but no action for the recovery of such damages shall be maintained unless a claim therefor is presented in writing to such company," etc. We are constrained to hold that section 2164, which requires the notice, does not apply to a case of this kind. Here there was neither erroneous transmission nor unreasonable delay. The claim is for negligence in sending a false, fictitious and forged message. If appellant's contention in this respect be correct, then a presumption of negligence arose from a showing that the message was a forgery. This must follow if the statute be given the construction claimed for it. But appellant rightly insists that there is no presumption of negligence from the mere sending of a forged message. Hence no notice is required where such a message is negligently sent, and plaintiff, under the facts shown, may recover in the event it be found that the Bank of Britt might have done so in its own right.

4. Again, it is argued that plaintiff, as assignor of the Bank of Britt, is not entitled to recover for the reason that, had the bank brought the suit, it should and would have been defeated because of an estoppel by reason of its conduct with reference to the former litigation, and by reason of an election on its part to allow the action to be brought in the name of and for the benefit of Schriver Bros. Had the case gone to judgment in the federal courts, there might be <sup>614</sup> ground for claiming that this judgment was binding upon the Bank of Britt, because of its conduct with reference to the litigation. But it never passed to judgment, and the most that can be said in this connection is that the circuit court of appeals was of opinion that Schriver Bros., as the undisclosed principals of the Bank of Britt, had no right to recover. Schriver Bros. dismissed that case, and presumptively paid all the costs of the litigation. Assuming that they had no right of action against the telegraph company and that the Bank of Britt

was concluded by that holding there was, in fact, no holding that the Bank of Britt might not have a right of recovery. Indeed, the opinion of the circuit court of appeals, in effect, concludes that the Bank of Britt might have had a cause of action against the telegraph company in its own right. Under our cases, a misconception of plaintiff's right to sue or to sue by a particular form of action does not amount to an election of remedies: *Redhead v. Wyoming Cattle I. Co.*, 126 Iowa, 410, 102 N. W. 144; *Lemon v. Sigourney Sav. Bank*, 131 Iowa, 79, 108 N. W. 104. The doctrine of election applies only when a plaintiff in fact has two or more remedies. If it be determined that there is but one, his adoption of another is not held to be an election: See cases just cited. For the purposes of this discussion, it must be assumed that there is a liability to either Schriver Bros. or the Bank of Britt. If there be no liability to either, then the doctrine of election has no application to the case. If the liability is to the Bank of Britt, then it is not, for reasons already stated, estopped by judgment, for none was rendered, and there is no estoppel in pais because there is no testimony upon which to base such a finding. All that is shown in this connection is that its officers were witnesses at the trial in the federal court, who appeared and gave testimony pursuant to subpoenas duly served. From such facts an estoppel in pais does not arise. As the action was brought before it was barred by the general statute of <sup>615</sup> limitations, and is at law, the doctrine of laches does not apply: *Thomas v. Holmes*, 142 Iowa, 288, 120 N. W. 626.

5. If defendant telegraph company, through its agent, Lyman, was guilty of the negligence charged and found by the trial court to have been established, it was liable to someone for the damages sustained, and that one was either the Bank of Britt or Schriver Bros., and, as plaintiff represents and is the assignee of both, he is entitled to recover, unless it be for some technical reason already considered or hereafter referred to. The circuit court of appeals seemed to believe that the liability was to the Bank of Britt, and not to Schriver Bros. We may easily conceive of a case where, if the rule announced by that court were to be followed, there would be no liability to anyone. Suppose that, instead of passing the check through the Bank of Britt, Schriver Bros. had used some other channel whereby to collect the draft given it by Barnes, would there have been any right of action under the doctrine announced by the circuit court of appeals, even had Schriver Bros. relied upon and used the forged message? From a reading of the opinion we are constrained to believe that the circuit court of appeals, to be consistent, must have held that there would not have been any liability on the part of the telegraph company.

But, however this may be, it is shown that upon the strength of the telegram the Bank of Britt gave Schriver Bros. credit for the amount of the check or draft, sent it for collection to the Bank of Denison, and, when the instrument was protested, took Schriver Bros.' note for the amount of the credit given them, which note was then and is now worthless. By this means the bank lost its hold upon the cattle, which it retained until the receipt of the telegram, and gave Schriver Bros. a credit to which they were not entitled, and which they, as we understand it, exhausted before it was learned that the message was a forgery. It seems to <sup>616</sup> us that, conceding the negligence of defendant, the Bank of Britt had a clear right of action against the defendants. As sustaining this view, see *United States Tel. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519; *Lee v. Western Union Tel. Co.*, 51 Mo. App. 375.

Whether or not Schriver Bros. had a right of action is a much more troublesome question. The circuit court of appeals held that they did not have, and there is dicta to the same effect in *Lee v. Western Union Tel. Co.*, 51 Mo. App. 375. On the other hand, there is dicta to the effect that there is a right to recover under such circumstances in *Western Union Tel. Co. v. Mellon*, 96 Tenn. 66, 33 S. W. 725. And Judge Thompson, in his work on Electricity, states the rule as follows: Section 427: "The true view is the one which elevates the question above the plane of mere privity of contract, and places it where it belongs, upon the public duty which the telegraph company owes to any person beneficially interested in the message, whether the sender, or his principal where he is agent, or the receiver, or his principal where he is agent." Moreover, in *Harkness v. Western Union Tel. Co.*, 73 Iowa, 130, 5 Am. St. Rep. 672, 34 N. W. 411, we said on this question: "It is objected that the court erred in rendering judgment for the plaintiff because the message was neither sent by nor to her, and no contract was made with her. The court was justified in finding that both Sloan and Walters were the agents and attorneys of the plaintiff, and that the telegram was sent by one of them and received by the other for the use and benefit of the plaintiff. Therefore she may well be said to be an undisclosed principal, and in such case we understand the rule to be that such principal, as the ultimate party in interest, is entitled against third persons to all advantages and benefits of such acts and contracts of his agent, and the principal may sue in his own name on the contract: *Story on Agency*, sec. 418; *National L. Ins. Co. v. Allen*, 116 Mass. 398; *Gage v. Stimson*, 26 Minn. 64, 1 N. W. 806. The fact that the defendant had no knowledge that the plaintiff was in fact principal, and that the telegram was sent for her use and benefit, is immaterial, <sup>617</sup> except that it may be true that the defendant may set up as a defense any matters that

would constitute a defense if the suit was brought in the name of the agent, which occurred prior to the disclosure of the principal." See, also, as bearing upon this proposition, *May v. Western Union Tel. Co.*, 112 Mass. 90; *Milliken v. Western Union Tel. Co.*, 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281; *Leonard v. New York etc. Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446; *Cashion v. Western Union Tel. Co.*, 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160; *Western Union Tel. Co. v. Simpson*, 10 Kan. App. 473, 62 Pac. 901; *Western Union Tel. Co. v. Adams*, 75 Tex. 531, 16 Am. St. Rep. 920, 12 S. W. 857, 6 L. R. A. 844.

On principle the case, in so far as it is bottomed upon liability to *Schrivver Bros.* and to plaintiff as their assignee, assumes many different aspects. From one point of view the defendant telegraph company is to be treated as an ordinary individual conveying written information to another, the character of which information is known to it. In this aspect its rights and liabilities are perhaps contractual, although even in this relation it may be guilty of actionable negligence or misfeasance. In another light a telegraph company assumes the attitude of a common carrier of information, owing a duty to the public and to each and everyone who may apply to it for service. No matter which of these prevails, it cannot be a party to an actionable fraud without submitting itself to liability to the party injured. We have heretofore said that the relation which a telegraph company bears the public is akin to that of a common carrier, and, following this rule, have held that an addressee of a message, although having no direct contract relations with the company, may recover all damages sustained by him due to the erroneous transmission of or delay in sending a message: See *Herron v. Western Union Tel. Co.*, 90 Iowa, 129, 57 N. W. 691; *Mentzer v. Western Union Tel. Co.*, 93 Iowa, 752, 57 Am. St. Rep. 294, 62 N. W. 1, 28 L. R. A. 72; *McPeck v. Western Union Tel. Co.*, 107 Iowa, 356, 70 Am. St. Rep. 205, 78 N. W. 63, 43 L. R. A. 214; *Cowan v. Western Union Tel. Co.*, 122 Iowa, 379, 101 Am. St. Rep. 268, 98 N. W. 281, 64 L. R. A. 545. Indeed, section 2163 of the Code, which we have heretofore quoted, makes a telegraph company liable for all damages resulting from failure to perform any duty required by law relating to the transmission and receipt of messages. This is the view prevailing in other states: *Western Union Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715; *Western Union Tel. Co. v. Fenton*, 52 Ind. 1; *Western Union Tel. Co. v. McKibben*, 114 Ind. 511, 14 N. E. 894; *Western Union Tel. Co. v. Mellon*, 96 Tenn. 66, 33 S. W. 725.

The action in this case clearly sounds in tort growing out of a duty which the telegraph company owed, not only to the sender, but to the addressee of the message and to all persons

interested in its correct transmission and delivery. If the action were based upon contract and could be brought by the sender alone as in England and in some of our commonwealths, it is manifest that neither the addressee nor his undisclosed principal might recover. We have passed that point, however, because of the practical concession of counsel that the addressee may recover the damages, if any sustained by him.

Assuming, then, that the addressee may recover because the action sounds in tort, may an undisclosed principal of this agent recover the damages if any sustained by him? For the solution of this question we must look to some well-settled rules applicable to somewhat analogous cases. It seems to be well settled that, if an agent makes a contract for the transportation of goods without disclosing the fact that he is acting merely as agent, his principal is entitled to sue the carrier for loss of or injury to the goods: *New Jersey S. N. Co. v. Merchants' Bank*, 6 How. 344, 12 L. ed. 465; *Elkins v. Boston & M. R. R.*, 19 N. H. 337, 51 Am. Dec. 184; *Hartford Co. v. Chicago etc. Ry. Co.*, 175 U. S. 91, 20 Sup. Ct. Rep. 33, 44 L. ed. 84; *Hall v. Nashville etc. Ry. Co.*, 13 Wall. 367, 20 L. ed. 594; *Green v. Clark*, 12 N. Y. 343.

<sup>619</sup> But it is said that, even if the action be bottomed upon tort or neglect of duty, there can be no recovery because the damages suffered by Schriver Bros. could not reasonably have been apprehended. As a general rule, it is true, of course, that a telegraph company cannot be held liable for special damages or perhaps for more than nominal damages, unless it knew or had reason to believe from the message itself, or from extraneous matters, something of its importance, and that damage was likely to result to someone from its breach of duty: *Evans v. Western Union Tel. Co.*, 102 Iowa, 219, 71 N. W. 219. But it is not necessary that the company or its agent have knowledge of all the details of the business to which the message relates, nor of the particular business intended. It is enough if the results likely to follow may be gathered in a general way from the sending of the telegram: *Evans v. Western Union Tel. Co.*, 102 Iowa, 219, 71 N. W. 219; *Manville v. Telegraph Co.*, 37 Iowa, 214; *Garrett v. Western Union Tel. Co.*, 83 Iowa, 257, 49 N. W. 88; *McPeck v. Western Union Tel. Co.*, 107 Iowa, 356, 70 Am. St. Rep. 205, 78 N. W. 63, 43 L. R. A. 214. It is not essential either that the parties must have contemplated the amount of the actual damages which ought to be allowed. The liability of the company is for all direct damages which both parties would have contemplated as flowing from its breach, if at the time they entered into it they had bestowed proper attention upon the subject, and had been fully informed of the facts: *Leonard v. New York Co.*, 41 N. Y. 544, 1 Am. Rep. 446; *Western Union Tel. Co. v.*

Church, 3 Neb. (Unof.) 22, 90 N. W. 878, 57 L. R. A. 905; *Western Union Tel. Co. v. Edmondson*, 91 Tex. 206, 66 Am. St. Rep. 873, note, 42 S. W. 549.

Now, assuming, as we must, that defendant's agent knew the law, and taking it for granted that he knew the contents of the message, and assuming, again, as we must from the testimony, that he knew Barnes was in the livestock business and buying and selling cattle, we find him <sup>620</sup> accepting the message from Barnes, which we have heretofore set out, knowing that it was not signed or authorized by the Bank of Denison, directed to the Bank of Britt, and relating to a draft or check drawn by Barnes upon the Bank of Denison. This message amounted in law to an acceptance of that draft, from which the Bank of Denison, if the message were authentic, could not recede: *Johnson v. Clark*, 39 N. Y. 216; *Garretson v. North Atchison Bank (C. C.)*, 47 Fed. 867; *Coolidge v. Payson*, 2 Wheat. 66, 4 L. ed. 185; *Exchange Bank v. Rice*, 98 Mass. 288. Upon this acceptance anyone dealing with Barnes' check or draft had a right to rely, and the Bank of Britt undoubtedly had authority, implied as of law, to use the telegram as constituting an acceptance and as part of the instrument itself. The agent must have known of this fact if he believed that Barnes' check or draft had been purchased or was to be cashed by the Bank of Britt. He must have known, also, for such is the law, that the bank, as agent of the holder, might receive the draft simply for collection, and might, after the receipt of the message, conclude to do what the evidence shows it did in this case.

Moreover, there is nothing to show that the operator thought he was dealing with the Bank of Britt as a principal, and there is nothing on the face of the telegram to indicate that this was the fact. He did know that Barnes was buying cattle. He was informed by the message that Barnes had issued a check or draft to someone and for some purpose to the amount stated. In view of this knowledge, he should have assumed that Barnes was pursuing his ordinary business, and had issued his draft for the purchase price of cattle. He did not know, nor does the message disclose, the then ownership of the check or draft, although it was apparent to him that, whoever the owner, he had refused to accept it unless the bank on which it was drawn would honor it. It is true that the message was directed to the Bank of Britt, but, <sup>621</sup> as we have said, the agent must have known that it was not then the owner. The object of the telegram was to make the check good, no matter in whose hands it might then be, and there was nothing either in law or morals to prevent the bank's using the message after its receipt. Indeed, according to all known rules of business, it became a part of the transaction, and was likely to pass either to the then holder of the draft or



to any person who might care to purchase the check or draft after the message was received; so that the agent had every reason to believe that this telegram was not a private or confidential one to the Bank of Britt, but was one relating to commercial paper which the Bank of Britt was authorized to use and present to anyone interested, either as a holder or prospective purchaser of Barnes' draft. In view of the law on this subject, and the known customs and habits of business men, no other conclusion can, as it seems to us, be properly derived from the facts already recited. As sustaining these views, see *Exchange Bank v. Rice*, 98 Mass. 288; *Stemen v. Harrison*, 42 Pa. 49, 82 Am. Dec. 491; *Riley v. Bell*, 120 Iowa, 618, 95 N. W. 170.

It is not necessary in an action bottomed upon tort for plaintiff to show that the exact damage should have been foreseen and anticipated: *Cowan v. Western Union Tel. Co.*, 122 Iowa, 379, 101 Am. St. Rep. 268, 98 N. W. 281, 64 L. R. A. 545; *Burk v. Creamery P. M. Co.*, 126 Iowa, 730, 106 Am. St. Rep. 377, 102 N. W. 793; *Brown v. West Riverside Coal Co.*, 143 Iowa, 622, 120 N. W. 732.

The doctrine which we have announced regarding liability to one who is not party to the transaction is not a new one. It was announced in the old case of *Polhill v. Walter*, 3 Barn. & Adol. 114. In that case it was said: "It is true that the representation was made immediately to the plaintiff, and was intended by the defendant to induce the plaintiff to do the act which caused his damage. Here the representation is made to all to whom the bill may be offered in the course of circulation, and is, in fact, <sup>622</sup> intended to be made to all, and the plaintiff is one of those; and the defendant must be taken to have intended that all such persons should give credit to the acceptance, and thereby act upon the faith of that representation, because that, in the ordinary course of business, is its natural and necessary result." Again, in *Swift v. Winterbottom*, L. R. 8 Q. B. 244, it is said: "It is now well established that, in order to enable a person injured by a false representation to sue for damages, it is not necessary that the representation should be made to the plaintiff directly. It is sufficient if the representation is made to a third person to be communicated to the plaintiff or to be communicated to a class of persons of whom the plaintiff is one, or even if it is made to the public generally, with a view to its being acted on, and the plaintiff as one of the public acts on it and suffers damage thereby. It is enough that one who makes complaint because of the false representation is one of those whom the person making the false representations ought to have been aware he was injuring or might injure by what he was doing." These principles are fundamental, and have been announced by this court: *Warfield v. Clark*, 118 Iowa, 69, 91 N. W. 833;

*Hubbard v. Weare*, 79 Iowa, 678, 44 N. W. 915. See, also, *Culliford v. Gadd*, 139 N. Y. 618, 35 N. E. 205, from which we make the following quotation: "The evidence warranted the jury in concluding that this representation was made by the defendant. It is not a defense to show that the representations were not made to the plaintiff in person, but were made to her agent, so long as they induced the payment of the money. Fraud committed on the agent is fraud upon his principal: See *Raymond v. Howland*, 12 Wend. 176; *Allen v. Addington*, 7 Wend. 9. There is testimony in the case to satisfactorily support the finding by the jury that the principal was disclosed to the defendant and that he acted with full knowledge of the capacity in which the plaintiff's husband <sup>623</sup> was acting. If this were not so, the charge of the learned trial judge that 'it is immaterial whether or not the defendant knew that Culliford was acting as the agent for his wife' was not error, for the reason that the agent is not bound to disclose his principal, and his failure to do so does not waive any rights of his undisclosed principal as against the defendant."

That Barnes intended to deceive and defraud by sending this spurious message, and that it was immaterial to him as to whom this was, is conceded. Suppose, now, that Lyman, as the agent of a private person acting within the apparent scope of his authority, with knowledge of the spurious character of a writing similar to the message in suit, and knowing or having good reason to believe that a fraud was intended, should have delivered this writing to the holder of the check or draft or to one who purposed buying it or to an agent of the holder of the check or draft, would there be any doubt of the liability of the principal for whom the agent acted in carrying the guaranty or letter of acceptance? It seems to us that, even should we eliminate the notion that defendant owed a duty to the public and place the matter simply on the ground of private duty based upon contract, the result would be the same. Here defendant received what was the equivalent of a forged, spurious, and fictitious writing, knowing its character and having notice or knowledge of the maker's intent to defraud. This he undertakes to deliver to a certain person in order that it might be used and relied upon either by him or someone holding the unaccepted draft; he does deliver it to the person to whom it is addressed, who is acting for the holder of the draft, and the message is shown to the holder or is acted upon by the person to whom delivered. Would there be any doubt in such case of the right of the holder of the draft to act upon the writing carried by the private party and to recover the damages sustained by him? We think not: <sup>624</sup> See *Wilson's Admr. v. Green*, 25 Vt. 450, 60 Am. Dec. 279; *Bauman v. Bowles*, 51 Ill. 380. From the latter case we

quote as follows: "It is further urged, the evidence shows no participation on the part of Ellsworth, either in the sale or fraud. The sufficient answer is, that he signed these false certificates as secretary, and by such means lent himself to the perpetration of the fraud. His signature shows that he co-operated with Bauman in making and issuing these fraudulent certificates, and he must be held responsible to persons injured by his wrongful act. In actions of this character it is not necessary to show any privity of contract between the plaintiff and Ellsworth. It is sufficient if the latter has been guilty of fraudulent representations made to enable Bauman to deceive the public, and Bauman has thereby been assisted in defrauding the plaintiff: 1 Hilliard on Torts, 8, note; Weatherford v. Fishback, 3 Scam. 170; Gerhard v. Bates, 20 Eng. L. & Eq. 129; Langridge v. Levy, 2 Mees. & W. 519." See, also, Perkins v. Evans, 61 Iowa, 35, 15 N. W. 584. This same doctrine was applied to telegraph companies in May v. Western Union Tel. Co., 112 Mass. 90.

6. Lastly, it is argued that the trial court was in error in directing the verdict for the reason that the question of defendant's negligence is ordinarily for a jury. That this is the rule is, of course, conceded, and it would be applicable and controlling here but for the fact that the record shows an agreement by defendant's counsel that the court should decide the matter as a mixed question of law and fact. At the conclusion of the testimony, defendants filed a motion for a directed verdict upon each count of the petition. This motion was overruled, and thereupon plaintiff filed a motion for a verdict in his favor for the full amount claimed. Either just before or just after the filing of this motion the following colloquy occurred between the court and counsel: "The Court: <sup>625</sup> Now, under the view of the court in this case, there are no disputed facts in the case and nothing for the jury to determine, but I would like to have the views of counsel in that regard. Mr. Call (one of the counsel for the defendants in open court): I will say that the counsel for the defendants concur in that view." This, it seems to us, fully justified the court in determining both the law and the facts of the case. At least defendants are in no position to complain: Wagner Co. v. Cawker, 112 Wis. 532, 88 N. W. 599; First Nat. Bank v. Crabtree, 86 Iowa, 731, 52 N. W. 559; Bennett v. Carey, 72 Iowa, 476, 34 N. W. 291; Harding v. Kohl, (Iowa), 108 N. W. 233; Read v. State Ins. Co., 103 Iowa, 307, 64 Am. St. Rep. 180, 72 N. W. 665; McDermott v. Mahoney, 139 Iowa, 292, 115 N. W. 32, 116 N. W. 788. There is no claim that the testimony does not justify a finding of negligence, and we are not prepared to say that it does not justify a finding of knowledge on the part of the agent that fraud was intended by Barnes, and that he so far participated

therein as to knowingly send a false and spurious message. It is not necessary, however, to make a definite holding on this last proposition. On account of the holding of the circuit court of appeals when one branch of the case was before it, which expresses views contrary to those entertained by us, we have given the case a great deal of attention, and are of opinion that no such errors appear as would justify a reversal.

The judgment must therefore be, and it is, affirmed.

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*The Right to Sue for Negligence in the Transmission or Delivery of a telegram* may be either in the sender or the sendee: *Western Union Tel. Co. v. Potts*, 120 Tenn. 37, 127 Am. St. Rep. 991; *Anniston Cordage Co. v. Western Union Tel. Co.*, 161 Ala. 216, 135 Am. St. Rep. 124. And it is not necessary to a recovery that the action should be brought either by the person whose name appears in the telegram as sender or by the one whose name appears as sendee. It may be brought by one whose name appears on the face of the message as beneficiary, though he is neither sendee nor sender, or by an undisclosed principal of the sender or sendee: *Western Union Tel. Co. v. Potts*, 120 Tenn. 37, 127 Am. St. Rep. 991. The fact that a telegraph company only contracted with an agent in sending a telegram, and had no knowledge that the plaintiff was in fact principal, is immaterial, except that it might set up as a defense any matters which occurred prior to disclosure of the principal which would constitute a defense in a suit by the agent: *Harkness v. Western Union Tel. Co.*, 73 Iowa, 190, 5 Am. St. Rep. 672. See, also, *Stewart, Morehead & Co. v. Postal Tel. C. Co.*, 131 Ga. 31, 127 Am. St. Rep. 205; *Western Union Tel. Co. v. Adams*, 75 Tex. 531, 16 Am. St. Rep. 920.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MAINE.**

**HUME v. FORT HALIFAX POWER COMPANY.**

[106 Me. 78, 75 Atl. 300.]

**EMPLOYER'S LIABILITY—Safe Place to Work.**—One of the duties which an employer assumes toward his employee is to exercise reasonable care and diligence to provide a reasonably safe place at which the employee is to work. (p. 335.)

**EMPLOYER'S LIABILITY—Warning Employee of Danger.**—The law implies that the discharge of the duty of the employer to furnish a reasonably safe place for employees to work requires him to notify them of all special risks and dangers of the employment, and all dangerous conditions attendant upon the place of employment of which he has knowledge, or by the exercise of reasonable care would have knowledge, and which are unknown to the employees, and would not be known and appreciated by them in the exercise of reasonable care. (p. 335.)

**EMPLOYER'S LIABILITY—Warning Employee of Danger.**—The duty of an employer to notify employees of the special risks and dangers of the employment is personal, and if he employs another to discharge the duty, the latter becomes a vice-principal, for whose acts and negligence the employer is liable. (pp. 335, 336.)

**EMPLOYER'S LIABILITY—Warning Employee of Danger.**—Where a foreman, knowing of the risks and dangers of a place, sets men at work there without notifying them of the danger, and the men do not, and by the exercise of reasonable care would not, know of the danger, his negligence is that of the employer. (p. 336.)

**EMPLOYER'S LIABILITY—Warning Employee of Danger.**—Where an employee is injured while working in a dangerous place when he is ignorant of the danger and is not notified thereof, it is unimportant, in determining his right to recover against the master, how or by whom the risk or danger was created. (p. 336.)

Forrest Goodwin and H. E. Cook, for the plaintiff.

Charles F. Johnson, for the defendant.

**79 KING, J.** This case is before the law court on defendant's exceptions and motion for a new trial.

In prosecuting the work of constructing a dam and power plant across the Sebasticook river at Winslow the defendant excavated a large quantity of slate rock and dirt, which it deposited a short distance below the excavation in a pile some

twelve to fifteen feet high and extending from the shore out into the river eighty-five to one hundred feet. Shortly before February 27, 1908, the defendant began removing this pile. At that time its top and sides were frozen, forming a thick crust, which had to be broken down and picked in pieces to facilitate its being loaded on teams and barrows. Blasts with dynamite were made frequently to break this crust and dislodge overhanging portions of it. A crew of about twenty men, under the charge of Lewis Emerson as foreman, were engaged in the work. On February 26, 1908, the plaintiff was employed by the defendant's superintendent to assist in this work, and was directed to report for duty to the foreman. He worked the afternoon of that day near the shore end of the pile. The next forenoon, being stormy, he did not work, but joined the crew when the whistle blew after the noon hour, and in a few minutes thereafter, while at work with his pick-axe at the bottom of the slope of the pile, and at a point about two-thirds of the length of the pile from the shore, a large piece of this frozen rock and dirt fell from the top of the pile, killing one man, Mr. Glidden, and entirely burying the plaintiff beneath it, causing him the injuries for which this action is brought.

There was a crack on the top of the pile, above the place where the plaintiff was working when injured, which one witness described <sup>so</sup> as "from two to three inches wide" and "probably ten feet or such a matter" long, and described by another witness as "a crack perhaps three-fourths of an inch wide in some places" and "fifteen or eighteen feet long."

During the forenoon of the day of the accident it snowed, the weather being soft and warm, and as the work progressed the rock and dirt were worked out from under the crust, leaving an overhanging mass at the top above the place of the accident. During that forenoon an attempt was made to pry off and dislodge this mass from the top with bars. Failing in this the foreman decided to blast it off with dynamite, and during the noon hour he and Glidden drilled two holes up underneath the overhang, and were filling the first hole with dynamite when the whistle blew and the crew came out to work. While they were preparing to load the other hole the mass suddenly fell, with the sad results stated.

The plaintiff claimed that his injuries were caused by the negligence of the defendant in placing him at work in an unsafe place, and in not informing him of certain dangerous conditions known to the defendant, but of which he had no knowledge. On the other hand, the defendant contended that the risk of portions of the frozen crust of this pile of rocks and dirt falling from the top to the bottom of the slope as the work progressed was a risk incident to, and attendant upon, the exercise of the plaintiff's employment, which he assumed

by entering upon the work, and further that he was warned by the foreman not to work at that place, and that his own negligence contributed to his injuries.

The exceptions are to the refusal of the presiding justice (1) to direct a verdict for the defendant; (2) to instruct the jury that Emerson, the foreman, was a fellow-servant of the plaintiff, and that the defendant company was not responsible for his negligence in the premises; (3) to instruct the jury that, if the place in which the plaintiff was set to work was unsafe and unsuitable, it had become so through the act of a fellow-servant.

The jury answered in the affirmative these specific questions submitted to them by the presiding justice: <sup>81</sup> 1. Did the plaintiff exercise in the premises the due care required of him so that no negligence of his contributed to his injury? 2. Was the nature of the danger or risk such that the plaintiff would not have appreciated it by the exercise of ordinary care to understand it? 3. Is it true that the defendant company did not warn the plaintiff of the danger of the work he was employed in? 4. Was it negligence on the part of the defendant company not to warn the plaintiff of such danger?

1. It is apparent that the place where the plaintiff was working when injured was unsafe, because of the danger of this portion of overhanging crust falling. Important and special causes of that danger were the crack on the top of the crust, the effect of the attempt to pry the overhang off with bars during the forenoon, and the drilling of the holes up underneath it. Of these special causes of danger the plaintiff had no knowledge. It is not claimed that he knew of the existence of the crack. He said he did not, and it could not be seen from below. Neither did he know what had been done that forenoon in his absence, nor that the holes had been made. There was but little time for him to have observed and appreciated even the extent of the overhang resulting from the work of the forenoon, for the accident happened within a few minutes after the whistle blew. There were others of the crew working near him at the time of the accident, two workmen being as near him as they could work with pickaxes. In view of all the facts and circumstances, and provided the plaintiff was not warned of the danger, it is not made manifest to the court that the jury erred in their answers to the first and second questions submitted, and thus finding that the plaintiff was in the exercise of due care, and that the nature of the danger was such that he would not have appreciated it by the exercise of due care.

2. The important question of fact in the case, and which was sharply contested, was whether the plaintiff was warned of the danger. The foreman claimed that he was; that when the crew, including the plaintiff, came out to work he directed



them to work over near the shore, and that, a few minutes later, finding the plaintiff and <sup>82</sup> another workman back at the place where plaintiff was hurt, he sent them over with the others, putting his hand on the plaintiff's shoulder with some show of force, and there was some testimony tending to corroborate the foreman. The plaintiff denied all this and claimed that he was not warned of danger by anyone, and that the foreman directed him to work at this particular place. There was testimony from two other workmen tending to corroborate the plaintiff. This question of fact was for the jury to determine. It was particularly called to their attention by the third special question submitted to them. Their answer shows that they did not overlook it. They saw the witnesses, and it was for them to judge of their credibility and the weight to be given to their testimony. They decided in the plaintiff's favor, and it does not appear to this court that their decision was so unmistakably wrong that it must be set aside.

3. Was it negligence on the part of the defendant company not to warn the plaintiff of the special and peculiar dangers that then were attendant upon the place where the plaintiff was set at work? The jury found that it was, and we think that finding is justified in fact and in law.

It is too well settled now to admit of discussion that one of the duties which an employer of labor assumes toward his employee is to exercise reasonable care and diligence to provide a reasonably safe place at which the employee is to work. And, moreover, the law implies that the discharge of this duty requires the master to notify his servant of any and all special risks and dangers of the employment, and of all dangerous conditions attendant upon the place of the exercise of the employment, of which the master has knowledge, or by the exercise of reasonable care would have knowledge, and which are unknown to the servant, and would not be known and appreciated by him if in the exercise of reasonable care on his part.

This duty thus imposed upon the master is personal. The servant has the right to look to him for the discharge of it. If, instead of discharging it himself, the master employs some other person to do it for him, then such other person stands in the place of the master, <sup>83</sup> and becomes a substitute for him—a vice-principal—in respect to the discharge of that duty, and the master then becomes liable for the acts and the negligence of such other person in the premises to the same extent as if he had performed those acts and was guilty of the negligence personally. We need only cite the quite recent case of *Welch v. Bath Iron Works*, 98 Me. 361, 57 Atl. 88. But see the recent case of *Manuel v. Mayor etc. of City of Cumberland*, 111 Md. 196, 73 Atl. 709, and case there cited.

From the evidence and special findings of the jury in this case we think it must be accepted by the court as established in fact that the defendant, acting by its foreman, set the plaintiff at work in the place where he was injured; that that place was then attended with certain risks of danger which the plaintiff did not know, and would not have known and appreciated by the exercise of reasonable care on his part, but the knowledge of which was essential to the plaintiff's safety; and that the defendant's foreman when he set the plaintiff at work in that place knew of those risks of danger and neglected to notify the plaintiff of them.

It follows, then, from an application of those principles of law above referred to that this neglect of the foreman to notify the plaintiff of those risks of danger is in law the neglect of the defendant. It had entrusted to its foreman the duty of placing the defendant in a reasonably safe place to work, the discharge of which duty, under the facts established in this case, involved the necessity of informing the plaintiff of the risks of danger attending the work in that place which the foreman knew. In the discharge of that personal duty of the defendant the foreman became its substitute, and stood in its place, and his negligence was the negligence of the defendant. The first exception and motion, presenting as they do the same question in effect, must, therefore, be overruled.

4. It follows from what has been said above that there was no error in the refusal of the presiding justice to instruct the jury that the foreman was a fellow-servant of the plaintiff, and that the defendant was not responsible for his negligence in the premises.

In respect to the negligence here complained of, the failure to inform the plaintiff of the risks of danger attendant upon the place <sup>84</sup> where he was set at work, the foreman was not a fellow-servant of the plaintiff, but a substitute for the defendant, a vice-principal, for whose negligence the defendant was responsible.

5. Lastly, there was no reversible error in the refusal to instruct the jury that, if the place in which the plaintiff was set at work was unsafe and unsuitable, it became so through the act of a fellow-servant. As a statement of fact, that may be true in whole or in part, but it is of no consequence in the determination of the rights of the parties here. The negligence relied upon in this suit is the failure of defendant to inform the plaintiff of risks of danger attending his working in the place where he was set at work. It is unimportant how or by whom those risks were created, so long as they existed in fact, and the plaintiff was entitled by law to be notified of them by the defendant. The plaintiff does not here claim that the foreman was not his fellow-servant so far as he may

have personally acted with his own hands in working out the rocks and dirt from under the overhang, or in working upon it to dislodge it, or in drilling the holes up underneath it. None of those acts were necessarily negligent acts; so far as anything appears here to the contrary, they may have been perfectly proper and necessary acts in the prosecution of the common work of removing the pile of rocks and dirt. The plaintiff's case is predicated, not upon the proposition that the foreman did cause, or assist in causing, the dangerous conditions which rendered the place where he was set at work unsafe, but upon the alleged claim that the defendant delegated to its foreman the discharge of a personal duty, which it owed to him, to inform him of those dangerous conditions, and that the foreman was negligent in the discharge of it.

It is not contended in argument before this court that the damages awarded by the jury to the plaintiff for his injuries are excessive. Accordingly, the entry will be, exceptions and motions overruled.

Judgment on the verdict.

*An Employer Owes to His Employee the Duty of Providing a reasonably safe place in which to work, and the employee ordinarily has a right to assume that this duty has been discharged:* See the note to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 885; *Wickham v. Detroit United Ry.*, 160 Mich. 277, 136 Am. St. Rep. 436; *City of Owensboro v. Gabbert*, 135 Ky. 346, 135 Am. St. Rep. 462; *Monson v. La France Copper Co.*, 39 Mont. 50, 133 Am. St. Rep. 549. The master cannot delegate this duty so as to relieve himself from responsibility: *Vickers v. Kanawha etc. R. R. Co.*, 64 W. Va. 474, 131 Am. St. Rep. 929; *Bernheimer Bros. v. Bager*, 108 Md. 551, 129 Am. St. Rep. 458, and cases cited in the cross-reference note thereto. But see *Whitmore v. Alabama etc. Iron Co.*, 164 Ala. 125, 137 Am. St. Rep. 31.

*An Employer Owes His Employees the Duty of Warning them of dangers incident to the employment which he knows or ought to know, and it would seem that this duty is nondelegable:* *Brice-Nash v. Barton Salt Co.*, 79 Kan. 110, 131 Am. St. Rep. 284; *Rogers v. Cleveland etc. Ry. Co.*, 211 Ill. 126, 103 Am. St. Rep. 185; *Adams v. Grand Rapids Refrigerator Co.*, 160 Mich. 590, 136 Am. St. Rep. 454. Compare, however, *Donovan v. Ferris*, 128 Cal. 48, 79 Am. St. Rep. 25; *McLaine v. Head & Dowst Co.*, 71 N. H. 294, 93 Am. St. Rep. 522.

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**ALMON H. FOGG COMPANY v. BARTLETT.**

[106 Me. 122, 75 Atl. 380.]

**BANKRUPTCY—Discharge of Principal.—**The Sureties on a bond given for the release of the principal, a judgment debtor, from arrest on execution, are released by his discharge in bankruptcy. (pp. 338, 339.)

Doherty & Tompkins and Leonard A. Pierce, for the plaintiff.

Harry M. Briggs, for the defendants.

<sup>123</sup> **PEABODY, J.** This was an action of debt against the sureties on a statutory bond given in accordance with Revised Statutes, chapter 114, section 49, for the release of the principal from arrest on execution. The case is before the law court on an agreed statement of facts and the stipulations of the parties.

The defendant, Arthur W. Bartlett, having been arrested on an execution in favor of the plaintiff, was released on giving the bond in suit dated February 12, 1908, signed by himself as principal and the other defendants as sureties. The principal was adjudged a bankrupt by the district court of the United States for the district of Maine, February 29, 1908, and received a discharge in bankruptcy April 24, 1908. It is contended by the defendants that this discharge of the principal is a valid defense to the action.

The bond was given to the plaintiff as a statutory equivalent for the security afforded it by the arrest of the debtor. The sureties had intervened, and by obtaining the release of the debtor, deprived the creditor of whatever advantage it had gained by his arrest. By the conditions of the bond they had agreed that the debtor should within six months of its date cite the creditor before two justices of the peace and of the quorum, submit himself to examination, <sup>124</sup> and take the oath prescribed in Revised Statutes, chapter 114, section 55, pay the debt, interest, costs and fees, arising in said execution, or deliver himself into the custody of the keeper of the jail to which he was liable to be committed under the execution. Neither of these alternative agreements was fulfilled, and the defendants are liable unless this was made unnecessary by the debtor's discharge in bankruptcy before the expiration of the six months. They assumed the risk of future events which might be contemplated unfavorable to the creditor. The debtor might voluntarily place himself in a situation to be exempt from arrest, or he might abscond, so that the sureties could not surrender him according to one of the conditions of the bond. He might become insane and incapable of making a disclosure of his property affairs so as to fulfill that condition of the bond.

Under the general rule of law which prevails in Maine that the sureties on a poor debtor's bond can be discharged only by a literal fulfillment of its conditions, neither of these events would relieve them from liability: *Haskell v. Green*, 15 Me. 33; *Harrington v. Dennie*, 13 Mass. 93. But there may be circumstances which would constitute an equitable defense to a suit on the bond if happening within the period of the six months in which its conditions are to be fulfilled. The death of the principal, his voluntary release by the creditors, or a change of statute making performance of the conditions of the bond unlawful, would discharge the sureties: 3 Ency. of Pl. & Pr. 186; *Champion v. Noyes*, 2 Mass. 48.

The last case cited is very similar to the case at bar. To a scire facias on a bail bond a plea in bar was filed, that the principal is a certified bankrupt, that the original judgment was for a provable debt owed to the plaintiff before the bankruptcy, and that the certificate had been allowed. It was held on demurrer that the plea in bar was good. The court say in the elaborate opinion: "Were the principal in the case surrendered, the court could not commit him; or if committed, he would the next moment be entitled to his discharge. To surrender him under these circumstances would be expensive to the bail, oppressive to the principal, and useless to the plaintiff." The decision is sustained by the weight <sup>125</sup> of authority: *Collier on Bankruptcy*, 6th ed., 214, 215; 3 Ency. of Pl. & Pr. 185; 3 Am. & Eng. Ency. of Law, 2d ed., 633; 5 Cyc. 32. The contrary appears to have been held in *Goodwin v. Stark*, 15 N. H. 218.

*Marr v. Clark*, 56 Me. 542, presents a case where the principal on a bond given to procure his release from arrest on mesne process undertook to fulfill one of its conditions by making "true disclosure of his business affairs and property under oath." In the proceeding before the justices he stated under oath that he had no real or personal estate, and that he had filed his petition in bankruptcy and produced his certificate; but he refused to answer further, claiming that this was a full disclosure. It was held in the opinion of the court by Danforth, J.: "If the bankrupt law will relieve the debtor from fulfilling the conditions of his bond, he may avail himself of that relief in any legitimate way, but he has sought his discharge in a method entirely independent of the bankruptcy law." It was decided that he had not done all that his obligations under the statute required. This case is cited in support of the plaintiff's position, but it simply decides that the debtor had not complied with this alternative condition of the bond; the reasoning of the court favors the defense.

The decision in *Hackett v. Lane*, 61 Me. 31, goes no further than to hold that where the defendants on a poor debtor's bond rely in defense upon the distinct ground that the prin-

cipal obligor has fully performed one of the alternative conditions of the bond, it must appear that he followed the statute implicitly in all its requirements.

The agreed statement and stipulations give to the defendants the benefit of the plea of a discharge in bankruptcy of the principal obligor before the forfeiture of the bond.

Judgment for defendants.

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*Under the Rule of the Bankruptcy Act* that an attachment obtained against an insolvent within four months prior to the filing of a petition in bankruptcy is void and the property discharged if he is adjudged a bankrupt, a bond given in such a case to obtain the dissolution of the attachment is likewise released: *Crook Horner Co. v. Gilpin*, 112 Md. 1, 136 Am. St. Rep. 376.

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## QUELLETTE v. GRAND TRUNK RAILWAY COMPANY.

[106 Me. 153, 76 Atl. 280.]

**APPEAL.**—Exceptions to the Refusal to Direct a Verdict for the defendant raise the same question as to the sufficiency of the evidence to sustain a verdict for the plaintiff as would be raised by the usual motion for a new trial, except as to the amount of damages. (p. 341.)

**CARRIER—Passenger Alighting in Front of Passing Train.**—Where a passenger alights from a train standing on one track and steps in front of a train passing on a parallel track, he must, in order to be entitled to a verdict against the railroad company for his injuries, prove that they were caused by the negligence of the company, and that no failure to exercise reasonable care on his part contributed to bring them about. (p. 341.)

**CARRIER—Stopping Train on Sidetrack—Notice to Passenger.**—Negligence on the part of a railroad company may not be inferred from the mere stopping of its train on a side or passing track without informing passengers that the stop is not at a station platform, when no station had been called or announced, and no attendant circumstances exist calculated to induce a passenger to conclude that the stop is at the usual and proper landing place. (p. 343.)

**CARRIER—Sleeping Passenger.**—It is not the Duty of a carrier to keep a passenger awake; and if his indulgence in sleep is the cause of injury sustained by his alighting from the train as it stands on a sidetrack and stepping in front of a train moving on another track, under the supposition that he has reached his station, he cannot recover. (p. 344.)

**CARRIER—Passenger Alighting in Front of Moving Train.**—If a passenger alights from a train standing on a sidetrack, and without looking, and heedless of the obvious danger, undertakes to cross another track in front of a moving train, he is not only negligent, but reckless. (p. 344.)

**CARRIER—Passenger Alighting from Train in Darkness.**—It is not the act of a reasonably prudent man accustomed to railroad

travel to step from a car into black darkness under a supposition that the car is then at the usual place provided for the landing of passengers. The very darkness itself should be sufficient warning that the station is not there. (p. 344.)

Newell & Skelton, for the plaintiff.

C. A. & L. L. Hight, for the defendant.

<sup>184</sup> KING, J. Action to recover damages for personal injuries sustained by the plaintiff through the alleged negligence of defendant. Verdict for plaintiff for four thousand eight hundred dollars. The case comes to the law court on defendant's exceptions to the refusal of the presiding justice to direct a verdict for the defendant and his refusal to give certain requested instructions. The exceptions to the refusal to direct a verdict for defendant raises here the same question as to the sufficiency of the evidence to sustain a verdict for plaintiff as would be raised by the usual motion for a new trial, except as to the amount of damages. To entitle the plaintiff to a verdict it was incumbent upon him to affirmatively prove at least two propositions: (1) That his injuries were caused by the negligence of the defendant, and (2) that no failure to exercise reasonable care on his part contributed to bring about his injuries.

There is but little conflict in the testimony so far as it relates to those propositions.

On February 6, 1908, the plaintiff was a passenger on defendant's train from Lewiston, Maine, to Berlin, New Hampshire. At <sup>185</sup> Gorham, an intermediate station, this train crossed another train from Montreal to Portland. There were at the time at least two parallel tracks at this station extending practically east and west, with the station platform on the north. The Portland train was on the main track next to the platform heading east. The plaintiff's train on approaching Gorham took the first passing track next to the main track and stopped at a point overlapping somewhat the easterly end of the other train. The plaintiff was seated in the forward end of the "smoker," facing the rear of the car. He testified that he was "kind of half asleep" or "dozing," and just as his train was coming to a stop on the passing track he heard some one call "Berlin Station," when he immediately took his grip and coat, left the car by the forward platform, stepped down and off the steps on the right-hand side, supposing, as he put it, "I was getting off on the station platform," and was instantly struck by something and rendered unconscious. No one saw the accident. After the Portland train passed on east and the plaintiff's train had backed over the switch on to the main track and pulled up to the platform, the plaintiff was found unconscious and severely injured,



lying in a hole in the snow at the switch two or three hundred yards east from the platform in front of the station.

The plaintiff did not see any person who called "Berlin Station," and could not say it was a trainman, nor was there any other evidence that such a call was made, and there was no reason for such a call to be made, as Berlin Station had not been reached. But whether the plaintiff heard such call in fact, or in dream, he undertook to alight from the train while it was on the passing track, and in so doing was injured and carried to the place where found by one or the other train.

The distance between the outside rail of the main track and the inside rail of the passing track was seven feet ten inches, and the space between cars standing abreast on those tracks about four feet. It is not made certain by the evidence if the forward end of the smoker had passed by the engine of the Portland train. The plaintiff gave no testimony as to this. In his declaration, however, he alleged that it had not, and "that the plaintiff, alighting as aforesaid, . . . <sup>156</sup> started across said tracks to said station platform, and was then and there struck by said "Portland train" leaving said station, hurled a great distance through the air, thrown violently upon the ground, and left unconscious with a broken leg," etc.

Mr. Leader, a passenger for Gorham on the Berlin train, passed through the smoker to a rear car just before the train stopped and saw the plaintiff "apparently dozing in the seat as I went by, and I kind of slapped him like that [indicating]. and said good-bye." Plaintiff knew Mr. Leader was to stop at Gorham. Leader alighted from the rear platform of the rear car and crossed the main track in front of the engine of the Portland train. The headlight of that engine was burning. He was not certain if there was more than one car in the rear of the smoker, but the rear end of the Berlin train was "surely a car-length, if not better," east of the pilot of the engine of the Portland train. It had been storming during the day and was snowing some when the train reached Gorham at 5:26 P. M.

The plaintiff thus described in testimony what he did in getting off the train: "A. I took hold of my grip and coat and started out. Q. Describe where you went and how you went. A. I can't very well describe. All I can say I just had time to put hardly my face out when I was struck. Q. You went out on the platform? A. Yes, I went out on the platform. Q. Then what did you do? A. I was struck by the car. Q. When you were on the platform, or did you step down? A. No, I stepped down. . . . Q. And was it dark or light? A. Dark."

On cross-examination plaintiff was asked: "Q. Did you get your feet on the ground? A. Yes, sir. Q. Did you take a step forward? A. No, sir; I didn't have a chance to take it.

I didn't know there was anything there. Q. Do you know whether you did take a step forward or not? A. I know I didn't."

There was no evidence that Gorham station had been called or announced in any way before or at the time the train stopped on the passing track.

The gist of the plaintiff's alleged cause of action is that the defendant did not inform him that the train had not stopped at <sup>157</sup> the station platform, and did not warn him of the dangers incident to alighting from the train where it then was.

If it was not reasonably to be expected in the actual course of events that the plaintiff might attempt to alight from the train when it stopped on the passing track, then there was no duty imposed upon the defendant to warn him not to alight. Was his act of alighting there reasonably to be expected under the facts and circumstances as disclosed? We think not. The train had not reached his destination, Berlin, and nothing had been done by defendant to cause him to think so; neither had the train reached the place provided for passengers to alight at the intermediate station, Gorham, and no call or announcement of that station had been made, and nothing appears to have been done by defendant which might cause the plaintiff to think the stop was at the station, other than the actual stopping of the train; nor was the stop at a place where, so far as it appears, passengers were ever known by defendant to leave the train, or ever did leave the train, as was the fact in *Boss v. Providence & W. R. R. Co.*, 15 R. I. 149, 1 Atl. 9.

The only ground, then, upon which it can be contended that the plaintiff's act in leaving the train as he did was reasonably to be expected is the fact that the train did stop without notice to him that it was not at a station platform.

There are many cases which hold that where, after a station had been called, and the train either stopped short or overran, and a passenger in the exercise of due care was injured in alighting in a dangerous place, the company may be found negligent, and for the reason that the calling the station as the next stop, and then stopping the train without giving warning that the station is not reached, are acts of the company from which in the light of attendant circumstances negligence may be found.

But no authority has been called to our attention, and we have found none, in support of the proposition that negligence on the part of a railroad company may be inferred from the mere stopping of its train on a side or passing track without informing the passengers that the stop is not at a station platform, when no station had been called or announced, and no attendant circumstances <sup>158</sup> existed calculated to induce a passenger to conclude that the stop was at the usual and proper landing place.

Moreover, it is important to be noted in this case that the fact that the plaintiff had fallen asleep was undoubtedly the real cause of his misfortune. Disturbed in his dreamy slumber he erroneously concluded that the train had reached his destination, Berlin Station. He was familiar with the route, and knew that his friend Leader, who bade him "good-bye" as the train was stopping, was to leave the train at Gorham. It is manifest that if he had not been sleeping he would not have concluded that this stop was at Berlin, instead of on the passing track at Gorham, but would have known and appreciated where the train was. It was not the duty of the defendant to keep him awake. Though a passenger, he was, nevertheless, free to indulge in sleep if he desired, but if that indulgence was the cause of the damage for which this action is brought, and we think it was, he must bear it and not the defendant.

Again, the plaintiff failed to prove affirmatively that he exercised reasonable care in leaving the train. Such care required him to look where he was alighting, and to observe the situation so far as it could be observed, and to control his actions accordingly. If it be true, as alleged in his writ, that his car was stopped at a point east of the engine of the Portland train, and that he was struck by that train in crossing the main track, then he alighted in the face of the headlight of that engine, which must have revealed to him, if he looked, the situation, and that his train was not at the station. If without looking, and heedless of the obvious danger, he undertook to cross in front of the engine, his act was not only negligent but reckless.

If, on the other hand, as his testimony indicates, he stepped from the car into utter darkness, then certainly he must be charged with a lack of reasonable care, for the darkness was apparent, and observed by him. He said: "I couldn't see anything before me."

It is not the act of a reasonably prudent man accustomed to railroad travel to step from a car into black darkness under a supposition that the car is then at the usual place provided for the <sup>159</sup> landing of passengers. The very darkness itself should be sufficient warning that the station is not there.

It is, therefore, the opinion of the court that the evidence was not sufficient to sustain a verdict for the plaintiff, and that the defendant's exceptions to the refusal to direct a verdict in its favor must be sustained.

The other exceptions are not considered. The entry will be, exceptions to refusal to direct a verdict for defendant sustained.

New trial granted.

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*Neither the Announcement of the Station nor Stopping the Train before it arrives at the platform, if required by law or usage to*

avoid collisions or accidents, is negligence per se in a railroad company toward a passenger injured while attempting to alight. When the station is announced and the train stopped soon thereafter in the daytime to take a sidetrack at a spot where there is no depot or platform, and all the surroundings indicate that it is not a proper place for landing, a passenger who attempts to alight and is injured in so doing cannot recover, in the absence of circumstances caused by the railroad company inducing him to reasonably suppose that he was attempting to alight at the proper place. In such case his injury is accidental, if not the result of his own negligence, and the jury should be so instructed, and of his inability to recover: *Smith v. Georgia Pac. Ry. Co.*, 88 Ala. 538, 16 Am. St. Rep. 63.

*One Who, at an Intermediate Point in His Journey, Leaves the Train* at a place not intended for the discharge of passengers, and while the train is standing for some other purpose, assumes the ordinary risks incident to his action. If a passenger, while his train stands at an intermediate station on a sidetrack to allow another train to pass, leaves his car to go to a pump for a drink, and, hurrying back, is struck while crossing the main track by the approaching train, which he could have seen, he is not a "passenger being transported over the road" within the meaning of that term as used in a statute prescribing the liability of railroads to passengers, and the railroad is not answerable for his death: *Chicago etc. Ry. Co. v. Sattler*, 64 Neb. 636, 97 Am. St. Rep. 666.

*One Who Jumps from a Street-car in Which He has Been Riding* and steps in front of another car going in an opposite direction to the one which he has left and is instantly killed, cannot be regarded as having exercised due care, when it does not appear that he looked to see whether any car was approaching or paid any attention to warnings given him: *Creamer v. West End Street Ry. Co.*, 156 Mass. 320, 32 Am. St. Rep. 456.

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### SANFORD v. KIMBALL.

[106 Me. 355, 76 Atl. 890.]

**BAILEMENT—Negligence—Burden of Proof.**—In an action of negligence against a bailee, not a common carrier, the general burden to prove negligence rests upon the plaintiff. If he proves the bailment and a failure to return on demand, he ordinarily makes out a prima facie case, and it is then incumbent on the bailee to explain the cause of refusal, as by showing a loss by fire, theft or accident. It then devolves upon the plaintiff to show that such loss was due to the negligence of the bailee. The final burden is on the bailor to prove negligence, not on the bailee to prove due care. (p. 346.)

**BAILEMENT—Hired Horse—Mysterious Injury.**—The hirer of a horse, to prima facie exonerate himself from liability for injury to the animal, need go no further than show that the cause of the injury is a mystery. He need not show how the injury was received. (p. 347.)

Asa A. Richardson and George F. & Leroy Haley, for the plaintiff.

Cleaves, Waterhouse & Emery, for the defendant.

<sup>356</sup> CORNISH, J. Action on the case for negligence in the use and care of the plaintiff's horse by the defendant.

The jury returned a verdict for the defendant, and the case is before this court on the plaintiff's motion to set aside the verdict as against the law and the evidence.

The material facts are not in dispute. In the summer of 1908, the parties agreed to exchange work in haying, with teams and men. Under that agreement the plaintiff let the defendant have the horse in question on August 13th. On August 25th the plaintiff went after the horse but as the defendant had not finished haying it was agreed that the defendant should keep him another day and return him on the afternoon of the 26th. The defendant used the horse in haying on the afternoon of the 25th, put him in the barn, fed him <sup>357</sup> about 6:30 P. M., and left him for the night unhitched in his sixteen-feet square pen or box-stall. The next morning the defendant found the horse in the same place where he had left him the night before, with a clean cut three or three and one-half inches long and from one to one and a half inches deep, across the upper part of the off forward leg. The wound was not bleeding and there were no traces of blood on the floor of the barn or in the stall, although there were marks of blood on a pail, as if the wound had been washed by someone. The defendant testified that he carefully examined the barn to ascertain, if possible, the cause of the injury, but found nothing, and he was entirely ignorant as to how the injury was inflicted, whether by accident or design. The wound was treated once by the plaintiff and subsequently by the defendant and his hired man, but after about ten days death ensued.

It is settled in this state, whatever the doctrine may be elsewhere, that in an action of negligence against a bailee, not a common carrier, the general burden of proving negligence rests upon the plaintiff. If he proves the bailment and a failure to return on demand, he has ordinarily made a prima facie case, and it is then incumbent on the bailee to explain the cause of the refusal, as by showing the loss of the property by fire or theft; or its injury by accident or otherwise. It then devolves upon the plaintiff to show that such fire or theft or accident was due to the failure of the bailee to use such a degree of care of the property as under the circumstances the law requires. The final burden is on the bailor to prove negligence, not on the bailee to prove due care: *Mills v. Gilbreth*, 47 Me. 320, 74 Am. Dec. 487; *Dinsmore v. Abbott*, 89 Me. 373, 36 Atl. 621; *Buswell v. Fuller*, 89 Me. 600, 36 Atl. 1059; *Bradbury v. Lawrence*, 91 Me. 457, 40 Atl. 332. The plaintiff, however, contends that it devolved upon the defendant to satisfactorily explain how the injury was received, and in absence of such satisfactory explanation his liability follows. The law does not require so much, amounting in this case to an impossibility, because the cause or source of this injury is admitted

to be a mystery. If the plaintiff's contention were true, the liability of the bailee in cases where the causes of the injury are unknown would rise to that of an insurer. It was only incumbent upon the <sup>355</sup> defendant to explain the circumstances and to give the reason why the horse was not returned to the plaintiff. He need go no further. This was done, and it then became the province of the jury, under proper instructions, to determine whether or not the defendant was negligent, either in connection with the injury or in its subsequent treatment. No exceptions were taken to the charge of the presiding justice, so that it may be assumed that proper instructions were given. On the facts, the jury have found in favor of the defendant, and we see no reason to disturb their verdict. The matter was one peculiarly within their experience, and their judgment upon such a question should not be lightly set aside. A careful reading of the testimony in this case, however, approves rather than disapproves their conclusion.

Motion overruled.

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*As to the Burden of Proof as Between Bailor and Bailee in an action against the bailee for injury or loss of the property, see James v. Orrell, 68 Ark. 284, 82 Am. St. Rep. 293; Hildebrand v. Carroll, 106 Wis. 324, 80 Am. St. Rep. 29; Knights v. Piella, 111 Mich. 9, 66 Am. St. Rep. 375; Higman v. Camody, 112 Ala. 257, 57 Am. St. Rep. 33; Wintringham v. Hayes, 144 N. Y. 1, 43 Am. St. Rep. 725; Woodruff v. Painter, 150 Pa. 91, 30 Am. St. Rep. 786; Lancaster Mills v. Merchants' etc. Co., 89 Tenn. 1, 24 Am. St. Rep. 586. The burden of proof of negligence is on plaintiff in an action on the case for negligence against the bailee of a horse for hire, and is not shifted by merely showing that the horse was sound when delivered to the bailee, and when returned was injured in a way that does not ordinarily occur without negligence: Malaney v. Taft, 60 Vt. 571, 6 Am. St. Rep. 135.*

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## POMEROY v. PRESCOTT.

[106 Me. 401, 76 Atl. 898.]

**COMPROMISE AND SETTLEMENT.**—A Statutory Provision that "no action shall be maintained on a demand settled by a creditor, or his attorney intrusted to collect it, in full discharge thereof, by the receipt of money or other valuable consideration, however small," does not apply to a waiver or release of several items in the plaintiff's claim by his attorney, there being no valuable consideration therefor and no settlement of the demand "in full discharge thereof." (p. 351.)

**ATTORNEY**—Authority to Release or Compromise.—An attorney who is clothed with no other authority than that arising from his employment in that capacity, has no power to compromise and settle or release and discharge his client's claim. He cannot bind his client by any act which amounts to a surrender in whole or in part of any substantial right. (p. 352.)

**ATTORNEY—Power Over Remedies and Procedure.**—An attorney may do all things incidental to the prosecution of the suit in which he is employed that affect the remedy only, and not the cause of action. (p. 352.)

**ATTORNEY—Authority to Release Part of Cause of Action.**—An attorney without special authority cannot make a compromise settlement which involves a release of the cause of action, or any substantial part of his client's rights. (p. 352.)

**ACTION—Effect of Striking Out Part of Items.**—Where some of the items of an account sued upon are stricken out by authority of the plaintiff, no further action can ever be maintained for their recovery. (p. 353.)

**JUDGMENT—Estoppel.**—A Judgment for a Part of an entire demand is a bar to any other suit for another part of the same demand. (p. 353.)

**ACTION—Splitting Entire Claim into Several Causes.**—A claim which is in its nature entire cannot be split up into several causes of action; and if suit is brought for a part only of the items constituting an entire claim, recovery for that part will bar recovery in any subsequent suit for the residue or any other items of the same demand. (p. 353.)

**ATTORNEY—Authority to Release Part of Cause.**—A plaintiff's attorney exceeds his general authority when he waives and releases several items of an account sued on and constituting part of the plaintiff's single cause of action. (p. 354.)

Oakes, Pulsifer & Ludden, for the plaintiff.

Guy H. Sturgis, for the defendant.

<sup>402</sup> **WHITEHOUSE, J.** This is an action of assumpsit on an account annexed, wherein the plaintiff seeks to recover from the defendant the sum of \$283, for services in decorating the auditorium at Portland preparatory to holding an automobile show in February, 1906.

It appears that the claim in suit comprised thirteen items. The first four amounted to \$120, and the remaining nine aggregated \$163. The defendant pleaded the general issue, with a brief statement in which it was alleged that any promise on the part of the defendant to pay the last nine items in the account was a promise to pay the debt of another; that it was not evidenced by any memorandum in writing signed by the defendant, and that under the statute of frauds no recovery could be had as to those items. It <sup>403</sup> was further alleged in the brief statement that all of the claims and charges contained in those nine items were specifically waived in writing by the former attorney of record who brought the suit.

The instrument purporting to be a written waiver and release of the last nine items was introduced in evidence subject to the plaintiff's objection, and is of the following tenor:



"Portland, Maine, January 11, 1908.

"I, Eugene E. Pomeroy, formerly of Lewiston, Maine, do hereby waive, relinquish and release all claims and rights whatsoever, which I now have, or may hereafter acquire, against Frederick M. Prescott, of Boston, Massachusetts, on account of any balances due me for decorating Auditorium in Portland, Maine, during the automobile show in February, 1906, from [the persons named in the last nine items of the account].

"Meaning and intending to waive all claims whatsoever against Frederick M. Prescott for an account of said balances alleged to be due me from the parties above mentioned, as above set forth, and waiving all rights whatsoever, which I now have, or may hereafter acquire, against said Frederick M. Prescott under and by virtue of the capias writ of myself vs. said Prescott, dated March 1, 1907, returnable the third Tuesday of April, 1907, before the Supreme Judicial Court for the county of Androscoggin, in the State of Maine, being any and all charges or items therein set forth relating to above balances, claiming under said writ and in said suit only recovery for the following items, to wit:

To decorating Auditorium in Portland, Maine, 1906..\$	75
To balance due me from F. M. Prescott, personal booth on main floor.....	9
To balance due me from F. M. Prescott, personal booth on basement .....	20
To balance due me from F. M. Prescott, personal booth on basement .....	16
Amounting altogether to the sum of \$120.	

"EUGENE E. POMEROY,

"By ———, his Attorney."

<sup>404</sup> No evidence was introduced of any authority in the attorney to execute the waiver beyond his general authority as attorney of record in the suit, or that any consideration was received for the same, except as correctly stated by the presiding justice in his charge. But the facts stated by the presiding justice as the basis of his ruling on the question of waiver did appear.

The presiding justice instructed the jury in relation to the waiver as follows: "Now, it seems that since this writ was brought, counsel (not the counsel who are trying the case, but counsel in Portland who represented the plaintiff and brought the suit) undertook to make an arrangement with counsel for the defendant in regard to certain of these items. It was stated by counsel, and perhaps in your presence (I think you were present this forenoon), that in anticipation of this trial, in making various arrangements about taking testimony and depositions and one thing and another, preparatory to the trial, that in order to accomplish some pur-

pose, the attorney who was then counsel for the plaintiff undertook to waive any claim as to certain of the items. So far as the case is now concerned, it matters not whether he acted under misapprehension or not, or whether he was wise in doing it or not. He did it, and a question of law has arisen as to what the effect of it was—whether he had, as a lawyer, and as counsel in this case, authority to so act and to bind his client. And I have intimated to counsel, and I now instruct you, that at least for the purposes of this trial that the act of that attorney was within his authority under the circumstances as conceded to be true. He did have authority to waive certain items of the account, and to say that when the case came on to be tried, the plaintiff would rely only on certain other items which are the four items at the top of this specification, being the first four items in the account annexed. And when I speak of the account annexed I mean this later one. It seems that there has been an amended account which has the items a little more in detail. So that the attorney undertook to waive the last nine items, but to retain the first four items. The last nine items relate to these various booths <sup>406</sup> around on the floor (where men would not pay the full price, and where Mr. Pomeroy says that Mr. Prescott agreed to make it up to the full price.

“As I say, I think that under the circumstances of the case that the attorney, whether wise or unwise, was acting within his authority—that he had a right to do it—had the power to do it—and that his client is bound by his action, and that therefore the last nine items of this account annexed the plaintiff cannot now recover for, in any event. And if you find for the plaintiff, and the plaintiff’s version is the true one, by a fair preponderance of the evidence, then you will return a verdict for the plaintiff for the amount of the first four items.”

The presiding justice instructed the jury to make a separate finding in relation to the last nine items in the amended bill of items, and propounded to the jury the following question: “When this action was commenced, was anything due to the plaintiff on account of the last nine items, in the amended bill of items in the plaintiff’s writ, namely, for decorating booths occupied by the parties named in the last nine items?” And to this query the jury answered in the affirmative, and in addition rendered a verdict for the plaintiff in the sum of one hundred and thirty-eight dollars and nineteen cents (\$138.19).

The case comes to the law court on exceptions to the ruling admitting the waiver in evidence and to the instructions given by the presiding justice in the charge to the jury.

It is stipulated that if the exceptions are sustained, judgment shall be ordered for the plaintiff for the full amount of

his claim, with interest from March 1, 1907, the date of the writ.

It is provided by section 59 of chapter 84, Revised Statutes, that "no action shall be maintained on a demand settled by a creditor, or his attorney intrusted to collect it, in full discharge thereof, by the receipt of money or other valuable consideration, however small."

It is obvious that this statute is not available in the defense of this action, first, because there was no settlement of the demand "in full discharge thereof," and secondly, because it does not appear from any facts stated in the charge or elsewhere in the exceptions <sup>408</sup> that there was any valuable consideration whatever for "waiving and releasing" the last nine items in the plaintiff's account.

Indeed, this statute is not relied upon or invoked by the counsel for the defendant, but it is contended in his behalf that in attempting to "waive and release" the nine items in question, the attorney of record at that time was acting within the scope of his authority as an attorney at law retained by the plaintiff to collect the claim intrusted to him; that by virtue of his employment he had the implied power to elect and control the remedy and to avail himself of such mode of procedure as he deemed most effectual in accomplishing the purpose of his employment, and that the "waiver" of the nine items in question was simply incident to the conduct of the suit and the control of the remedy, and as such was within the general authority of an attorney.

But in *Jenney v. Delesdernier*, 20 Me. 183, cited by counsel on both sides, in which it was held that an attorney without any special authority therefor may approve of the receipt taken by the officer for personal property attached by him. the court, quoting from the opinion in *Gaillard v. Smart*, 6 Cow. 385, thus speak of the authority of an attorney: "His general power does not extend to a retraxit, or release, because they relate to the cause of action itself; not merely to the remedy, which he is retained to conduct. And here is disclosed the true principle relative to the extent and limitation of the power of an attorney. He may elect and control the remedy, and all the arrangements arising out of and connected with it, but cannot release or discharge the cause of action without receiving payment, or do anything which will have that effect."

Accordingly, in *Wilson v. Wadleigh*, 36 Me. 496 (a case not embraced by the provisions of the statute of 1851, now section 59 of chapter 84, Revised Statutes, above quoted), it was held that an attorney, by virtue of his general employment to prosecute a suit, has no authority to discharge the judgment or execution which he may recover unless upon payment of the amount due. In the opinion the court said

of the power of an attorney: "He is necessarily vested with great discretion in the management of a cause during its progress to <sup>407</sup> final judgment, but he is not authorized to assign or transfer that judgment when obtained. Such authority is not necessary for the discharge of his duty, and would leave the interests of his client to his mercy. In *Peniman v. Patchin*, 5 Vt. 346, Phelps, J., says: "He cannot compromise a demand without special authority for that purpose, nor discharge it without satisfaction. Much less can he assign it for his own benefit; such an act being not only foreign to the purpose of his employment, but inconsistent with it. A power so liable to abuse (which indeed could hardly be exercised without abuse), can with no propriety be admitted": See, also, *Lewis v. Gamage*, 1 Pick. 347, and *Shores v. Caswell*, 13 Met. 413. In the last-named case it was held that an attorney by virtue merely of his retainer to prosecute or defend a suit, had no authority to release a claim of his client on a third person, for the purpose of making such person a competent witness for his client.

But it is unnecessary to consider further the general authority of an attorney, for the law is too well settled and familiar to admit of discussion that an attorney who is clothed with no other authority than that arising from his employment in that capacity has no power to compromise and settle or release and discharge his client's claim. He may do all things incidental to the prosecution of the suit and which affect the remedy only and not the cause of action. He cannot bind his client by any act which amounts to a surrender in whole or in part of any substantial right: *Derwort v. Loomer*, 21 Conn. 245; *Messick v. Ledergerber*, 56 Mo. 466; *Walden v. Bolton*, 55 Mo. 405; *Davis v. Hall*, 90 Mo. 659; 3 S. W. 382; *Lewis v. Duane*, 141 N. Y. 302, 36 N. E. 322; 4 Cyc. L. & Pr. 945; 3 Am. & Eng. Ency. of Law, 358.

It is not in controversy that the written instrument in this case declaring that the plaintiff does "hereby waive, relinquish and release all claims and rights whatsoever" against the defendant for any balances due on account of the nine items in question was an apparent attempt on the part of the attorney who executed it, not only to waive recovery of those nine items in this particular suit, but to execute a final discharge of those items and forever bar <sup>408</sup> recovery upon them. It has been seen, however, that an attorney without special authority cannot thus make a compromise settlement which involves a release of the cause of action or any substantial part of his client's rights.

But it is insisted in behalf of the defendant that the waiver of recovery in this suit was within the authority of the attorney, and therefore valid, and that its operation is not defeated by combining with it an attempt to make a final dis-

charge of that part of the cause of action. It is suggested that if the instrument in question is not effectual as a discharge, it may still be held a waiver for this suit, and the plaintiff has the right to institute a new action for the items waived. And in determining whether the waiver of the nine items in question would necessarily operate as a final surrender of a part of the plaintiff's cause of action, it is important to inquire whether a new action could have been maintained for the items waived.

The plaintiff's cause of action was a claim against the defendant for services rendered in decorating the auditorium at Portland. It was obviously the plaintiff's contention that his cause of action arose from one bargain and one entire contract or single job as between him and the defendant. The attempted waiver by the former attorney was repudiated by the plaintiff, and under instructions of the presiding justice, to which no exceptions were taken by the defendant, the plaintiff's contention that the entire claim was due appears to have been adopted in the special finding of the jury. The defendant filed no motion to have this finding set aside, but entered into a stipulation with the plaintiff that if the exceptions to the charge upon the question of waiver were sustained, "judgment, if for the plaintiff in any amount, shall be for the full amount of the plaintiff's claim, with interest from the date of the writ."

Under these circumstances the law is well settled that if the items which the attorney attempted to waive had been stricken from the account by authority of the plaintiff himself, no further action could ever have been maintained for their recovery. In *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93, it is said by the federal court that "There are no maxims of the law more firmly established or of more value in the administration of justice than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy; namely, '*interest rei publicae ut sit finis litium*,' and '*nemo debet bis vexari pro una et eadem causa*.' " Hence the principle is uniformly and inflexibly maintained that a judgment for a part of an entire demand is a bar to any other suit for another part of the same demand. A claim which is in its nature entire cannot be split up into several causes of action, and if suit is brought for a part only of the items constituting an entire claim, recovery for that part will bar recovery in any subsequent suit for the residue or any other items of the same demand. In *Foss v. Whitehouse*, 94 Me. 491, 48 Atl. 109, it was held that judgment in an action of assumpsit for money paid to obtain a release from unlawful imprisonment is a bar to a subsequent action of tort to recover any other damages resulting from the same imprisonment. "It

is common learning," said the court, "that a plaintiff cannot thus split up a cause of action and bring several actions for the different items of damage resulting from the one cause of action." In *Willoughby v. Atkinson Furnishing Co.*, 96 Me. 372, 52 Atl. 756, it was held that recovery of damages in a former suit for a breach of the defendant's obligation under a lease to replace certain partitions "in as good condition as they found them" was a bar to a recovery in the pending suit for the loss of rent resulting from the same breach, which might have been included in the former suit.

In *Burritt v. Belfy*, 47 Conn. 323, 36 Am. Rep. 79, a suit for several months' rent was pending in a city court, and another suit was brought before a justice of the peace for an additional month's rent which was due when the former suit was brought; it was held that judgment in the second suit was a bar to the first suit.

In *Secor v. Sturgis*, 16 N. Y. 548, it is said in the opinion: "The true distinction between demands or rights of action which are single and entire and those which are several and distinct is, that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts. Perhaps as safe and simple a test as the subject admits of, by which to <sup>410</sup> determine whether a case belongs to one class or the other, is by inquiring whether it rests upon one or several acts or agreements. In the case of torts, each trespass, or conversion, or fraud, gives a right of action, and but a single one, however numerous the items of wrong or damage may be; in respect to contracts, express or implied, each contract affords one, and only one, cause of action": See, also, *Knowlton v. New York etc. R. R. Co.*, 147 Mass. 606, 18 N. E. 580, 1 L. R. A. 625; *Clark v. Baker*, 5 Met. 452; *Rosenmueller v. Lampe*, 89 Ill. 212, 31 Am. Rep. 74, and 23 Cyc. L. & Pr. 1174.

The conclusion is therefore irresistible that the nine items of the account sued which the plaintiff's former attorney attempted to "waive and release," and which the jury found to be actually due, constituted a part of the plaintiff's single cause of action, and that judgment for the first four items would have been a bar to any subsequent action for the items waived. In agreeing to eliminate those items from the account without the knowledge and consent of his client, the former attorney exceeded his authority, and the certificate must be, exceptions sustained.

Judgment for the plaintiff for \$283, with interest from March 1, 1907.

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*An Attorney has Ordinarily No Implied Authority to Settle, compromise or release his client's cause of action. His authority, when employed in a case, is limited to the management of the litigation and*

the control of all proceedings therein. But the client may, even without the consent of the attorney, dismiss the suit at pleasure: *Gibson v. Nelson*, 111 Minn. 183, 137 Am. St. Rep. 549; notes to *Tobler v. Nevitt*, 132 Am. St. Rep. 163; *Cameron v. Boeger*, 93 Am. St. Rep. 172.

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### **HALL v. MERRILL TRUST COMPANY.**

[106 Me. 465, 76 Atl. 926.]

#### **CORPORATION—Power to Trustee to Sell and Vote Stock.—**

Where two groups of stockholders transfer their shares to a trust company to prevent a third group from acquiring control of the corporation, the agreement of transfer providing that the trust company shall take out a certificate to itself as trustee, vote the stock as three named shareholders or a majority of them direct, pay dividends to the owners, and sell the shares for such price and at such time as the three named stockholders or a majority of them direct, provided a sufficient number of shares are sold to constitute a majority of the stock outstanding, the agreement is valid, and creates a power of sale with an incidental provision for voting. It is something more than a mere power of attorney. It creates in effect a joint trusteeship, and is not revocable at the pleasure of one of the parties. (p. 362.)

Bill to enjoin the sale of stock in the Machias Lumber Company and held by the Merrill Trust Company in trust, and to determine the rights of the parties under a trust agreement.

Symonds, Snow, Cook & Hutchinson, Tyler & Young, H. E. Bolles and R. Frothingham, for the plaintiff.

Heath & Andrews, for the defendants.

<sup>466</sup> **CORNISH, J.** The Machias Lumber Company is a corporation existing under the laws of the state of Maine, engaged in the manufacture and sale of lumber, and owning and operating valuable timber lands on the Machias river and mills at Machias, with an issued capital stock of two thousand five hundred and fifty-two shares. The plaintiff is the largest individual stockholder, and since its organization has been the president of the corporation, which is admittedly a prosperous concern.

In January, 1905, the ownership was divided, broadly speaking, into three parts; the Hall interest, held by the plaintiff and his family, and business associates, representing three hundred and ninety shares; the Ames interest, held by the estate of John K. Ames, members of the Ames family and their friends, representing eight hundred and ninety-two shares; and the Oak and Simpson interest, representing seven hundred and eighty-seven shares. Other shares, amounting to four hundred and eighty-three in number, may be termed



miscellaneous, with a somewhat scattered ownership among outside parties, although some of these were also held by the Hall and Ames interests. The Oak and Simpson holding was in fact controlled by the American Realty Company, which is allied with the International Paper Company, and which was, to quote the language of the plaintiff's brief, "a rival for the ownership and control of the timber lands operated by the Machias Lumber Company, and which was seeking to acquire such lands through further purchases of stock of the Machias <sup>467</sup> Lumber Co." "In order to prevent Oak and Simpson," quoting further from the same source, "from acquiring the shares held by Hall and his associates, and thereby obtaining control of the corporation, or from acquiring the shares held by Ames and his associates thereby obtaining control of the corporation," an agreement was entered into between the several holders of the Hall and Ames interests, being nine in number and owning one thousand two hundred and eighty-two shares, a majority of the entire stock issued, whereby their several shares were transferred to the Merrill Trust Company to be held by it as trustee, under the terms of the following letter which was sent to it by each of these nine stockholders:

"To the Merrill Trust Company of Bangor, Maine.

"The certificates for two hundred and fifty-four (254) shares of the capital stock of the Machias Lumber Company issued to James M. W. Hall and duly assigned by me, and sent to you, you are to deal with as follows:

"Said shares are to be transferred to you as Trustee and you are to take out a certificate to you as Trustee for the same. While it stands in your name as Trustee you are to vote said shares or cause them to be voted at all meetings of the stockholders of said Company upon all questions, and especially upon all questions of a lease or sale of the Company's property and franchise, as Jas. M. W. Hall of Cambridge, Mass., Alfred K. Ames, of Machias, Me., and Wilson D. Wing, of Bangor, Me., or a majority of them direct.

"In case of death or permanent disability of either Wilson D. Wing, Jas. M. W. Hall or Alfred K. Ames, herein mentioned, during the continuance of this agreement the authority vested in them in connection with and as mentioned in this trust shall continue up to the time of the expiration of this agreement by the following named successors: David L. Wing of New York City, in place of Wilson D. Wing; Frank S. Ames of Machias, Me., in place of Alfred K. Ames; James R. Hall of Cambridge, Mass., in place of James M. W. Hall.

"While you hold such stock you are to pay to me all dividends which you may receive on said stock by forthwith sending to me a check to my order for the same.

468 "You may thus hold said stock as Trustee until the expiration of December thirty-first, nineteen hundred and six, at which time if you shall not have sold the same as herein provided you are to retransfer said shares to me.

"You may sell and transfer said shares for such price and at such time as said Hall, Ames and Wing, or a majority of them may direct, provided, however, you shall sell at the same time sufficient shares of the capital stock of said Company as, reckoning my said shares in, shall be at least a majority of the shares of the capital stock of said Company then outstanding. You are thus to deal with said shares without any risk or liability on your part, excepting that you are to be responsible for the safe keeping of the same. This shall bind me, my heirs, executors and administrators and inure to my and their benefit whenever the context so requires or admits."

This agreement was renewed at its expiration and continued in force two years longer, or until December 31, 1908.

No change was made in the personnel of the management, the plaintiff continuing as president and general manager, and his son, James R. Hall, as treasurer; nor was there any change in the business policy of the company. In fact, the corporate affairs were controlled by the same persons and in the same manner after this agreement was made as before.

In April, 1908, the Oak and Simpson interest, being unable to obtain control of a majority of the stock, concluded to sell its own shares. Various interviews and negotiations were had between Oak and Simpson on the one side and the plaintiff on the other, the latter ostensibly representing Ames and Wilson as well as himself, and holding himself out to his associates, who reposed the utmost confidence in him, as desirous of purchasing this outstanding interest for the joint benefit of the three. At the final interview, however, held in Bangor on April 17, 1908, the plaintiff declined to accede to the exact terms required by Oak and Simpson and the trade fell through. Within fifteen minutes after the plaintiff declined to purchase, Mr. Oak took the matter up by telephone 469 with James R. Hall, the plaintiff's son in Cambridge, Massachusetts, in accordance with a previous request from the son that this should be done in case the proposed trade with the father was not consummated. The son was informed of the terms designated by Oak and Simpson, and before two hours had elapsed he had bought this outstanding interest, at the precise figure which had been declined by the father.

The plaintiff studiously delayed giving Ames and Wilson any information in regard to the transaction, professing utter ignorance of the situation, and as late as April 23d wrote Mr. Ames that he had not learned the details, but would know who the purchasers were as soon as the stock certificates came in for transfer. A careful reading of the evidence, and

especially of the correspondence, leads to no other conclusion than that the plaintiff intended to have his own negotiations with Oak and Simpson fail, and the stock bought in by his son; so that it might be wholly controlled by his own friends, making the Hall interest a practical majority, provided that portion covered by the trust agreement could be withdrawn. The plaintiff's contention that he was acting in good faith and that the sale to his son and his associates came as a surprise overtakes the credulity of the court.

The seven hundred and eighty-seven shares belonging to Oak and Simpson were duly transferred to the purchasers, and then, the trust agreement having outlived its usefulness so far as the plaintiff was concerned, although only two days before the Oak and Simpson stock was purchased he had suggested to Ames that it be continued for a further term of five years, he repudiated it in a letter to the Merrill Trust Company, dated May 9, 1908, in the following language:

"Referring to instrument under which your Trust Company purports to have received and to hold certain capital stock of the Machias Lumber Company, I beg to give you notice that I have been advised that the instrument in question is illegal and that your Trust Company has no authority granted it thereby and will make itself responsible for any damage which may accrue by reason of any attempted actions thereunder.

470 "I give you this notice in order that you may act at your peril and with full knowledge of my position concerning the instrument in question.

"Without waiving the foregoing notice, I further so far as I legally can, revoke any authority I may have granted by depositing with you three hundred and sixty-one (361) shares of the stock of the Machias Lumber Company."

Disregarding this repudiation or revocation on the part of Hall, except in so far as it operated as a waiver of any right of consultation as a member of the committee of three, Messrs. Ames and Wilson, as a majority of that committee, on November 2, 1908, directed the trustee to sell the twelve hundred and eighty-two shares held in trust, at public auction on November 25, 1908, after due notice thereof by publication and by sending a copy of such notice to all the equitable owners of the stock including the plaintiff. Thereupon the plaintiff brought this bill in equity to enjoin said sale and to determine the rights of the parties under the trust agreement. On November 23, 1908, a preliminary injunction was granted on bond. A motion to dissolve this injunction was filed by the defendants on December 15, 1908, and at a hearing on December 23, 1908, it was ordered that the preliminary injunction be dissolved unless the plaintiff on or before December 28, 1908, file a stipulation agreeing that the cause

should be prosecuted to final decree, that in the meantime the Merrill Trust Company should not vote the stock held in trust, that no new stock should be issued, and "that if the bill is dismissed on final decree, said shares may be sold under the trust agreement, provided there shall be sold at the same time sufficient shares as, reckoning in said three hundred and sixty-one shares, shall be at least a majority of the shares of the capital stock of the Machias Lumber Company then outstanding." This stipulation was duly signed and filed by the plaintiff. Under this stipulation, and on report of the evidence, the cause is before this court. The decision involves a construction of the so-called trust agreement and its revocability.

The plaintiff's chief contention is that the agreement constituted a voting trust, irrevocable by its terms before December 31, 1908, <sup>471</sup> and as such was illegal and void as contrary to public policy. Assuming the premise, the learned counsel elaborately discusses all the decided cases involving the validity or invalidity of voting trusts, and places the one under consideration in the category of the illegal and void.

The assumption, however, is unwarranted. The appellation is a misnomer. The instrument was not designed for the purpose of creating a voting trust, and does not purport to be such. The plaintiff would construe it as a voting trust, with an incidental provision in regard to the sale of the stock, while in fact it is just the reverse, and should be construed as creating a power of sale with an incidental provision in regard to voting. It is an agreement to guard against the sale of either the Hall or the Ames interest to an adverse third party, namely, the Oak and Simpson interest, and to provide for the sale of the entire stock held in trust, if deemed advisable, to which the right of voting, while so held by the trustee, was merely an unimportant incident. Upon this theory, and this alone, the bill in equity is framed. It neither expressly nor by implication labels the agreement as a voting trust nor assails it on that ground. The attack in the bill is based on grounds utterly inconsistent with the attack in the argument. The purposes are stated in these words: "That said agreements were entered into under a peculiar existing state of facts, and for the purpose of protecting the interests of all the stockholders of the Machias Lumber Company from an adverse interest which was then seeking to acquire control. . . . That the principal purpose of said instruments of trust was to provide a means, if the occasion should arise, by which the properties and franchises of the Machias Lumber Company could be sold as an entirety for the benefit of all of its stockholders, majority and minority alike."

The grounds of complaint as stated in the bill are three:

"1. That said agreements contemplated only a sale by private treaty and did not contemplate a sale by public auction.

"2. That a majority of the committee has not directed said sale in the manner contemplated by the trust agreements.

<sup>472</sup> "3. That all real reason for the existence of said agreements has ceased to exist, and no necessity or reason for a sale exists at the present time.

"That at the present time the plaintiff and those associated with him hold and claim to control the majority of the capital stock, . . . and that a sale as advertised, if consummated, will deprive him and those associated with him of such control." In other words, the material allegations in the plaintiff's bill which are presumed to recite his claims for equitable relief are, the making of the trust agreement for a legal purpose and for the protection of all the stockholders of the company, including those outside as well as those inside the trust, and the illegality of the proposed sale by the trustee for two reasons; first, because it was to be at auction when the agreement contemplated a private sale, and, second, because the plaintiff, as one of the committee of three, was not consulted by his associates prior to their directing the trustee to make the sale, with the further claim that the plaintiff having acquired control of the adverse interest, the trust agreement had come to an end. These are the substance of the grievances set forth in the bill, and they may well be regarded as all that then existed in the mind of the plaintiff. The idea of a voting trust is not even hinted at, much less alleged. The evidence was also developed along the same lines. There was no complaint of any wrong, past or present, to stockholders assenting or nonassenting by the exercise of the voting power. The same officers had been continued in control, the same business policy had been pursued. In fact, the voting power had apparently ceased to be of any moment as the elections for the year were over, and the contemplated sale of stock required no exercise of that power whatever. It was to be made under the terms of the agreement when directed by a majority of the committee. So that the wrong complained of did not involve a stock vote or the voting power in the slightest degree. It is apparent that the learned counsel for the plaintiff, in drafting the bill and developing the evidence, kept in mind the true issue, whether the requirements of the trust agreement had been complied with in the proposed sale. It is also <sup>473</sup> apparent that the idea of a voting trust was conceived much later for the purpose of injecting into the agreement a taint that might possibly vitiate it ab initio.

The inconsistency of the two positions taken by the plaintiff is well illustrated in that part of the plaintiff's argument

which claims that the alleged voting trust was "a scheme for the benefit of the participating stockholders and in fraud of the minority," while the bill avers that it was entered into "for the purpose of protecting the interests of all the stockholders of the Machias Lumber Company."

In short, the plaintiff's rights in the bill and on the facts are based upon the validity of the agreement and noncompliance with its conditions, while the argument would treat it as invalid from the beginning.

The court adopts the plaintiff's first conception of his own case and regards the agreement as not constituting a voting trust. It is therefore relieved from considering the question of the legality of such a trust, a question most interesting in itself but quite outside the case at bar and therefore purely academic. Let us discuss the plaintiff's rights under the agreement as it is.

It is not contended that the transfer of shares of stock to a trustee to sell the same in compliance with the specifications of the trust agreement is invalid. Such an agreement violates no principle of law and no rule of public policy. It is, in effect, giving the trustee a power of attorney to sell on certain conditions. This instrument, therefore, in itself is valid. In what respect have its conditions been violated? The plaintiff's contention that this agreement contemplated only a private sale is untenable. Such is not its fair and reasonable interpretation. True, it is silent on the question whether the sale shall be private or public. The direction is to "sell and transfer said shares for such price and at such time as said Hall, Ames and Wing, or a majority of them, may direct." It is for the committee or a majority of them to dictate the price and time of sale, and inferentially at least the mode. Either a private or an auction sale might be within the power of that committee, but if the committee were to be limited to one method, that at auction would certainly be fairer to all concerned, especially where, as here, <sup>474</sup> notice was given to the public through newspaper advertisements and personally to each equitable owner. The letter of the agreement was not violated and its spirit was carefully observed.

The plaintiff's second contention is that the proposed sale was invalid because he was not consulted by his associates prior to the order of sale. This contention is also untenable. Whatever may have been the plaintiff's rights in this respect under the agreement, he had expressly waived them in his letter of May 8, 1908, to the trust company, in which he ignored the contract and revoked any authority he had given thereunder. It would have been a useless proceeding for Ames and Wilson to have attempted to confer with him in regard to carrying out the terms of an agreement which he

had repudiated in toto. The law does not require such idle and useless ceremony. The plaintiff cannot complain because he was taken at his word: *Milliken v. Skillings*, 89 Me. 180, 36 Atl. 77; *Bowden v. Dugan*, 91 Me. 141, 39 Atl. 467; *Pitcher v. Webber*, 103 Me. 101, 68 Atl. 593.

Nor is there any virtue in the allegation that the plaintiff and his associates hold and claim to control a majority of the outstanding capital stock, and to allow the sale to proceed might throw the majority into the hands of the defendants. If the plaintiff and his associates hold such a majority, it can only be through the purchase of the Oak and Simpson interest, which was acquired under such circumstances as disclosed bad faith on the part of this plaintiff, as we have already said, and if the sale of the trust stock is to be at public auction, the plaintiff has the same right to bid for its purchase as have the defendants.

A single point remains—that of revocation. The plaintiff, admitting for the sake of argument, that the agreement was not per se invalid, vigorously contends that it is at least revocable and has been revoked by him.

Had the plaintiff alone given the trustee the naked power to sell his shares under certain conditions and no other parties were involved, that power, if not coupled with any interest, might be revoked. But that is not this case. Here, in order to effect a common purpose, an agreement was entered into between the nine stockholders, each agreeing to transfer his stock, to be held by the <sup>478</sup> trustee for that common purpose, in consideration that the others would transfer theirs. A mutual contract was thereby entered into, the consideration of which was valid and sufficient: *Clark v. Sigourney*, 17 Conn. 511; *Greene v. Nash*, 85 Me. 148, 26 Atl. 1114; *Bigelow v. Bigelow*, 95 Me. 17, 49 Atl. 49. The written instrument was something more than a mere power of attorney. A valid trust was created giving certain powers and duties to the trustee. There was, in effect, a joint trusteeship, the trust company holding the legal title, but the powers were to be exercised as Hall, Ames and Wilson, or a majority of them, should direct, so that these three were really the active trustees, and the plaintiff in his bill, recognizing this, speaks of Ames and Wing as his cotrustees.

The agreement was not only to put the shares in trust, but to keep them there until December 31, 1908, unless previously sold as therein specified. To permit any party to that agreement to withdraw from it at his pleasure would be to sanction the breaking of a contract, and to that a court of equity should not readily lend its aid.

Finally, the good faith of the defendants is attacked, but on this it is only necessary to say that the whole course of dealing on their part was open and honest from beginning to



end, and in ordering the sale of the stock to be made before the expiration of the trust agreement, they adopted the only course open to them to protect their own interests in a legal way and in a way which the plaintiff himself had previously approved of and solemnly agreed to.

Our conclusion therefore is, that the instruments of trust referred to in the bill were valid, unrevoked and binding upon all the parties thereto, that the bill must be dismissed with a single bill of costs for defendants, but under the stipulation the decree below must be so framed as to direct the trustee to sell all the stock now in its hands, at public auction, after due notice to all the equitable owners, with the same effect as if made before December 31, 1908.

Decree in accordance with this opinion.

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*Pooling or Combining of Corporate Stock* with an object to carry out a particular policy to promote the best interests of all the stockholders is not necessarily illegal: *Chapman v. Bates*, 61 N. J. Eq. 658, 88 Am. St. Rep. 459, and see cases cited in the cross-reference note thereto. But the general policy of the law prohibits the separation of the voting power from the beneficial interest in corporate stock. And to justify such a separation there must be a property interest to conserve, some definite policy in the interest of the corporation to be carried out, some beneficial interest of the stockholders to be served, or some purpose not unlawful of an advantageous character to the stockholders to be effectuated: *Boyer v. Nesbitt*, 227 Pa. 398, 136 Am. St. Rep. 890.

*An Agreement Between the Majority Stockholders in a Corporation* and the three directors, whereby the stockholders transfer the legal title and the voting rights of their stock to the directors as trustees, for the term of five years for the purpose of securing a continuation of the business policy of the company organized by the officers then in control of its affairs, is not invalid as opposed to the public policy or statutes of Pennsylvania: *Boyer v. Nesbitt*, 227 Pa. 398, 136 Am. St. Rep. 890.

*Agreements to Control the Future Voting of Stock* are discussed in the note to *Smith v. San Francisco etc. Ry. Co.*, 56 Am. St. Rep. 138.

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## CITY OF BANGOR v. PEIRCE.

[106 Me. 527, 76 Atl. 945.]

**SPECIAL ASSESSMENT.**—A Statute Imposing a Personal Liability upon a land owner to make compensation for increase in the value of his property, caused by adjacent public improvements made at public expense, is constitutional. (p. 365.)

**SPECIAL ASSESSMENT.**—The Imposition of a Personal Liability for special assessments for public improvements is not under the power of eminent domain, but under the taxing power of the legislature. (p. 365.)

**SPECIAL ASSESSMENT**—Personal Liability of Trustee.—A person vested with legal title to property in trust only may be made

personally liable for special assessments for public improvements, although the statute imposing the liability does not provide that he may be reimbursed from the trust estate. Such right of reimbursement exists without being expressed in the statute. (p. 367.)

**TRUSTEE—Right to Reimbursement in Trust Estate.**—Whenever any law, statutory or other, imposes a personal duty upon a guardian, executor or trustee to pay money of his own for the benefit of the estate in his care, it follows under the general principles of jurisprudence, without special statutory provision, that the money so paid will be chargeable to the estate, and that in equity, at least, reimbursement will be enforced. (p. 368.)

**SPECIAL ASSESSMENT—Personal Liability—Survival.**—The personal liability of a trustee for a special assessment on land to which he holds the legal title survives his death, and may be enforced against his estate in the hands of his personal representatives. (pp. 368, 369.)

Donald F. Snow, Charles A. Bailey and Taber D. Bailey,  
for the plaintiff.

E. C. Ryder, for the defendant.

<sup>531</sup> EMERY, C. J. By statute, Revised Statutes, chapter 23, sections 33–37, inclusive, provision for widening streets, etc., in cities is made substantially as follows, viz.: When the city council widen any street and decide that damages should be allowed therefor, they may apportion a part or the whole of such damages as to them seems fit upon the lots adjacent to and bounded on such street. Before such apportionment or assessment is made, public notice is to be given to all persons interested. Any person not satisfied with the amount for which he is assessed can have the assessment upon his land determined by arbitrators. If the assessment finally fixed on any lot is not paid, the lots may be sold, etc.; and, by section 37, "If said assessments are not paid, and said city does not proceed to collect said assessments by a sale of the lots or parcels of land upon which said assessment is made, or does not collect, or is in any manner delayed or defeated in collecting, said assessments by a sale of the real estate so assessed, then the said city, in the name of said city, may maintain an action against the party so assessed for the amount of said assessment, as for money paid, laid out and expended, in any court competent to try the same, and in such action may recover the amount of such assessment, with twelve per cent interest on the same from the date of said assessment, and costs."

Acting under the above statute, the city council of Bangor duly widening Franklin street, allowed thirty thousand dollars for damages caused thereby, and apportioned a part of said damages upon certain lots <sup>532</sup> adjacent to and bounded on Franklin street. The lots so assessed had been conveyed to Laura Hayford by a deed reciting that the consideration was "paid by Laura Hayford of said Bangor, as she is trustee

under the last will of Wm. B. Hayford, late of said Bangor, deceased"; and that the conveyance was made to "the said Laura Hayford, trustee, her successors in said trust, heirs and assigns forever," with habendum to "the said Laura Hayford, trustee, her successors in said trust, heirs and assigns forever." There was in the deed no other suggestion that she was not to have the land in absolute fee simple. The assessment upon this land by the city council was made against "Laura Hayford, trustee," January 29, 1906. She did not appeal from the assessment, nor did she pay the assessment during her lifetime up to her death, March 20, 1907. The assessment not having been paid nor any other measures to collect it having been taken, the city, on December 22, 1908, brought this suit therefor against her estate in the hands of Anna C. Peirce, administratrix, thereof. Authority for the suit is claimed under section 37 of the statute above quoted.

No question is made of the regularity of the proceedings, nor of the validity of the assessment upon the lots. The only contention in the defense is that Laura Hayford was not in her lifetime personally liable for the assessment, and hence, of course, her individual estate is not liable after her death. Two propositions are urged in support of the contention: First, that the legislature has no power to impose upon the owner a personal liability for such assessment; second, that in fact this assessment was not upon her personally but only upon her as trustee, and hence only the trust estate was made liable.

1. The constitutional question raised has received different answers in different states. The majority of the answers affirm the power. Many of the cases denying the power seem to be based on a theory that it is unjust to make the owner personally liable for what is only a benefit to a particular parcel of land. But the justice or injustice of the requirement is a question for the legislature, not for the court. The power is manifestly legislative in character, and hence must be upheld unless clearly prohibited to the legislature <sup>533</sup> by some section or clause of the state or federal constitution. No exercise of the legislative power is to be held thus prohibited unless the prohibition is manifest, beyond a reasonable doubt, as has often been iterated in prior opinions of this court. We do not find in either constitution any section or clause clearly forbidding the imposition of a personal liability upon the owner to make compensation for the increase in the value of his property caused by adjacent public improvements made at the public expense. The imposition of a personal liability for special assessments is not under the power of eminent domain, but is under the taxing power of the legislature, almost, if not quite, its most extensive, least

limited power: *Dalrymple v. Milwaukee*, 53 Wis. 178, 10 N. W. 141; *White v. People*, 94 Ill. 604; *Allen v. Drew*, 44 Vt. 175; *Warren v. Henley*, 31 Iowa, 31; *New Haven v. Fair Haven & W. R. R. Co.*, 38 Conn. 422, 9 Am. Rep. 399; *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. Rep. 663, 28 L. ed. 569; *State v. Newark*, 35 N. J. L. 168; *Hill v. Higdon*, 5 Ohio St. 243, 67 Am. Dec. 289; *Litchfield v. Vernon*, 41 N. Y. 123. In this state, *Auburn v. Paul*, 84 Me. 212, 24 Atl. 817, was a case to enforce a personal liability upon an abutting owner for the sum assessed upon his abutting property under a statute identical with the section 37 in this case. The action was sustained, the court remarking (page 216): "The constitution nowhere provides that the legislature shall not require private interests receiving a peculiar advantage from a public work to contribute in a commensurate degree." In *City of Lowell v. Hadley*, 8 Met. 180, as early as 1844, there was sustained without question an action of *assumpsit* against the owner to recover the amount of an assessment for the expense of a sidewalk in front of his land. Statutes imposing personal liability to pay special assessments have long existed and been enforced in Maine and Massachusetts without question, and this acquiescence is strong argument for their constitutionality, if argument were needed.

2. The statute (section 37), above held constitutional, expressly, in terms, authorizes "an action against the party so assessed for the amount of said assessment as for money paid, laid out and expended." If the deed to Laura Hayford and the assessment had made no mention of her title being that of trustee, it would now <sup>534</sup> need no argument to justify holding her personally liable under the statute: *Auburn v. Paul*, 84 Me. 212, 24 Atl. 817; *Lowell v. Hadley*, 8 Met. 180. The deed and the assessment, however, did describe her as "trustee," and it should be conceded that a trust in the land could have been enforced against her. Was she, nevertheless, personally liable for the assessment made upon the land which she held under the deed above recited?

She held the legal title, and, though holding it in trust, she was yet the legal owner with all the legal rights, duties and liabilities of owner as to all the world except the *cestui que trust*: *Smith v. Portland*, 30 Fed. 734, *Carey v. Brown*, 92 U. S. 171, 23 L. ed. 469, and cases there cited; *Obert v. Bordine*, 20 N. J. L. 394; 1 *Perry on Trusts*, 3d ed., sec. 32. She could have maintained real actions against disseisors and actions of forcible entry and detainer against tenants, and also actions for rents, injuries to the freehold, etc., in her own name without describing herself as trustee. She would have been personally liable to others for injuries resulting from the condition of the property: *Shepard v. Creamer*, 160 Mass. 496, 36 Atl. 475. In actions against her concerning

the property, it would not have been necessary to declare against her as trustee: *Odd Fellows H. Assn. v. McAllister*, 153 Mass. 292, 26 N. E. 862, 11 L. R. A. 172. As said in that case (page 297): "The description of the defendants as 'trustees' in the writ was surplusage. There is no provision by which judgment and execution against trustees run against the trust estate in their hands, as in the case of executors and administrators. Even when they are entitled to indemnity from the trust fund, the judgment in an action at law is against them as individuals, whatever may be the doctrine in equity."

That general taxes upon land held in trust may be assessed to the holder of the legal title, and that such holder is within the statutes imposing a personal liability therefor upon the person assessed, is well settled, and, indeed, does not appear to have been questioned: *Baldwin v. Trustee*, 37 Me. 369; *Tracy v. Reed*, 13 Saw. 622, 38 Fed. 69, 2 L. R. A. 773; *Miner v. Pingree*, 110 Mass. 47; *Richardson v. Boston*, 148 Mass. 508, 20 N. E. 166; *Knight v. Boston*, 159 Mass. 551, 35 N. E. 86; *Dunham v. Lowell*, 200 Mass. 468, 86 N. E. 951; *Latrobe v. Baltimore*, 19 Md. 13; *Perry* <sup>535</sup> on Trusts, sec. 331; *Beach on Trusts and Trustees*, sec. 415; *Lewin on Trusts*, 1st ed., p. 557. On principle, the trustee would seem to be as much within the statute as executors, administrators, guardians, etc., whose personal liabilities for taxes on property in their hands assessed to them is at least assumed in *Fairfield v. Woodman*, 76 Me. 549; *Dresden v. Bridge*, 90 Me. 489, 38 Atl. 545, and is expressly held in *Payson v. Tufts*, 13 Mass. 493.

It is urged, however, that even if Mrs. Hayford was personally liable for general taxes assessed upon the land in question, it does not follow that she was personally liable for special assessments like that in this case. That much may be conceded. The question of her personal liability in either case depends upon the statute in that case. In the case of special assessments the statute is comprehensive and explicit that an action for the amount of the assessment may be maintained "against the party so assessed." Mrs. Hayford was the party and the only party assessed. She was the proper person to be assessed, as she was the legal owner, held the legal title. The taxing authorities were not required to go behind her title. The addition of the word "trustee" to her name did not make her any the less the party assessed, any more than does the addition of the word "guardian," or "executor" or "administrator" in assessments against such persons. It did not exempt her from her obligation, as the holder of the legal title and the party properly assessed, to pay the assessment as required by the statute.

One argument strongly urged against the applicability of the statute to one who holds the legal title, not for himself but in trust only for others, is that the statute does not provide that such person may be reimbursed from the trust estate. It is contended that for want of such a provision the statute must be held inoperative upon persons holding only the legal title without any beneficial interest, since otherwise it would be open to the constitutional objection that it would thus operate to take the property of one person for the benefit of another without due process of law. The answer is that the trustee would have the right of reimbursement from the trust estate for what he is compelled by the statute to pay for its benefit, and it is not necessary the right should be expressed in the statute. <sup>536</sup> Whenever any law, statutory or other, imposes a personal duty upon a guardian, executor or trustee to pay money of his own for the benefit of the estate in his care, it follows under the general principles of jurisprudence, without special statutory provision, that the money so paid will be chargeable to the estate, and that in equity, at least, reimbursement will be enforced: *Perry on Trusts*, secs. 910, 913, 915; *Perrine v. Newell*, 49 N. J. Eq. 57, 23 Atl. 492; *Woodruff v. New York R. R. Co.*, 129 N. Y. 27, 29 N. E. 251; *Gisborn v. Charter Oak Ins. Co.*, 142 U. S. 326, 12 Sup. Ct. Rep. 277, 35 L. ed. 1029. The principle is illustrated by analogous cases where life tenants have been obliged to pay the whole assessment for street improvements benefiting the property. The duty to pay the whole may be imposed on life tenants though the benefit is to the fee as well as the life estate, and when imposed and performed the life tenant can compel the remainderman to contribute his equitable share: *Plympton v. Boston Dispensary*, 106 Mass. 544; *Reyburn v. Wallace*, 93 Mo. 326, 3 S. W. 482. So in the case of a tenant from year to year: *Hitner v. Ege*, 23 Pa. 305. No statute was invoked in those cases.

It is still further urged that if there was a right of action against Mrs. Hayford personally, it should have been brought in her lifetime, since by its terms the trust ended with her death, and now there is no trust estate from which her estate can be reimbursed if now compelled to pay. In the argument at bar there was some discussion whether a special assessment is a debt. Whether technically a debt or not, there was a personal duty to pay the assessment, not contractual, to be sure, and only imposed by statute, but nevertheless a personal duty. Duties imposed by law are as much duties as those assumed by contract: 3 *Blackstone's Commentaries*, 160. This duty she did not perform in her lifetime, as she might and should. Her estate must now answer for her default: *Bulkley v. Clark*, 2 Root, 60; *Wooten v. House* (Tenn. Ch.

App.), 36 S. W. 936. The right of action was against her personally, and hence under modern law survives her death.

Judgment for the plaintiff for eight thousand seven hundred and forty-eight dollars and ninety-nine cents, with interest at twelve per cent per annum from January 29, 1906, the date of the assessment.

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*The Creation of a Personal Liability for Special Assessments* is the subject of a note to *City of Brookings v. Natwick*, 133 Am. St. Rep. 929.

Am. St. Rep., Vol. 133—24



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MASSACHUSETTS.**

**STEWART v. FINKELSTONE.**

[206 Mass. 28, 92 N. E. 37.]

**MORTGAGEE—Right to Protect Property from Waste.**—A mortgagee of real estate, though out of possession, may maintain an action in the nature of waste, or may go into equity to prevent the commission of waste. (p. 372.)

**BUILDING RESTRICTIONS—Rights and Obligations Imposed.** Building restrictions, imposed in deeds of several lots comprising a tract of land, create a right in the nature of an easement in favor of, as well as impose a liability upon, the grantee of every lot, growing out of the common character of the deeds. The interest is in a contractual stipulation for the common benefit. The nature of the right and obligation created by restrictions upon the use of real estate is such as to render their breach an injury to the fee of other land included within the scheme of improvement. (p. 372.)

**MORTGAGEE—Remedy in Equity to Protect Security.**—A mortgagee is allowed to go into equity to prevent injuries threatened to the land covered by his mortgage, because any act in its nature capable of harming the value of his security may be such an injury as to entitle him to equitable relief and protection. (pp. 372, 373.)

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**LACHES—Rules as to What Constitutes.**—There is no hard-and-fast rule as to what constitutes laches. If there has been unreasonable delay in asserting claims, or if, knowing his rights, a party does not seasonably avail himself of means at hand for their enforcement, but suffers his adversary to incur expense or enter into obligations or otherwise change his position, or in any way by inaction lulls suspicion of his demands to the harm of the other, or if there has been actual or passive acquiescence in the performance of the act complained of, then equity will ordinarily refuse her aid for the

establishment of an admitted right, especially if an injunction is asked. (p. 374.)

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**BUILDING RESTRICTIONS—Trivial or Technical Violations.** Whether building operations constitute in small particulars technical deviations from a strict compliance with the letter of building restrictions is of no consequence after the lapse of half a century of general concurrence in a practically uniform construction of their meaning by acts done. (p. 375.)

**BUILDING RESTRICTIONS—Violation by Party Complaining.** Minor violations of building restrictions by a complainant, which are of a character wholly different from the infractions made by the defendant, are not a bar to the enforcement of his rights. (p. 375.)

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sel selected by them [the plaintiffs] from acting for them." There is no hard-and-fast rule as to what constitutes laches. If there has been unreasonable delay in asserting claims, or if, knowing his rights, a party does not seasonably avail himself of means at hand for their enforcement, but suffers his adversary to incur expense or enter into obligations or otherwise change his position, or in any way by inaction lulls suspicion of his demands to the harm of the other, or if there has been actual or passive acquiescence in the performance of the act complained of, then equity will ordinarily refuse her aid for the establishment of an admitted right, especially if an injunction is asked. It would be contrary to equity and good conscience to enforce such rights when a defendant has been led to suppose by the word, silence or conduct of the plaintiff that there was no objection to his operations. Diligence is an essential prerequisite to equitable relief of this nature. Quiescence will be a bar when good faith requires vigilance. But so long as there is no knowledge of the wrong committed and no refusal to embrace opportunity to ascertain facts, there can be no laches. Upon the discovery of infringement of rights, such reasonable expedition is required in their prompt assertion as is consistent with due deliberation as to the proper means for relief. On the other hand, one who openly defies known rights, in the absence of anything to mislead him or to indicate assent or abandonment of intent to oppose on the part of others, is not in a position to urge as a bar failure to take the most instant conceivable resort to the courts. After the right has been invaded under circumstances which would not defeat a plaintiff in seeking relief, and no substantial harm is shown to have accrued to the wrongdoer from delay, there is not the same imminent necessity for early enforcement of demands as exists before conditions have become fixed. Mere lapse of time, although an important, is not necessarily a decisive, consideration. Within the somewhat flexible limitations of these general rules what may be laches in any case depends upon its peculiar facts: *Linzee v. Mixer*, 101 Mass. 512; *Cooke v. Barrett*, 155 Mass. 413, 29 N. E. 625; *Nudd v. Powers*, 136 Mass. 273; *Whitney v. Union Railway*, 11 Gray, 359, 71 Am. Dec. 715; *Haven v. Haven*, 181 Mass. 573, 64 N. E. 410; *Tucker v. Fisk*, 154 Mass. 574, 28 N. E. 1051; *Hill v. Mayor of Boston*, 193 Mass. 569, 70 N. E. 725; *Parker v. American Woolen Co.*, 195 Mass. 591, 81 N. E. 468, 10 L. R. A., N. S., 585; *Stewart v. Joyce*, 201 Mass. 301, 87 N. E. 613; *Daly v. Foss*, 199 Mass. 104, 85 N. E. 94. An interval of perhaps ten weeks between the first knowledge by Buttrick and the consultation with an attorney, during which he communicated with Stewart, who was out of the state, when there is nothing to indicate that it operated to the

prejudice of the defendant, cannot be accounted laches respecting so important an infraction of rights as the present case reveals. The subsequent delay in instituting the suit is excused, because it arose solely from the influence of one having a record interest in the defendant's estate.

The defendant contends that the plaintiffs cannot prevail because they are themselves violating the same restriction which they seek to enforce against the defendant. The original deed from the city of Boston, through which the defendant gained title, contained the clause that "A dwelling-house has been erected and completed on said lot in conformity with the conditions and restrictions." The record shows that the single justice found that the constructions now upon the plaintiffs' lot were those originally placed there, and that they were substantially the same on the two lots. It follows that they were regarded on all sides more than fifty years ago as a substantial compliance with the restrictions. The photographs and chalks of the buildings in the neighborhood furnish some indication of like buildings upon similar lots. Whether these constitute in small particulars technical deviations from a strict compliance with the letter of the restrictions, is of no consequence after the lapse of half a century of general concurrence in a practically uniform construction of their meaning by acts done: *Frost v. Jacobs*, 204 Mass. 1, 90 N. E. 357; *Jackson v. Stevenson*, 156 Mass. 496, 32 Am. St. Rep. 476, 31 N. E. 691. Moreover, the minor respects in which it is claimed that the plaintiffs have violated the restrictions are of a character wholly different from the infractions committed by the defendant, and therefore are not to be regarded as a barrier to the enforcement of their rights: *Bacon v. Sandberg*, 179 Mass. 396, 60 N. E. 936.

<sup>28</sup> The single justice, after taking a view of the neighborhood affected by the restrictions, determined that there had been no change whatever in the character of the buildings contemplated by the scheme contained in the restrictions, with the exception of those at the corners of the streets, and this was not of sufficient moment to interfere with it as a whole. This finding, supported by oral evidence as well as a view, was clearly warranted. It leaves no room for the application of the rule of changed conditions laid down in *Jackson v. Stevenson*, 156 Mass. 496, 32 Am. St. Rep. 476, 31 N. E. 691. In this respect the case is like *Evans v. Foss*, 194 Mass. 513, 80 N. E. 587, 9 L. R. A., N. S., 1039, 11 Ann. Cas. 171.

It is strongly urged that a mandatory injunction ought not to issue, for the reason that it would operate oppressively and inequitably, and impose on the defendant a loss disproportionate to the good it can accomplish, and that the

plaintiffs ought to be relegated to financial compensation by way of damages. This remedy is a drastic one, and ought to be applied with caution, but in cases proper for its exercise, it ought not to be withheld merely for the reason that it will cause pecuniary loss. It has been found that the defendant with full knowledge of the restrictions "deliberately attempted" to override them, and thus to deprive the district of the character given it by the restrictions. He took his chances as to the effect of his conduct with eyes open to the results which might ensue. It has been the practice of courts to issue mandatory injunctions upon similar facts: *Codman v. Bradley*, 201 Mass. 361, 87 N. E. 591; *Curtis Mfg. Co. v. Spencer Wire Co.*, 203 Mass. 448, 133 Am. St. Rep. 307, 89 N. E. 534; *Downey v. Hood & Sons*, 203 Mass. 4, 89 N. E. 24. Entrenchment behind considerable expenditures of money cannot shield premeditated efforts to evade or circumvent legal obligations from the salutary remedies of equity.

The costs allowed in the decree, including the expense of the surveyor's plans, were within the discretion of the court, which does not appear to have been wrongly exercised: *Rev. Laws, c. 203, sec. 14*; *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80.

Decree affirmed.

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*The Rights and Remedies of a Mortgagee against the impairment of his security by injury to the mortgaged premises* are discussed in the notes to *Webber v. Ramsey*, 43 Am. St. Rep. 432; *Lavenson v. Stand ard Soap Co.*, 13 Am. St. Rep. 153. In the recent case of *Delano v. Smith*, 206 Mass. 365, 92 N. E. 500, where a second mortgagee brought an action for damages against the members of the board of health for using the mortgaged premises as a smallpox hospital, the court said: "Whether the mortgagee is in possession of the mortgaged premises or not, or whether his right to possession begins only with the breach of condition and there has been no breach, nevertheless he has such an interest in the property and its preservation as enables him to maintain an action in his own name for injury to it. Such right of action is founded not upon the right to present possession, but on title to the estate. He may maintain such an action, although he is a junior mortgagee and although the security remains ample for his protection. He has a right to his security unimpaired. The leading principles by which the rights of mortgagor and mortgagee may be worked out are clearly explained by *Wells, J.*, in *Gooding v. Shea*, 103 Mass. 360. Cases which recognize a right of action in the mortgagee to recover damages for injury to his security are numerous."

*A Mortgagee of Lands may First Maintain an Action Against a Trespasser* thereon, and is entitled to recover such sum as will compensate him for the injury done to the mortgage as a security, and in a subsequent suit against the trespasser by the mortgagor the former may give in evidence the recovery by the mortgagee in mitigation of damages: *Elvins v. Delaware etc. Tel. Co.*, 63 N. J. L. 243, 76 Am. St. Rep. 217.

*A Mortgagee is not Entitled to an Injunction Against the Sale* on the mortgaged premises of beer not manufactured by him, such sale being



contrary to the terms of the mortgage, but not impairing his security: *Hardy v. Allegan County Judge*, 147 Mich. 594, 118 Am. St. Rep. 557.

*The Removal of Timber from Mortgaged Land, by Which the Security of a Second Mortgagee is impaired*, constitutes a present injury to him sufficient to put in operation the statute of limitations against his right of action therefor, though his mortgage has not matured: *Jenks v. Hart etc. Lumber Co.*, 143 Mich. 449, 114 Am. St. Rep. 673.

*The Validity of Building Restrictions* inserted in deeds is considered in the note to *Wakefield v. Van Tassell*, 95 Am. St. Rep. 219.

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### GRAY v. HEMENWAY.

[206 Mass. 126, 92 N. E. 31.]

#### **CORPORATION—Dividends, Whether Income or Capital.—**

Where a corporation, having accumulated large surplus earnings, declares an extra dividend of fifty per cent in the usual form, and gives stockholders an option to take stock in a new and independent company to an amount equal to one-half their dividends, the surplus, when thus divided, is to be treated as income going to life tenants, and not as capital going to the remaindermen. (p. 378.)

Bill by trustees under the will of Augustus Hemenway for instructions as to whether a stock dividend should be treated as income and distributed among life beneficiaries or be added to the trust fund as capital. From a decree that the dividend should be distributed as income, the remaindermen appealed.

J. G. Palfrey, for the remaindermen.

J. L. Thorndike, for the defendants entitled to the income.

<sup>127</sup> KNOWLTON, C. J. The only question raised by the appeal in this case is whether a certain dividend, made by the Delaware, Lackawanna and Western Railroad Company upon shares held by the plaintiff as trustees under the will of Augustus Hemenway, is to be treated by them as income going to the life tenants, or as capital going to the remaindermen. At the time of this dividend the railroad company, in conducting its business, had accumulated a large surplus, amounting to more than thirty-four million dollars, most of which was invested in stocks and bonds of subsidiary companies and a part in cash. The vote of the directors declaring this dividend was in part as follows: "Resolved, that an extra dividend of fifty (50) per cent be hereby declared, payable on July 20, 1909, to stockholders of record at the close of business on July 1st." This was the only part of the vote that referred directly to this subject. There followed in the same vote a declaration of

a stock dividend of fifteen per cent payable in capital stock of the company, with a statement of the reasons for making the stock dividend.

In the notice sent to stockholders there was a statement that a decision of the supreme court of the United States had declared <sup>128</sup> it to be unlawful for the corporation to transport, in interstate commerce, coal owned by it, and that a coal selling company had been organized with a capital of six million eight hundred thousand dollars, to which it was proposed that the railroad corporation as a seller should contract to sell and deliver at the mines the coal which it mined and purchased. Stockholders of the railroad company were invited to take stock in the new coal company to an amount equal to one-half of the cash dividend to which they were entitled, and to appropriate half of the dividend to payment for the shares subscribed for. A blank was inclosed adapted to use for this purpose. Perhaps it was expected that most of the stockholders would accept the invitation; for it might have been anticipated that the stock in the coal selling company would soon be worth more than par.

But the dividend of fifty per cent was an absolute cash dividend, made in the usual form. While the stockholders had an option to take stock in a new company, they were not obliged to do so. The new corporation had no legal connection with the old one. There was a plan to make mutually profitable contracts between the two corporations, but neither had any control of the other in its corporate capacity. While the very great surplus held by the railroad company was legally capital as between life tenant and remainderman until it was divided, it was in fact the earnings of the original capital, and there was good reason why it, or a large part of it, should be divided and treated as income. When the corporation elected to divide it, it became income, and the fact that the stockholders might use one-half of it if they chose to pay for a subscription which they were invited to make to the capital stock of a new corporation, did not change its character. We do not think the facts warrant a finding that the making of the dividend payable in cash was intended by the directors to be a mere form, to cover up that which was really a stock dividend of the corporation. The case is governed by the decisions in *Minot v. Paine*, 99 Mass. 101, 96 Am. Dec. 705, *Davis v. Jackson*, 152 Mass. 58, 23 Am. St. Rep. 801, 25 N. E. 21, *Lyman v. Pratt*, 183 Mass. 58, 66 N. E. 423; *Hyde v. Holmes*, 198 Mass. 287, 84 N. E. 318, and *Hemenway v. Hemenway*, 181 Mass. 406, 63 N. E. 919.

Decree affirmed.

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*Dividends and the Respective Interests Therein of Life Tenants and remaindermen are discussed in the note to Green v. Bissell, 118 Am. St. Rep. 162. Cash dividends upon corporate stock are to be regarded*

as income, and pass to the life tenant, while stock dividends are to be treated as capital and go to the remainderman: *Smith v. Dana*, 77 Conn. 543, 107 Am. St. Rep. 51; *Green v. Bissell*, 79 Conn. 547, 118 Am. St. Rep. 156. Undistributed profits of a corporation, though invested in permanent works, property improvements, or acquisitions, or business extensions, do not become, by force of that fact, permanent additions to the capital stock of the corporation, beyond the recall of the directors to be distributed as cash dividends: *Smith v. Dana*, 77 Conn. 543, 107 Am. St. Rep. 51. The distribution among the shareholders of a corporation of shares of stock received in payment of indebtedness due to the corporation must be treated as cash and not as stock dividends, as income, not as capital, and as between tenants for life entitled to receive the income and remaindermen entitled to the capital, such dividend must be paid to the former: *Green v. Bissell*, 79 Conn. 547, 118 Am. St. Rep. 156. The word "dividend," when used without qualification or explanation, signifies dividends paid in money: *Lancaster Trust Co. v. Mason*, 152 N. C. 660, 136 Am. St. Rep. 851.

## HOOD v. MARYLAND CASUALTY COMPANY.

[206 Mass. 223, 92 N. E. 329.]

### INSURANCE—Employer's Indemnity—Contracting Disease.—

A policy insuring an employer "against loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death accidentally suffered . . . by any employee," covers the liability of the assured to a hostler whom he negligently sets at work caring for horses afflicted with glanders, and who, in doing such work, himself contracts the disease. (pp. 381, 382.)

W. R. Sears, for the plaintiff.

M. O. Garner, for the defendant.

<sup>223</sup> MORTON, J. The defendant issued to the plaintiff corporation a policy insuring it "against loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death accidentally suffered while this policy is in force, by any employee . . . of the assured while on duty within the factory, shop or yard described in the schedule. . . . in and during the operation of the trade or business described in the schedule." While the policy was in force one Jeremiah Barry, who was employed by the plaintiff as a hostler in its stables at Charlestown, had the care of horses which were afterward found to have been suffering from glanders and were killed, and Barry was directed to assist in cleaning up the stalls. No notice was given to him that the horses suffered or had suffered from glanders. Glanders is an infectious disease, and subsequently Barry was attacked by it, and brought an action against the plaintiff for negligently putting him to work on the horses and thereby exposing him to the disease. Judgment was rendered in his favor

for fifteen hundred and twelve dollars, which the plaintiff paid in full. The present action is brought to recover the amount so paid with the costs and expenses of suit. The defendant was duly notified by the plaintiff of the bringing of the action against it, and was requested, as provided in the policy, to take upon itself the defense of the suit, but it declined to do so on the ground that the cause of action did not come within the terms of the policy. The case <sup>224</sup> was heard by a judge of the superior court without a jury on stipulations by the parties as to the facts and the evidence. It was agreed that the damages assessed in Barry's favor were fair and reasonable, and it was so agreed that, if the judge found that the defendant was liable, he should add to the fifteen hundred and twelve dollars such sum as he found to be reasonable and proper and necessarily disbursed by the plaintiff in the action of Barry against it. The judge found for the plaintiff in the sum of two thousand four hundred and seventy-four dollars and sixty-eight cents. The defendant asked the judge to make certain rulings and findings, which the judge refused to make, and the defendant excepted thereto and to the findings and rulings that were made. The case comes here on report. If the rulings and findings are correct, judgment is to be entered for the plaintiff; otherwise for the defendant.

The policy is entitled, "Manufacturers Employers Liability Policy." The contract which it contains is one of indemnity, in which the defendant engages to make good to the plaintiff any loss or damage which it may sustain by reason of its liability to its employees for bodily injuries accidentally suffered by them while engaged in doing the work which they were employed to do. It is a kind of insurance that has grown out of modern industrial and business conditions, and it is intended to afford full protection to employers in all cases where their employees have accidentally received bodily injuries for which they are liable. It also accomplishes the economic result with which, however, we have nothing to do, if distributing more or less widely some of the loss or damage which falls on those engaged in industrial occupations. It is to be noted that the policy does not contain the words "violent and external" in addition to the word "accidental," as is the case in many, if not most, accident policies. The insurance is liability insurance so called, and not insurance against accidents. The liability insured against is that "imposed by law upon the assured for damages on account of bodily injuries or death accidentally suffered . . . by any employee." Although the policy contains many conditions, there is no limitation or exception in regard to the kind or nature or cause of the accidents out of which the liability <sup>225</sup> insured against may arise. The fact that the accident may have been occasioned through negligence on the part of the insured is, therefore, immaterial.

Though instructions to that effect were requested and refused, and exceptions were taken to such refusal, they have not been argued; the defendant being apparently content with the instructions given in regard to that matter.

The question then is, whether the amount which the plaintiff was compelled to pay Barry was paid "for damages on account of bodily injuries accidentally suffered" by him within the meaning of the policy. It is plain that Barry suffered bodily injury in consequence of becoming infected with glanders; as much so as if he had had a leg or an arm broken by a kick from a vicious horse. Indeed, it is possible that the bodily injury caused by glanders was greater and more lasting than that caused by a broken leg or arm would have been. It is plain, also, that he suffered the injury "within the factory, shop or yard described in the schedule," and "during the operation of the trade or business described in the schedule."

Was the injury brought about accidentally within the fair scope and meaning of the policy, or was it the result of disease contracted while in the employ of the plaintiff but for which the defendant is not liable? It is clear, we think, that the infection which caused the disease from which Barry suffered was due to accident. It was in the nature of an accident that he was set to work upon or cleaning up after horses that had glanders, and it was in the nature of an accident that he became infected with the disease. The language used by Mathew, L. J., in *Higgins v. Campbell & Harrison and Turvey v. Brintons*, [1904] 1 K. B. 328, 337, where the judgment of the court of appeal was sustained by the house of lords (*Brintons v. Turvey*, [1905] App. Cas. 230), though there was a vigorous dissent by Lord Robertson, is appropriate here: "It was an accident that the workman, in dealing with the wool, was brought in contact with that which might infect him with this disease of anthrax, and it was a further accident that the disease attacked him." If the disease was the result of an accident, then we do not see why it does not follow that the bodily injury which Barry suffered as the result of the disease was not accidentally suffered, nor why the case does not come <sup>226</sup> within the terms of the policy. The language is "bodily injuries accidentally suffered." It hardly could be broader. The intention is, as has been said, to afford full protection and indemnity to the assured. Any accident that causes bodily injury in any way is included. Bodily injury is more commonly associated, perhaps, with physical force of some sort, but in the absence of anything in the policy limiting it to that, we do not see how or why it can or should be so restricted. A liability growing out of an accident which results in infecting the workman with a loathsome and dangerous disease, and thereby causes him great and perhaps lasting physical injury, would seem to be

as much within the spirit and intent of the contract as if the injury had been caused by a blow or some other equally obvious manifestation of force. As was said by Lord Halsbury in *Brintons v. Turvey*, [1905] App. Cas. 230, 233, the anthrax case, "when some affection of our physical frame is in any way induced by an accident, we must be on our guard that we are not misled by medical phrases to alter the proper application of the phrase 'accident causing injury,' because the injury inflicted by accident sets up a condition of things which medical men describe as disease."

The construction which we are inclined to give to the policy accords with the great weight of authority in similar cases, and rests, we think, on sound principles: *Freeman v. Mercantile Mutual Accident Assn.*, 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753; *Hughes v. Clover, Clayton & Co.*, [1909] 2 K. B. 798 (affirmed by the house of lords March 14, 1910); *Brintons v. Turvey*, [1905] App. Cas. 230, [1904] 1 K. B. 328; *Wicks v. Dowell & Co.*, [1905] 2 K. B. 225; *Ismay, Imrie & Co. v. Williamson*, [1908] App. Cas. 437; *Fenton v. Thorley & Co.*, [1903] App. Cas. 443; *Columbia Paper Stock Co. v. Fidelity & Casualty Co.*, 104 Mo. App. 157, 78 S. W. 320; *Aetna Life Ins. Co. v. Fitzgerald*, 165 Ind. 317, 112 Am. St. Rep. 232, 75 N. E. 262, 1 L. R. A., N. S., 422, 6 Ann. Cas. 551; *Fetter v. Fidelity & Casualty Co.*, 174 Mo. 256, 97 Am. St. Rep. 560, 73 S. W. 592, 61 L. R. A. 459; *Cary v. Preferred Accident Ins. Co.*, 127 Wis. 67, 115 Am. St. Rep. 997, 106 N. W. 1055, 5 L. R. A., N. S., 926, 7 Ann. Cas. 484; *Omberg v. United States Mutual Accident Assn.*, 101 Ky. 303, 72 Am. St. Rep. 413, 40 S. W. 909; *Delaney v. Modern Accident Club*, 121 Iowa, 528, 97 N. W. 91, 63 L. R. A. 603; *Martin v. Manufacturers' Accident Indemnity Co.*, 151 N. Y. 94, 45 N. E. 377.

The defendant relies on *Bacon v. United States Mutual Accident Assn.*, 123 N. Y. 304, 20 Am. St. Rep. 748, 25 N. E. 399, 9 L. R. A. 617. The deceased in that case died <sup>227</sup> from malignant pustule. It did not appear how the disease was contracted, though from what is said in the dissenting opinion it might perhaps be inferred that it was contended that it was caused by the bacilli of anthrax coming from the carloads of hides which frequently passed the station where the deceased was employed, and from the cattle which were slaughtered in large numbers in the vicinity. The certificate, however, expressly provided that the benefits under it should not extend "to any bodily injury of which there should be no external and visible sign, nor to any bodily injury happening directly or indirectly in consequence of disease; nor to any death or disability which may be caused wholly or in part by bodily infirmities or disease existing prior or subsequent to the date of this certificate." What

the deceased was insured against were "bodily injuries effected through external, violent and accidental means." The form of the certificate or policy is enough, we think, to distinguish that case from this.

In accordance with the report the entry will be judgment for the plaintiff.

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*Insurance—When Covers Loss by Disease.*—An accident policy insuring against loss of business time resulting from bodily injuries effected through external, violent and accidental means, covers loss of business time from disease, if the disease was proximately caused by a bodily injury occasioned through external, violent and accidental means: *Aetna Life Ins. Co. v. Fitzgerald*, 165 Ind. 317, 112 Am. St. Rep. 232. See, also, *Cary v. Preferred Accident Ins. Co.*, 127 Wis. 67, 115 Am. St. Rep. 997; *Central Accident Ins. Co. v. Rembe*, 220 Ill. 151, 110 Am. St. Rep. 235; *Fetter v. Fidelity and Casualty Co.*, 174 Mo. 256, 97 Am. St. Rep. 560.

*For Recent Cases Construing Employers' Indemnity Policies*, see *Kenedy v. Fidelity etc. Co.*, 100 Minn. 1, 117 Am. St. Rep. 658; *Frye v. Bath Gas etc. Co.*, 97 Me. 241, 94 Am. St. Rep. 500; *Sanders v. Frankfort Marine etc. Ins. Co.*, 72 N. H. 485, 101 Am. St. Rep. 688; *Neason v. United States Casualty Co.*, 201 Mass. 71, 131 Am. St. Rep. 390.

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## GREENOUGH v. PHOENIX INSURANCE COMPANY OF HARTFORD.

[206 Mass. 247, 92 N. E. 447.]

**FIRE INSURANCE—Statement of Loss "Forthwith," What Constitutes.**—In determining whether an insured has rendered a statement of loss "forthwith," the inquiry is whether in the light of conditions surrounding him at the time when he was bound to act, considered, as they then should have been, by an ordinarily prudent man, he exercised reasonable diligence in rendering the written statement to the insurer without unnecessary delay. An insured, who has suffered loss, may properly take a few days in order to acquire the knowledge necessary intelligently to prepare a statement, adequate both to give some reliable data to the insurers and to protect his own rights in the future. The time required for this purpose must vary with the character and extent of the property injured, the intimacy of the relation of the owner to it, and the circumstances peculiar or personal to himself in which at the moment he may be placed. What may be "forthwith" in any case depends upon a due regard to all these considerations. (pp. 384, 385.)

**FIRE INSURANCE—Statement of Loss "Forthwith," When Waived.**—There may be negotiations for a settlement of a loss of such a tenor or occurring so soon after the fire or under such surroundings as amount to a waiver, for the time being, of the right of the insurer to require a statement of the loss forthwith, and as to make it a breach of good faith for it to set up as a defense the failure immediately to furnish the statement. Facts may be found to exist equivalent to a representation by the insurer to the effect that the right to require the written statement, while not abandoned,



would be treated as suspended until the termination of efforts at compromise. (p. 385.)

**FIRE INSURANCE—Statement of Loss—Construction of Policy.**—A paragraph in the standard form of insurance requiring the insured, in case of loss, to forthwith render a statement showing the value of the property, other insurance thereon in detail, etc., does not hold an insured to anything more than good faith and reasonable investigation to ascertain the facts in rendering the statement. He is not required to be a warrantor of the truth of all recitals in it. (p. 387.)

**FIRE INSURANCE—Statement of Loss—Construction of Policy.**—Where a standard form of insurance provides, "In case of any loss or damage under this policy, a statement in writing, signed and sworn to by the insured, shall be forthwith rendered to the company, setting forth the value of the property insured, the interest of the insured therein, all other insurance thereon, in detail, the purposes for which and the persons by whom the building insured, or containing the property insured, was used, and the time at which and the manner in which the fire originated, so far as known to the insured," the clause "so far as known" to him, applies to all the statements the insured is required to make. (p. 387.)

**STATUTES.**—The General Rule That a Modifying Clause is ordinarily to be confined to the last antecedent does not apply where a consideration of the subject matter requires a different construction. (p. 387.)

**STATUTES.**—Punctuation of Statutes, although often disregarded, may be resorted to when it tends to throw light upon the meaning of the language. (p. 387.)

C. M. Davenport, for the plaintiff.

F. W. Brown and W. L. Came, for the defendants.

<sup>248</sup> RUGG, J. These are actions upon contracts of insurance in the Massachusetts standard form. The first defense put forward is that no statement in writing was furnished by the insured "forthwith" as required by this clause of the policy: "In case of any loss or damage under this policy, a statement in writing, signed and sworn to by the insured, shall be forthwith rendered to the company, setting forth the value of the property insured, the interest of the insured therein, all other insurance thereon, in detail, the purposes for which and the persons by <sup>249</sup> whom the building insured, or containing the property insured, was used, and the time at which and the manner in which the fire originated, so far as known to the insured: Rev. Laws, c. 118, sec. 60. It may be noted in passing that the important change wrought in this clause by Statutes of 1910, chapter 552, has no bearing on these actions.

The word "forthwith" or other equivalent expressions used in this connection have been frequently before the courts for interpretation: *Harnden v. Milwaukee Mechanics' Ins. Co.*, 164 Mass. 382, 49 Am. St. Rep. 467, 41 N. E. 658; *Mandell v. Fidelity & Casualty Co.*, 170 Mass. 173, 64 Am. St. Rep. 291, 49 N. E. 110; *Smith & Dove Mfg. Co. v. Trav-*

elers' Ins. Co., 171 Mass. 357, 50 N. E. 516; Parker v. Middlesex Mutual Assur. Co., 179 Mass. 528, 61 N. E. 215; Cook v. North British & Mercantile Ins. Co., 181 Mass. 101, 62 N. E. 1049, 183 Mass. 50, 66 N. E. 597; Fuller v. New York Fire Ins. Co., 184 Mass. 12, 67 N. E. 879; Smith v. Scottish Union & National Ins. Co., 200 Mass. 50, 85 N. E. 841, and cases cited; Bennett v. Aetna Ins. Co., 201 Mass. 554, 131 Am. St. Rep. 414; Everson v. General Accident etc. Assur. Corp., 202 Mass. 169, 88 N. E. 658, and cases cited; Hughes v. Central Accident Ins. Co., 222 Pa. 462, 71 Atl. 923.

The result of these decisions is that, upon such a defense, the inquiry is whether in the light of conditions surrounding the insured at the time when he was bound to act, considered, as they then should have been, by an ordinarily prudent man, he exercised reasonable diligence in rendering the written statement to the insured without unnecessary delay. An insured who has suffered loss may properly take a few days in order to acquire the knowledge necessary intelligently to prepare a statement, adequate both to give some reliable data to the insurers and to protect his own rights in the future. The time required for this purpose must vary with the character and extent of the property injured, the intimacy of the relation of the owner to it, and the circumstances peculiar or personal to himself in which at the moment he may be placed. What may be forthwith in any case depends upon a due regard to all these considerations. This provision of the contract is prescribed by the statute, has been entered into by the parties, and must be performed, unless there is something in the words or conduct of the insurer which either partially or wholly excuses the insured from compliance. There may be negotiations for a settlement of the loss of such a <sup>250</sup> tenor or occurring so soon after the fire, or under such surroundings, as amount to a waiver for the time being of the right of the insurer to require the statement forthwith, and as to make it a breach of good faith for it to set up as a defense the failure immediately to furnish the statement. Facts may be found to exist equivalent to a representation by the insurer to the effect that the right to require the written statement, while not abandoned, would be treated as suspended until the termination of efforts at compromise.

The fire by which the plaintiff suffered loss occurred on December 12th, in a small country town. The property was a pickle factory. There was evidence which would support a finding that within two days after the fire the secretary of one of the defendants came to the plaintiff, appearing to represent both the mutual companies, talked over with him the subject of the loss, and, about a week after the fire (or

perhaps two weeks, the evidence upon this point not being definite), representatives of all the defendants empowered to adjust the loss having given previous notice of their coming to the plaintiff, visited the premises and remained there several hours; they were accompanied by a carpenter, who conferred with them from time to time and made measurements of the injured buildings, and they made divers propositions to the plaintiff in an ineffectual endeavor to adjust the loss. On the day after this, due statements were made, one of which was received by each of the defendants sixteen days after the fire. Early in the following January there was another meeting between the plaintiff and several adjusters who had authority to represent all the defendants, at which a further attempt was made to settle the loss. During this interview one of the adjusters, who acted as spokesman for all, said without dissent by any of them that "they had received the statements of loss and that they were all right."

If these were found to be the facts the inference was warranted that the defendants gave the plaintiff to understand by their words and conduct that statements need not be furnished until after there had been an examination of the premises by their representatives and an attempt to compromise their respective rights under the contract, and that thereafter their agents admitted that statements sufficient in form and satisfactory as <sup>251</sup> to time had been received by the insurers. All the circumstances taken together may have been found to relieve the plaintiff from acting earlier than he did as to the written statement, and to constitute a temporary waiver of their contractual rights in this regard on the part of the defendants: *Smith v. Scottish Union & National Ins. Co.*, 200 Mass. 50, 85 N. E. 841; *Walker v. Lancashire Ins. Co.*, 188 Mass. 560, 75 N. E. 66; *Boruszewski v. Middlesex Mutual Assur. Co.*, 186 Mass. 589, 72 N. E. 250.

It is further argued in defense that the statements as rendered were not in compliance with the policies, in that they failed "to set forth all other insurance therein in detail." The fact relied on in support of this contention is that it may have been found that there was another policy of insurance issued by the defendant, the Attleboro Mutual Insurance Company, which was not included in the list. The policy was applied for in writing, but the plaintiff's name to the application was signed by an insurance solicitor, and, although there was some evidence tending to show that it was issued and mailed to the plaintiff, and that he paid for it along with other policies, yet he did not receipt for it, and he testified that he had no recollection of ever having applied for the policy or having paid for it or its having been issued to him, and that he had "never received it."

On this state of the evidence the jury might have found either way on the question whether the policy became a binding contract. A finding certainly would have been warranted that the plaintiff made a full statement as to other insurance "so far as known to him," which is all that was required of him. This modifying clause of the insurance contract applies to all the statements which the insured is required to make. It cannot be presumed to have been the intent of the legislature in enacting this paragraph of the standard form to hold an insured to anything more than good faith and reasonable investigation to ascertain the facts in rendering the statement. He is not required to be a warrantor of the truth of all recitals in it. The general rule that a modifying clause is ordinarily to be confined to the last antecedent does not apply where a consideration of the subject matter requires a different construction. The punctuation of the paragraph, which has been the same in all its enactments (Stats. 1873, c. 331, sec. 1; Stats. 1881, c. 166, sec. 1; Pub. Stats., c. 119, <sup>252</sup> sec. 139; Rev. Laws, c. 118, sec. 60; Stats. 1907, c. 576, sec. 60), confirms this view, and punctuation, although often disregarded, may be resorted to when it tends to throw light upon the meaning of the language: *Commonwealth v. Kelley*, 177 Mass. 221, 58 N. E. 691, and cases cited; *Best v. Nagle*, 182 Mass. 495, 65 N. E. 842; *Welsh*, Petitioner, 175 Mass. 68, 55 N. E. 1043; *Commonwealth v. Grant*, 201 Mass. 458, 87 N. E. 895. This is the construction of the statute indicated in *Smith v. Scottish Union & National Ins. Co.*, 200 Mass. 50, 85 N. E. 841, and appears to be in harmony with the trend of decisions elsewhere: *Connecticut Mutual Life Ins. Co. v. Schwenk*, 94 U. S. 593, 24 L. ed. 294; *McMaster v. Insurance Co.*, 55 N. Y. 222, 14 Am. Rep. 239; *Miller v. Hartford Ins. Co.*, 70 Iowa, 704, 29 N. W. 411; *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389, 33 N. E. 475.

Exceptions sustained.

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*Conditions in Policies of Insurance as to the Time of Giving Notice* of loss, accident or death are construed reasonably and most strongly against the insured. If the condition is that the notice must be given immediately or forthwith, it is necessary only that due diligence be exercised and notice given within a reasonable time, regard being had to the circumstances surrounding the case: *Aetna Life Ins. Co. v. Fitzgerald*, 165 Ind. 317, 112 Am. St. Rep. 223; *Woodmen Accident Assn. v. Pratt*, 62 Neb. 673, 89 Am. St. Rep. 777, and cases cited in the cross-reference note thereto; *Ward v. Maryland Casualty Co.*, 71 N. H. 262, 93 Am. St. Rep. 514; *Horsfal v. Pacific Mut. Life Ins. Co.*, 32 Wash. 132, 98 Am. St. Rep. 846; *Hatch v. United States Casualty Co.*, 197 Mass. 101, 125 Am. St. Rep. 332; *Commonwealth v. People's Express Co.*, 201 Mass. 564, 131 Am. St. Rep. 416.

*The Giving of Notice and the Furnishing of Proof* of death are separate acts. But the proof of death, seasonably made, may serve the

purpose of both notice and proof, because the formal statement of facts made in the proof ordinarily includes all the information imparted by the notice. But a mere informal notice does not usually supply the place of formal proof: *Da Rin v. Casualty Co.*, 41 Mont. 175, 137 Am. St. Rep. 709, and note.

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### CLARKE v. COWAN.

[206 Mass. 252, 92 N. E. 474.]

**MORTGAGE—Covenant to Give Partial Release.**—A provision in a mortgage of a large number of lots that the mortgagee will “release and quitclaim any lot upon the payment” of a specified sum is with the mortgagor, not with him and his assigns, and must be regarded as a personal agreement for his benefit, and not for the benefit of anyone claiming through or under him. (pp. 388, 390.)

**MORTGAGE—Covenant to Give Partial Release.**—A provision in a mortgage of a large number of lots that the mortgagee will “release and quitclaim any lot upon the payment” of a specified sum is a privilege to be exercised before the mortgage debt becomes due according to the terms of the mortgage. (pp. 388, 390.)

**MORTGAGE—Partial Release—Second Mortgage.**—Where the owner of a large number of lots gives a mortgage thereon providing that the mortgagee will “release and quitclaim any lot upon the payment” of a certain sum, and afterward gives a second mortgage on six of the lots, and the first mortgagee releases a part of the lots, some before and some after notice of the second mortgage, and the assignee of the second mortgage forecloses it and purchases at the sale, he can redeem from the first mortgage only upon paying such amount as remains due thereon after such deductions as he is entitled to on account of the lots released after the first mortgagee had notice of the second mortgage. (p. 390.)

**MORTGAGE—Record of Second Mortgage as Notice.**—The fact that a second mortgage, covering a few of a large number of lots, is on record, is not constructive notice of it to the holder of the first mortgage covering all the lots. (p. 391.)

**MORTGAGE—Partial Release—Second Mortgage.**—Where the owner of one hundred and forty lots gives a mortgage thereon providing that the mortgagee will “release and quitclaim any lot upon the payment” of a certain sum, and afterward gives a second mortgage on six of the lots, and the first mortgagee releases all but forty of the lots before having notice of the second mortgage, and twenty-eight more lots after notice, leaving twelve lots, including the six covered by the second mortgage, and the assignee of the second mortgage forecloses it and purchases at the sale, the amount he is required to pay, in redeeming from the first mortgage, is determined by deducting from the balance due on the mortgage such proportion thereof as the value of the twenty-eight lots bears to the value of the forty lots. (pp. 389, 391.)

**TENDER.**—Ordinarily, in Case of Tender, Judgment will be rendered only for the amount, if any, which the plaintiff recovers over and above the amount tendered. (p. 393.)

B. W. Potter and P. Potter, for the plaintiff.

H. L. Parker, Jr., for the defendant.

<sup>253</sup> MORTON, J. The defendant is the holder and owner of what was originally a mortgage on one hundred and forty lots of land in Worcester, given to secure the payment of ten thousand five hundred dollars, on demand, after five years from the date of the mortgage. The mortgage is dated October 15, 1897, and contains a provision that the grantee therein will "release and quitclaim any lot upon the payment of one hundred and fifty dollars per lot of 7,000 sq. ft." The plaintiff took an assignment of a second mortgage on six of the lots. This mortgage was dated December 2, 1902, and was given to secure the payment of five hundred dollars on demand after date. It was assigned to the plaintiff March 7, 1903, and the master found that the defendant had no actual notice of this mortgage until March 14, 1903. The plaintiff subsequently, on June 20, 1905, foreclosed this second mortgage and became the purchaser of the lots at the foreclosure sale. This is a bill by him to redeem these lots from the defendant's mortgage, which was overdue when the plaintiff took his assignment. The case was sent to a master, who found that the plaintiff was entitled to redeem or to have the defendant's mortgage assigned to him upon paying to the defendant sixteen hundred and eighty-six dollars and eighteen cents, with interest at the rate of five and one-half per cent per annum from March 14, 1903, less thirty dollars and ninety-nine cents, interest, which the master found that the defendant had received. Both <sup>254</sup> parties file exceptions to the report. The exceptions were overruled and a decree was entered that upon payment or tender of sixteen hundred and eighty-six dollars and eighteen cents, with interest at the rate of five and one-half per cent per annum from March 14, 1903, less thirty dollars and ninety-nine cents, the plaintiff was entitled to have the defendant's mortgage assigned to him. From this decree the plaintiff appealed.

It appeared from the master's report that, of the one hundred and forty lots which were originally subject to the defendant's mortgage, one hundred had been released by the defendant before the defendant received from the plaintiff notice of the assignment of the mortgage on the six lots in question. It further appeared that of the forty lots remaining the defendant had released twenty-eight since receiving from the plaintiff notice of the assignment, leaving only twelve lots, including the six belonging to the plaintiff, subject to the mortgage.

The plaintiff contends that he is entitled to redeem upon payment of one hundred and fifty dollars for each lot of seven thousand square feet, according to the terms of the mortgage deed held by the defendant. If that is not so, then he contends that he is entitled to an assignment of the mortgage, either upon paying to the defendant what shall remain

after deducting from the balance due thereon such proportion thereof as the total value at the date of the mortgage of the lots which have been released bears to the total value as of the same date of all the lots covered by the mortgage, or upon paying to the defendant what shall remain after deducting from the balance due on the mortgage the value of the lots that have been released since the defendant had actual notice of the assignment of the mortgage on the six lots to the plaintiff. The master did not adopt either one of these methods for ascertaining the amount to be paid by the plaintiff. He determined the amount by deducting from the balance due on the mortgage such proportion thereof as the value of the twenty-eight lots released by the defendant after he had actual notice of the assignment to the plaintiff bore to the value of the forty lots which then remained subject to the mortgage.

We think that the rulings of the master which were confirmed by the court were right. The covenant or agreement on the <sup>255</sup> part of the mortgagee in regard to releasing or quitclaiming any lot of seven thousand square feet upon payment of one hundred and fifty dollars, was with the mortgagor, not with him and his assigns, and must be regarded, therefore, as a personal agreement for his benefit, and not for the benefit of anyone claiming through or under him: *Pierce v. Kneeland*, 16 Wis. 672, 84 Am. Dec. 726; 1 *Jones on Mortgages*, 3d ed., sec. 79. Moreover, it was, we think, a privilege to be exercised before the mortgage debt became due according to the terms of the mortgage. Until that time, except for some such arrangement, the mortgagee would not have been bound to accept any payment which the mortgagor might desire to make, and when the mortgage debt became due there was no longer any necessity for the continuance of the agreement, since the mortgagor could pay or tender the entire amount due and the mortgagee would be obliged to accept the same: See *Reed v. Jones*, 133 Mass. 116. In *Clark v. Fountain*, 135 Mass. 464, 144 Mass. 287, 10 N. E. 831, where it was held that the "agreement was for the benefit of the estate of the mortgagors, and the right to enforce it passed to purchasers from them," the agreement was by the mortgagee, "for himself, his heirs, executors, administrators and assigns . . . with the grantors [mortgagors] their legal representatives and assigns." No reference was made either in the opinion or by counsel to *Reed v. Jones*, 133 Mass. 116, or to the fact, if material, that the mortgage was overdue. It follows that the master was right in ruling as he did that the plaintiff could redeem only upon paying such amount as remained due upon the mortgage after such deductions as the plaintiff was entitled to have made on account of the lots that had been released by the defendant after he had actual



notice of the mortgage held by the plaintiff: *Taylor v. Porter*, 7 Mass. 355; *Gibson v. Crehore*, 5 Pick. 146; *George v. Wood*, 9 Allen, 80, 85 Am. Dec. 741. The fact that the plaintiff's mortgage was on record was not constructive notice of it to the defendant: *George v. Wood*, 9 Allen, 80, 85 Am. Dec. 741.

<sup>256</sup> The question then is, What amount is the plaintiff entitled to have deducted on account of the lots that were released by the defendant after he had actual notice of the mortgage assigned to the plaintiff? So long as the defendant had no notice of any subsequent conveyance by the mortgagor, he was under no obligation to anyone in regard to what he should or should not release. The rights of the parties depend, therefore, on what the situation was when the defendant received notice. At that time there were forty lots, including the six of the plaintiff's which were subject to the defendant's mortgage. These were all bound for the payment of the balance due on it. The plaintiff has, however, no right to be put in a better position by reason of the releases which the defendant gave after he had notice of the plaintiff's mortgage than he otherwise would have occupied. If, therefore, the balance due on the mortgage is abated in the plaintiff's favor, in the proportion which the value of the lots released by the defendant since he had notice of the plaintiff's mortgage bears to the value of the whole number of lots then subject to the defendant's mortgage, he gets all that he is equitably entitled to. This was the rule adopted by the master, and <sup>257</sup> this, as we understand it, is the rule that is stated in *George v. Wood*, 9 Allen, 80, 85 Am. Dec. 741, and in *Parkman v. Welch*, 19 Pick. 231, though the manner in which the rule was applied in the latter case was criticised in *George v. Wood*, 9 Allen, 80, 85 Am. Dec. 741. If the plaintiff claimed under a deed which conveyed the six lots for full value and free from encumbrances, the case might stand differently: *Clark v. Fontain*, 135 Mass. 464. In such a case equity might well require, in accordance with the doctrine laid down in regard to the marshaling of assets, that the property subject to the defendant's mortgage should be so dealt with as, if possible, to relieve the plaintiff from any liability, and that, if the defendant released any of the property primarily liable for the mortgage debt, he should be charged as between himself and the plaintiff with the full value of the property so released. Many of the cases referred to in 2 Jones on Mortgages, section 1631, will be found to be cases of this nature. In the case before us the lots held by the plaintiff were conveyed subject to the defendant's mortgage. The master found that the value of the lots was the same at the time when the defendant received notice of the plaintiff's mortgage that it was at the date of the defendant's

mortgage, and that it has continued to be the same. There is therefore no occasion to determine the date as of which the value should be taken for the purpose of ascertaining the amount of the abatement to which the plaintiff is entitled, though it would seem as if it should be as of the date when the defendant first received notice of the plaintiff's mortgage. In *Parkman v. Welch*, 19 Pick. 231, as pointed out in *George v. Wood*, 9 Allen, 80, 85 Am. Dec. 741, no question was raised as to the effect or necessity of notice to the mortgagor, and the opinion apparently proceeded on the ground that a notice by the mortgagor whenever and under whatever circumstances given operated pro tanto as a payment of the mortgage debt as of the date of the mortgage, which is far, we think, from being universally true.

The bill as originally drawn set out that there was seventy-five dollars due on each lot, and alleged that the plaintiff had tendered the same with interest which the defendant had refused to accept, and that the plaintiff brought the sum so tendered into court; and prayed that an account might be taken of the amount due the defendant on his mortgage on said lots, and that on payment of <sup>25s</sup> the sum found due the plaintiff might hold said lots discharged from said mortgage. Subsequently the bill was amended so as to allege that after he knew of the assignment to the plaintiff the defendant had given releases of lots covered by his mortgage without any consideration therefor, and the plaintiff claimed that the defendant should account therefor, and offered to pay to the defendant what should be found to be fair and reasonable under all the circumstances. In his brief the plaintiff states that on September 2, 1909, after the master's report had been filed, the defendant received from the clerk the amount of four hundred and ninety-five dollars, which was the sum that had been paid into court by the plaintiff; and he contends that that amount should be taken into account in determining what is to be paid to the defendant. If the fact is as stated, the amount so received by the defendant could not have been taken into account by the master in fixing upon what was to be paid by the plaintiff, and, as the decree follows the findings of the master, it would seem that it could not have been taken into account by the court in entering the final decree. But the decree was not entered till September 22d, and if the plaintiff had notice of the payment of the money to the defendant on September 2d, he had ample time to bring the matter to the attention of the court by a motion to recommit the report to the master, or in such other manner as he might be advised. It does not appear when the plaintiff first learned of the payment to the defendant, or why the matter was not brought to the attention of the court before the entry of the final decree. As the case

stands, no question of tender is before us. But if the facts are as stated by the plaintiff and no allowance has been made for the sum paid into court by the plaintiff and received by the defendant, it would be manifestly unjust to affirm the decree as it stands. Ordinarily, in a case of tender, judgment will be rendered only for the amount, if any, which the plaintiff recovers over and above the amount tendered: *Boyden v. Moore*, 5 Mass. 365; *Williams v. Ingersoll*, 12 Pick. 345. But as already pointed out, that does not seem to have been the case here, and the attention of the court does not appear to have been called to the matter in any way. Although the amount tendered was at the rate of seventy-five dollars per lot and interest, for which the plaintiff claimed to be entitled to redeem, the bill as originally <sup>250</sup> drawn and as amended contained an offer to pay what was found to be due, and must be regarded, we think, as a bill to redeem generally. The receipt of the money tendered did not, therefore, prevent the defendant from contending that more was due him.

If the parties can agree within ten days on the sum to be deducted from the amount named in the decree, or if the defendant consents to the deduction of the amount tendered and interest from the time when the money was received by the defendant, the decree may be modified accordingly, and, as modified, affirmed. Otherwise the plaintiff's exceptions to the master's report will be overruled, the decree set aside, and the case stand for hearing as to what amount, if any, shall be deducted by reason of the alleged receipt by the defendant of the money tendered by the plaintiff, and the entry of such decree as the facts found in relation thereto will warrant.

So ordered.

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*A Mortgagee by Releasing Several Parcels of Land from His Mortgage* does not discharge therefrom another parcel of land sold by the mortgagor prior to such release, when he has no notice of the sale or that the purchaser thereunder is claiming rights sufficient to put a reasonably prudent man on notice, and the record of such purchaser's deed is not sufficient as constructive notice of such mortgage: *Balen v. Lewis*, 130 Mich. 567, 97 Am. St. Rep. 499. See, also, *Hibernia Sav. & L. Soc. v. Thornton*, 109 Cal. 427, 50 Am. St. Rep. 52.

*If, After a Conveyance of Mortgaged Premises by the Mortgagor by Deed containing a covenant against encumbrances, the mortgagee, without notice of such deed, releases a portion of the mortgaged premises from the lien of the mortgage without the knowledge or consent of the mortgagor, the latter is thereby released and discharged from further liability for the mortgage debt:* *Meigs v. Tunnicliffe*, 214 Pa. 495, 112 Am. St. Rep. 769. See, also, *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108.

*The Mortgaged Premises Constitute the Primary Fund Out of Which the mortgage debt is to be paid, and the mortgagee cannot arbitrarily release portions of the premises for less than their actual value without the consent of the mortgagor, and, if he does so, he must, on foreclosure, credit the mortgagor with the value of the premises released:* *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108.

## ROGERS v. ABBOT.

[206 Mass. 270, 92 N. E. 472.]

**BANKRUPTCY.**—An Assignment by a Receiver Appointed in bankruptcy of "all bills receivable" includes a judgment recovered by the bankrupt for the price of a machine sold by him, the judgment having been recovered before the assignment, and neither the receiver nor the assignee knowing that the claim had been reduced to judgment when the assignment was made. (p. 395.)

**BANKRUPTCY.**—An Assignment by a Receiver Appointed in bankruptcy of "all bills receivable" includes a judgment recovered by the bankrupt for the price of a machine sold by him, and also transfers the right to sue on a bond given to dissolve an attachment in the action wherein the judgment was recovered. (p. 395.)

**ASSIGNMENT.**—Suit in Name of Assignee of Chose.—The assignee of a chose in action, under an assignment not in writing as required by Revised Laws, chapter 173, section 4, cannot, if objection is made, sue in his own name. (pp. 395, 396.)

**BANKRUPTCY.**—A General Assignment for the Benefit of Creditors is, under the federal bankruptcy act, an act of bankruptcy and void, and the title to the property vests in the trustee. (p. 396.)

**BANKRUPTCY.**—Sale of Perishable Property.—Where a bankruptcy court orders property in the hands of a receiver to be sold because perishable, and the sale is made on that ground, and is confirmed by the court on the petition of the trustee, it is not necessary to state the grounds on which the property, taken as a whole, was considered to be in the nature of perishable property. (p. 396.)

**ASSIGNMENT.**—The Question Whether a Claim is Covered by an assignment is a question of law for the judge, but error in submitting it to the jury is harmless if they decide rightly. (p. 396.)

**BANKRUPTCY.**—Until a Discharge in Bankruptcy is Granted and is pleaded as a defense, no question arises as to the debt sued on being or not being provable. (p. 397.)

**BANKRUPTCY.**—If Defendants, Going to Trial Before Obtaining their discharge in bankruptcy, wish to plead their discharge as a bar, they should move for a continuance to see if they procure a discharge, and if they do, they should plead it. They are not entitled as of right to a stay of proceedings after they are adjudicated bankrupts. (p. 397.)

**ATTACHMENT.**—There is a Breach of a Bond Given to Dissolve an attachment, on the sureties failing to pay the amount of the judgment within thirty days after its date. (p. 397.)

**ATTACHMENT.**—The Limit of the Liability of Sureties on a bond given to dissolve an attachment is the penal sum named therein and damages for the detention thereof, and this is the largest sum for which judgment can be entered and execution issued. (pp. 397, 398.)

E. M. Brooks, for the defendants.

E. R. Hall, for the plaintiff.

<sup>271</sup> LORING, J. This is an action against the sureties on a bond to dissolve an attachment. The attachment (which was dissolved) was made in an action brought by the Holmes and Blanchard Company on August 12, 1898, to recover "the price of a machine sold by" that company to the Philadel-

phia and Boston Face Brick Company. The defendant in the original action (in which the bond to dissolve was given) was defaulted, <sup>272</sup> and judgment against it in the sum of nine hundred and one dollars and fifty-six cents was entered on November 7, 1904. That judgment has not been paid.

The writ in the case at bar was sued out on April 4, 1907. The declaration counted on the failure to pay the judgment of November 7, 1904, within thirty days after its date. The action was brought by the plaintiff in his own name as assignee of the Holmes and Blanchard Company (the obligee named in the bond) under an assignment dated March 14, 1905, made by the receiver of its property appointed by the United States district court in bankruptcy proceedings.

The defendants' first contention is that the claim sued on is not covered by this assignment. The assignment transferred to the plaintiff (inter alia) "all . . . bills receivable" of the Holmes and Blanchard Company. The claim on which the judgment against the Face Brick Company (the principal defendant in the action in which the bond to dissolve was given) was a debt due for the sale of a machine sold by the Holmes and Blanchard Company to the Face Brick Company. Such a debt is a bill receivable of the Holmes and Blanchard Company. The only doubt on the point arises from the fact that this claim had been reduced to judgment before the assignment. The explanation of the terms used in the assignment seems to be that neither the receiver of the Holmes and Blanchard Company (the assignor) nor the plaintiff (the assignee) knew that it had been reduced to judgment. This fact was testified to in terms and was not contradicted. We are of opinion that this bill receivable was covered by the assignment, although it had been reduced to judgment.

The next objection set up is that the chose in action assigned was the bill receivable and that sued on is the bond to dissolve. But the bond to dissolve took the place of the lien acquired by the attachment on the property attached, and the lien acquired by the attachment was security for payment of the judgment recovered in the action to collect the bill receivable assigned to the plaintiff. Being security for the "bill receivable" assigned to the plaintiff, it passed to him as an incident to the "bill receivable," under the familiar rule applied in cases like *Morris v. Bacon*, 123 Mass. 58, 25 Am. Rep. 17; *Commonwealth v. Globe Investment Co.*, 168 Mass. 80, 46 N. E. 410; *French v. Hall*, 198 Mass. 147, 84 N. E. 438, 16 L. R. A., N. S., 205. If the defendants had taken the objection that under these circumstances the <sup>273</sup> action could not be maintained in the plaintiff's name as assignee because the chose in action sued on had not been assigned in writing as required by Revised Laws, chapter 173,

section 4, the objection would have had to be sustained. But that objection was not taken in any one of the thirty-nine rulings requested by the defendants.

The next objection taken by the defendants is that the receiver was not authorized to make this assignment. The receiver was in terms authorized to make an assignment of the bills receivable. This objection, therefore, resolves itself into the authority of the court to authorize the receiver to assign this bill receivable.

The defendants contend that there was no evidence of a formal transfer by the common-law assignees to the receiver in bankruptcy, and for that reason that this bill receivable did not pass under the assignment to the plaintiff. A general assignment for the benefit of creditors is in terms made an act of bankruptcy by United States Statutes of 1898, chapter 541, and is a fraud on the act (see section 3 [4]), and so void (see section 67 [e]). Of this there is no doubt, and it is recognized in *Reddy v. Raymond*, 194 Mass. 367, 80 N. E. 484, cited by the defendants to the contrary. Title to all property which passed to common-law assignees vests in the trustee by force of United States Statutes of 1898, chapter 541, section 70.

The next contention is that a receiver cannot be authorized to make such a sale. The bankruptcy court can appoint receivers to take possession of all property the title to which would vest in the trustee (U. S. Stats. 1898, c. 541, sec. 2 [3]), and may order a sale of the property in the hands of receivers, if it is perishable. The sale here in question was made on that ground. But it was afterward confirmed by the court on a petition by the trustee. For that reason it is not necessary to state the grounds on which the property of this bankrupt, taken as a whole, was considered to be in the nature of perishable property.

This brings us to the exception to the ruling under which the judge submitted to the jury the question whether the assignment covered this bill receivable.

Both the plaintiff and the receiver testified without objection that in the sale by the receiver to the plaintiff each had in mind <sup>274</sup> this claim; and the presiding judge submitted to the jury as a question of fact the question whether this claim was covered by this assignment on this testimony and on the other evidence. The defendants' complaint is that in submitting this question to the jury he misstated the evidence. But that is of no consequence even if it be true. The question whether this claim was or was not covered by the assignment was a question of law and should have been determined by the judge. The jury decided it rightly, and so the defendants were not harmed: *Ricker v. Cutter*, 8 Gray, 248;

Smith v. Faulkner, 12 Gray, 251; Marble v. Moore, 102 Mass. 443; Goodnow v. Davenport, 115 Mass. 568.

The next exception argued by the defendants is to the ruling of the presiding judge that the claim here sued on was not provable as a debt in the bankruptcy proceedings against them. But whether the judge was right or wrong in that matter is again of no consequence. The defendants went to trial before obtaining a discharge in bankruptcy. Until a discharge is granted and is pleaded as a defense, no question arises as to the debt sued on being or not being provable. If the defendants had wished to plead their discharge in bankruptcy as a bar, they should have moved for a continuance to see whether they procured a discharge, and if they did obtain one, they should have pleaded it. The bankrupt is not entitled as of right to a stay of proceedings after he is adjudicated a bankrupt: Rosenthal v. Nove, 175 Mass. 559, 78 Am. St. Rep. 512, 56 N. E. 884; Feigenspan v. McDonnell, 201 Mass. 341, 87 N. E. 624. In the case at bar, the defendants by an amendment to their answer in the present action on the bond filed and allowed on February 5, 1908, pleaded that they were adjudicated bankrupts on May 11, 1903, five years before. If the debt was provable in bankruptcy and so would have been barred by a discharge, the defendants did not take the proper steps to plead that defense: See in this connection, Hackett v. American Legion of Honor, 206 Mass. 139, 92 N. E. 133.

After a verdict for the penal sum of the bond had been found by the jury "the court ordered that a finding or judgment be entered for the plaintiff in the sum of nine hundred and one dollars and fifty-six cents, and interest thereon from thirty days after November 7, 1904." We construe <sup>275</sup> this to be an order under Revised Laws, chapter 177 for issuing execution in the sum stated. There was a breach of the bond on the sureties' failing to pay the amount of the judgment within thirty days after its date: Wright v. Quirk, 105 Mass. 44; Campbell v. Brown, 121 Mass. 516. See, also, in this connection, Watertown Ins. Co. v. Simmons, 131 Mass. 85, 41 Am. Rep. 56; Welch v. Walsh, 177 Mass. 555, 83 Am. St. Rep. 302, 59 N. E. 440, 52 L. R. A. 782. Execution, therefore, could be properly awarded in the sum adopted by the court if it did not exceed the amount for which judgment is to be entered on the verdict. The limit of the defendants' liability as sureties on the bond (and therefore the largest sum for which judgment can be entered) is the penal sum one thousand dollars, and damages for the detention thereof: Harris v. Clap, 1 Mass. 308, 2 Am. Rep. 27; Warner v. Thurlo, 15 Mass. 154; Bank of Brighton v. Smith, 12 Allen, 243, 90 Am. Dec. 144. The amount for which execution should issue would have been nine hundred and one dollars



and fifty-six cents, with interest from November 7, 1904, had not that sum exceeded the amount for which judgment can be entered, namely, one thousand dollars, with interest from April 4, 1907.

It follows that unless the plaintiff remits the amount of the excess for which execution was ordered beyond the amount for which judgment can be entered, the exception to the order for which execution is to issue must be sustained, and that all other exceptions must be overruled.

So ordered.

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*A Court in Which a Suit Against a Bankrupt is Pending is not, after the adjudication of bankruptcy, bound to stay further proceedings therein, though it may do so if justice so requires; the action is not absolutely barred, and the court has power to proceed to judgment. Hence if after verdict, and before judgment, the defendants are adjudicated bankrupts under the United States bankruptcy act, and thereafter they file a suggestion of that fact and move that all proceedings be stayed, the court has power to deny such motion and to direct the entry of a special judgment to enable the plaintiff to proceed against the sureties upon a bond to dissolve an attachment, given more than four months before the bankruptcy: Rosenthal v. Nove, 175 Mass. 559, 78 Am. St. Rep. 512.*

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### DAVIS v. MCGRAW.

[206 Mass. 294, 92 N. E. 332.]

**ADOPTION—Whether Accomplished by One Spouse Alone.**—There is no such thing in Massachusetts as an adoption by one spouse alone, if both are living at the time of the adoption. (p. 399.)

**ADOPTION—Necessity of Both Spouses Joining Petition.**—In order that the probate court may have jurisdiction to act in adoption proceedings, it is necessary, where husband and wife are both living and each is competent to join in the petition, that both should sign it. (p. 399.)

**ADOPTION—Failure of Wife to Join in Petition.**—Where the wife of the petitioner in adoption proceedings is living and competent, her joinder in the petition is a condition precedent to the power of the court to consider the case, and if she does not so join, the decree of adoption is void. (p. 399.)

**BENEFIT SOCIETY—Payment to Person not Entitled.**—Payment by a benefit society to a person not entitled thereto is no defense to a suit by the person who is entitled to the benefit. (p. 400.)

Bill against a benefit society and Lucy D. McGraw to obtain the amount payable under a benefit certificate issued to Frederick H. Davis, and alleged to have been wrongfully paid by the defendant society to the defendant McGraw, who was named as the beneficiary in the benefit certificate, and who claimed to be the adopted daughter of Davis. The

plaintiff, Elizabeth E. Davis, was the widow of said Davis, and the special administratrix of his estate.

W. H. Lewis, A. P. Gay and J. L. Dyer, for the plaintiff.

H. G. Sleeper, for the Grand Lodge, Ancient Order of United Workmen of Massachusetts, submitted a brief.

M. M. Johnson filed a brief by leave of court.

<sup>297</sup> HAMMOND, J. The first question is whether the decree of adoption of Lucy D. McGraw was absolutely void for want of jurisdiction of the court.

The petition for the adoption was by Frederick H. Davis alone. In the petition he represents himself as a widower and prays for leave to adopt Lucy D. McGraw. The decree is that from its date "said child shall to all legal intents and purposes be the child of said petitioner." As a matter of fact, the petitioner had a wife still living, who had no knowledge of these proceedings until a few days after the death of the member, which occurred about six months after the decree. That it was at least voidable as against the widow there is no doubt. But was it absolutely void so far as respects the acts of the society done in reliance thereon?

The law of adoption is purely a creature of statute. Revised Laws, chapter 154, section 1, provides that a person of full age may petition the probate court for leave to adopt as his child another person younger than himself, with some exceptions not here material, but that if the petitioner has a husband or wife living who is competent to join in the petition, such husband or wife shall join therein, and upon adoption the child shall in law be the child <sup>298</sup> of both. There is no such thing in this commonwealth as an adopted child of one spouse alone, if husband and wife are both living at the time of the adoption. The child is the child of both, and so should the decree run. In the present case there was a wife competent to join in the petition. The decree, therefore, does not conform to the law, and is not such a decree as the court had the power to make.

But the objection to the validity of the decree goes deeper. In order that the police court shall have jurisdiction to act it is necessary, where husband and wife are both living and each is competent to join in the petition, as was the case here, that both should sign the petition. The joinder of the wife is a condition precedent to the power of the court to consider the case. The court not having jurisdiction, the decree was absolutely void, and of itself furnished no protection to anyone acting under it, even although acting in good faith: *Jochumsen v. Suffolk Savings Bank*, 3 Allen, 87, and cases cited. See, also, *Purinton v. Jamrock*, 195 Mass. 187, 80 N. E. 802, 18 L. R. A., N. S., 926. There is nothing in *Ross*

v. Ross, 129 Mass. 243, 37 Am. Rep. 321, inconsistent with this conclusion. There is no contention that McGraw came within any class of beneficiaries prescribed by the statute if the decree was void.

Here, then, is a case where the only legal beneficiary, namely, the father of the member, died before the member, and there never was any other legal designation. Section 7 of Law XVIII of the by-laws provides that "if all the beneficiaries shall die during the lifetime of the member, and he shall have made no other legal designation, and he shall leave a widow, and no minor children surviving him, the benefit shall be paid to his widow." There are no minor children, and by the plain language of the by-law the plaintiff, as the widow, is entitled to the benefit: See *American Legion of Honor v. Perry*, 140 Mass. 580, 5 N. E. 634; *Elsey v. Odd Fellows' Mutual Relief Assn.*, 142 Mass. 224, 7 N. E. 884; *Doherty v. A. O. Widows' & Orphans' Fund*, 176 Mass. 285, 57 N. E. 463, and cases cited. The fact that the defendant society has paid the money to Mrs. McGraw, who was not entitled to it, is no defense: *Tyler v. Odd Fellows' Mutual Relief Assn.*, 145 Mass. 134, 13 N. E. 360; *Jochumsen v. Suffolk Savings Bank*, 3 Allen, 87; *Loring v. Folger*, 7 Gray, 505.

In this case we have been favored by a brief, filed by the permission <sup>299</sup> of the court, by an *amicus curiae*, which we have carefully examined.

The conclusion to which we have come renders it unnecessary to consider the other grounds upon which the plaintiff relies in support of the case.

Decree for the plaintiff.

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*The Adoption by One Person of the Child of Another* is the subject of a note to *Van Matre v. Sankey*, 39 Am. St. Rep. 210. It has been decided that a wife is not a party to, nor in any way bound by, the adoption of a child by her husband when she does not join in the proceedings therefor: *Carroll's Estate*, 219 Pa. 440, 123 Am. St. Rep. 673; and that if a parent is not a party to, and has no actual or constructive notice of, proceedings wherein a decree for the adoption of his child is rendered, he is entitled to collaterally attack such decree by habeas corpus to recover the possession of his child: *Beatty v. Davenport*, 45 Wash. 555, 122 Am. St. Rep. 937.

## BEAUCAGE v. MERCER.

[206 Mass. 492, 92 N. E. 774.]

**NEGLIGENCE—Operating Automobile—Joint Enterprise.**—Where two persons are engaged in a joint enterprise in operating an automobile, the contributory negligence of one will bar a recovery by either, if it is in a matter within the scope of the joint agreement. (p. 402.)

**NEGLIGENCE—Towing Automobile—Instructions.**—Where a plaintiff charges negligence in the management of a towing automobile, and also negligence in the manner of hitching the cars together, and there is evidence warranting a finding of either kind of negligence, an instruction is erroneous which authorizes the jury to find for the defendant, even if the accident was due not to the defective hitching, but solely to the manner in which the towing car was managed. (p. 403.)

**AGENCY.**—If the Authority of an Agent of the Proprietor of a Garage is limited to the selection of only the necessary number of men to take charge of a car sent out to tow in a disabled car, and he selects more, the surplus men cannot be regarded as the servants of the proprietor for whose negligence he will be liable; but if the agent is empowered to send as many men as he thinks necessary, and sends such men as he thinks necessary, but more than in fact are necessary, all the men so sent are the servants of the proprietor, whether or not they are in fact needed. (p. 404.)

**NEGLIGENCE—Evidence of Speeding of Automobile.**—The fact that someone "is concerned" or frightened by the speed of the vehicle furnishes no reliable guide as to the rate of speed. (p. 404.)

**AGENCY—Evidence of Scope of Authority.**—On the issue of the scope of an agent's authority, a witness may tell what he saw the agent do, but not state the inferences he drew therefrom. (p. 404.)

Two actions in tort against W. J. Mercer, the proprietor of a garage, the first being by J. H. D. Beaucage for injuries to his person and to his automobile, and the second being by John A. Gilbert for personal injuries. It appears that the plaintiffs were riding together in Beaucage's automobile, which was kept at the defendant's garage, and became disabled on the road. Samuel J. Tremblay, Ovelia Tremblay and two others came out in an automobile to tow in the disabled car. The cars were hitched together, and on the way in the Beaucage car struck a telephone pole and the injuries complained of resulted.

One Revort, an employee of the defendant, in connection with proof of the agency of one Eagen, who answered a telephone call for a car to go out to the disabled machine, was asked on direct examination, "Can you state who was in charge there?" An objection to the question was sustained.

The jury returned a verdict for the defendant in each of the cases, and the plaintiffs alleged exceptions.

J. Barker, for the plaintiffs.

J. Fallon, for the defendant.

<sup>497</sup> HAMMOND, J. In dealing with these exceptions we are embarrassed by the meager report of the evidence as to the precise manner in which the accident occurred, and by the disconnected way in which the parts of the charge deemed material are reported; and we proceed to the consideration of the questions of law involved not without apprehension, lest something may have been omitted which, if inserted, might have materially changed the conclusion to which we have come.

As to the general doctrine of contributory and imputable negligence, the jury were instructed as follows: "If you should find that there was any negligence on the part of either of these plaintiffs, and that such negligence contributed to their injuries, neither of them could recover. I instruct you as a matter of law that if one was negligent, the negligence of that plaintiff is to be imputed to the other; in other words, if you should find that Beaucage was negligent in something which he did or omitted to do, which contributed to this accident, then neither he nor Gilbert could recover, and Beaucage's negligence would be imputed to Gilbert."

To this ruling the plaintiffs excepted.

The record recites that "as on several former occasions, both plaintiffs were in Beaucage's automobile in the daytime . . . taking a ride together, having agreed to share equally the expenses of the trip. The automobile, which was kept at the defendant's garage, became disabled on the Dalton Road, so called, over which street-cars run half hourly into Pittsfield and past the defendant's garage." Whether under all the circumstances of this case the agreement that the expenses should be shared equally was sufficient in law to make the ride a joint <sup>498</sup> enterprise (see *Adams v. Swift*, 172 Mass. 521, 52 N. E. 1068), and if it was, whether the joint enterprise was in law stopped when the car became disabled, so that Beaucage in telephoning for assistance was acting in his sole capacity as the owner of the car, or whether in law it continued until the car was returned, or whether there was conflicting evidence so that these were all questions for the jury, the record does not clearly show.

The trial, however, seems to have proceeded upon the theory that the plaintiffs were engaged in a common enterprise, and that it still was in force at the time of the accident. So long as the joint enterprise was in force, the contributory negligence of one would bar a recovery by either, provided always the negligence was in a matter within the scope of the joint agreement; and if that is to be regarded as the meaning of the instruction, then it was correct. While the record is not very clear as to whether this omission to put in the qualifying clause above named was, as applied to the evidence, preju-

dicial to the plaintiffs, we are inclined to assume in favor of the defendants that it was not.

The jury were further instructed in substance that if after the cars had been hitched together in the manner described in the evidence, the plaintiff Beaucage "protested and objected to the way in which it was done, and said that it was not safe," and if he made this objection "with a full appreciation and knowledge of the dangers . . . involved in riding in the machine under those circumstances, then neither he nor the plaintiff Gilbert would be entitled to recover." Upon this point the judge further proceeded as follows: "The question is whether he appreciated the risk and the danger which was involved in riding under those circumstances. If he did, if he not only knew it, but he fully appreciated all the risks involved, . . . then he could not recover, because his own negligence was under such circumstances as would be said to have contributed to his injury. On the other hand, if you should find that although he protested against, yet he did not fully appreciate, the risk, and relied upon any statements . . . made by the men there that they were sent to do the job and they proposed to do it, . . . and if you should find that he [Beaucage] acted with ordinary prudence and care in relying upon such representations, then it would not follow <sup>499</sup> that his acts in continuing to ride in the automobile would, as a matter of law, preclude him from recovery."

To this ruling the plaintiffs excepted.

It is plain from the record that the negligence with which the plaintiffs charged the defendant was twofold, first, in the manner in which the cars were hitched together, and second, in the manner in which the towing car was managed, in the way of excessive speed or otherwise. And the case was submitted to the jury with instructions (so far as respected the negligence of the defendant) that the defendant would be liable if negligent either in the way in which the disabled car was hitched to the towing car or in the operation of the cars after they were hitched. The whole question whether there was negligence in either of those particulars was left to the jury; and it must be inferred that the evidence was sufficient to warrant a finding in favor of either party as to either kind of negligence. In this state of the evidence these instructions were given. Under them the jury were in substance instructed to find for the defendant if the plaintiffs knew and appreciated the dangers and risk attendant upon the negligent hitching. The effect of this instruction was to authorize the jury to find for the defendant even if the accident was due not to the defective hitching, but solely to the manner in which the towing car was managed. The instruction, therefore, was erroneous, and the plaintiffs' exception to it must be sustained.

The instructions as to the agency of Ovelia Tremblay is somewhat vague and apparently misleading. Whether he was the servant of the defendant depended upon the authority given directly or indirectly by the defendant to the person who hired him, and not necessarily upon the question whether he was reasonably needed. If, for instance, the authority, real and apparent, of Eagen was limited to the selection of only the necessary number of men, and he selected more, then the surplus men could not be regarded as the servants of the defendant; but if Eagen was empowered to send as many men as he thought necessary, and acting under such authority he sent such men as he thought necessary, but more than in fact were necessary, or if he was empowered to send as many men as he pleased, and sent more than was necessary, in either case all the men so <sup>500</sup> sent would be the servants of the defendant, whether or not they were in fact needed. And to apply the principle directly to the employment of Ovelia Tremblay, if Eagen, having authority from the defendant, sent Samuel J. Tremblay out to this work with authority to hire as many men to help him as he thought necessary, and Samuel, thinking his brother Ovelia necessary, took him as a helper, then would Ovelia be the agent of the defendant, whether actually needed or not. Further illustration of the application of this principle is unnecessary.

The questions put to the witnesses Crowell and Murgittroyd were properly excluded. The fact that someone is "concerned" or frightened by the speed of the vehicle furnishes no reliable guide as to the rate of speed.

The question put to the witness Revort was also properly excluded. His idea of the scope of the agency of Eagen is not shown to have been derived from any other source than his knowledge of what he had seen Eagen do; and while the plaintiffs were entitled to have him tell what he had seen Eagen do, they were not entitled to have him state the inference he drew therefrom as to the scope of the agency. It was for the jury and not for him to draw the inferences: *Short Mountain Coal Co. v. Hardy*, 114 Mass. 197; *Providence Tool Co. v. United States Mfg. Co.*, 120 Mass. 35.

Inasmuch as the verdict was for the defendant on the question of liability, the instructions as to damages become immaterial.

Exceptions in each case sustained.

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*The Question of Imputed Negligence in Case of Persons Engaged in joint enterprises is discussed in the note to Hampel v. Detroit etc. R. R. Co.*, 110 Am. St. Rep. 280. If two employees are engaged, with the aid of a team and delivery wagon, in delivering the goods of their employer, and the one driving the team has as complete charge thereof as if he were the owner in his own business, his negligence, on account



of which the wagon was struck by a street-car and the other employees injured, cannot be imputed to the latter, nor relieve the railway company from liability for its negligence on the ground that the driver's negligence contributed to the injury: *Nonn v. Chicago City Ry. Co.*, 232 Ill. 378, 122 Am. St. Rep. 114.

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### FAXON v. BUTLER.

[206 Mass. 500, 92 N. E. 707.]

#### LANDLORD—Duty to Tenants as to Safe Condition of Halls.

The owner of a lodging-house, who retains possession and control of the hallways intended to be used in common by the tenants, is under the duty to a tenant to maintain them in the same condition they were in at the time of letting him a room. (p. 406.)

#### LANDLORD—Condition of Premises—Assumption of Risk.—A

tenant in a lodging-house takes the premises as she finds them, so far as the arrangement of the hallways is obvious; but she does not assume the risk of injury from having a dark hall left unlighted so as to make it dangerous because of stairs leading therefrom to the floor below, when the hall is under the control of the landlord and theretofore has been kept lighted. If the jury are satisfied that the light was extinguished before the usual time, they are warranted in finding the landlord negligent. (p. 406.)

#### LANDLORD—Unlighted Hall—Negligence of Tenant.—One

who hires a room in a lodging-house and has employment in an office in apartments adjoining the lodging-house which are also owned by the landlord, and who, after completing her duties in the office for the night, starts for her room, opens the door leading into the hall, closes it after her, takes one step forward in the darkness, and falls down the stairway, cannot be said as a matter of law to act without due care, when theretofore the hall had been kept lighted and was lighted earlier in the evening when she entered the office. (p. 407.)

Action for injuries sustained by the plaintiff while passing through a hallway to reach a furnished room hired and occupied by her on the second floor of the defendants' lodging-house. The evidence tended to show that the defendants retained the control and management of the hallways and the lighting of them; that the hallway leading to the plaintiff's room was dark, not lighted by windows; that the hallway was reached from the floor below by a stairway; that the plaintiff was employed in offices on the second floor of apartments adjoining her lodging-house, which were also owned by the defendants; that on the night of the injury she went to these offices, as was her custom, passing along the hallway, which was then lighted by gas as usual; that after performing her work in these offices she started for her own room, returning as she came; that she opened the door from the offices into the hallway, drew it toward her a sufficient distance, passed through and closed it after her; that upon her taking her hand from the knob, and while taking

the first step toward her room, she noticed for the first time that the light was out and she was in darkness; that she put her foot down, expecting it would strike the landing at the head of the stairs, but that it went over to the stair below, and she fell, and sustained the injury complained of. The judge ordered a verdict for the defendants at the close of the plaintiff's evidence, and the plaintiff alleged exceptions.

F. R. Shaw and H. L. Harrington, for the plaintiff.

C. T. Phelps and P. J. Ashe, for the defendants.

<sup>503</sup> BRALEY, J. The defendants, having retained possession and control of the hallways of the building, which were intended to be used in common by tenants, were required to maintain them in the same condition that they were in at the time of the letting to the plaintiff: *Wilcox v. Zane*, 167 Mass. 302, 45 N. E. 923; *Andrews v. Williamson*, 193 Mass. 92, 118 Am. St. Rep. 452, 78 N. E. 737. It is apparent from the plaintiff's <sup>504</sup> evidence that, the hallway on the second floor upon which her room opened having been constructed without windows, the defendants, as a part of their general management of the building, always lighted and maintained after dark a gas-light in this hall, which not only was left burning until midnight, but, as the jury could find, was not usually extinguished before the next morning. The plaintiff no doubt took the premises as she found them, so far as the arrangement of the hallways was obvious. But, under the conditions to which she testified, she did not assume the risk of personal injury from using during these hours an unlighted hall, which might become dangerous because of the location of the stairs leading to the story below. The defendants make no contention that, when injured, she was not lawfully using the hall, and, if the jury were satisfied that the light had been extinguished before the usual time, they would have been warranted in finding that the defendants were negligent: *Lindsey v. Leighton*, 150 Mass. 285, 15 Am. St. Rep. 199, 22 N. E. 901; *Leydecker v. Brintnall*, 158 Mass. 292, 33 N. E. 399; *Oxford v. Leathe*, 165 Mass. 254, 43 N. E. 92; *Wilcox v. Zane*, 167 Mass. 302, 45 N. E. 923. Nor can it be said as matter of law that the plaintiff failed to use due care. The hall had been lighted as usual when she passed through it to the room on the same floor where she was employed, and upon completion of her work shortly before 12 o'clock, when she opened the door to return, there was no reason to expect from her previous experience that the light had been put out. The door through which she must pass swung into the room, and it was not until the door had been closed that she perceived the hall was in darkness.

In taking the first step after passing the threshold her foot went beyond the edge of the landing, causing her to fall into the stairway, and from their common knowledge the jury might infer that she could not reasonably be expected instantly to appreciate the effect of the darkness, which made the use of the hall hazardous. It was for them to determine under the circumstances whether her conduct was ordinarily prudent, or whether instead of stepping forward she should have endeavored to turn back: *Wright v. Perry*, 188 Mass. 268, 74 N. E. 328; *Wills v. Taylor*, 193 Mass. 113, 78 N. E. 774; *Hamilton v. Taylor*, 195 Mass. 68, 80 N. E. 592.

We are accordingly of opinion that the verdict for the defendant was ordered improperly. .

Exceptions sustained.

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*The Liability of a Landlord for the Condition of the Passageways* and stairways of an apartment house is considered in the recent cases of *Andrews v. Williamson*, 193 Mass. 92, 118 Am. St. Rep. 452; *Siggins v. McGill*, 72 N. J. L. 263, 111 Am. St. Rep. 666. In the absence of any agreement on the subject, a landlord's duty to his tenant with respect to a common passageway in a house consisting of several tenements is to keep the passageway in the condition it was in, or apparently in, at the time of the leasing. But to put an ordinary mat before the outer door of a tenement on a narrow landing, which is part of a common passageway, where the terms of the contract between a landlord and his tenant were that such way was not to be lighted throughout the night, is not negligence entitling the tenant to recover damages caused by his tripping on the mat and falling in such a manner as to sustain serious injury: *McGowan v. Monahan*, 199 Mass. 296, 127 Am. St. Rep. 501.

*Landlord and Tenant.*—Where a Porch or Stairway is used in common by the different occupants of a tenement house or flat building, the landlord will be presumed to have reserved possession thereof for the benefit of all the tenants, and he is under obligation to all parties having occasion to use the premises to exercise ordinary care to keep the same in repair: *Farley v. Byers*, 106 Minn. 260, 130 Am. St. Rep. 613.

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### BATTY v. GREENE.

[206 Mass. 561, 92 N. E. 715.]

**MARRIAGE—Fraud in Concealing Prior Marriage.**—Where a woman marries a man and intentionally conceals from him her prior undissolved marriage to another, this is a fraud upon him upon which he can maintain an action for deceit or a petition to annul the marriage. (p. 409.)

**MARRIAGE—Fraud in Procuring—Property Rights.**—Where a woman marries a man and lives with him for years, at all times intentionally concealing her prior undissolved marriage to another, he, or his administrators after his death, may maintain an action against the administrator of her estate to recover the portion thereof which he contributed during the supposed marriage. (pp. 409, 410.)

J. K. Greene, administrator, pro se.

E. T. Esty, for the plaintiff.

<sup>503</sup> HAMMOND, J. This is a bill in equity brought against the administrator of the estate of Elizabeth H. F. Mitchinson, so called, to recover property obtained by the said Mitchinson by fraud and still held by the defendant as a part of her estate. The case was sent to a master, and is before us upon appeals taken by the defendant to the decree affirming the master's report and to the final decree in favor of the plaintiff. Since this action was brought the original plaintiff has died and the action is now prosecuted by Edwin Batty, the administrator of his estate.

The following facts, among others, are found by the master: Charles Batty, the original plaintiff, went through a marriage ceremony with the said Mitchinson in September, 1889, and they lived together as husband and wife from that time until her death, which occurred October 13, 1902. Before this she had gone through a marriage ceremony with one Mitchinson, with whom she had lived for nineteen years as his wife until his death, which occurred before the marriage ceremony between <sup>504</sup> herself and Batty. After her death it transpired that before either of these ceremonies she had married in England one Fotherby, who died in April, 1902. Of this marriage Batty knew nothing "until after June 27, 1898, and before April, 1902." Batty at the time of his supposed marriage owned some property, and for several years carried on a "butter and egg business" in Worcester, while the wife kept a boarding-house in Webster, both in this state. After a while he gave up the business in Worcester and spent all his time in Webster, "rendering some, but not much, aid to his wife in running the boarding-house." About seven years after the marriage the boarding-house business was given up, and they came to Worcester to live in the lower tenement of one of the houses purchased after the marriage and standing in her name. "From the time of his marriage Batty put his money into a common fund with his wife's which was used for the purposes of both, and for convenience in drawing checks; sometimes a part of it was kept in a bank in Batty's name. Batty put the profits of his business, the rents from his houses, and all sums of money received by him into the common fund." All the houses purchased since the marriage with money from this common fund stood in the name of the wife. Of the common fund existing at the time of her death Batty contributed at least six-fifteenths. The master found that he was entitled to this as being his just proportion thereof; and the final decree is in favor of the plaintiff for that part,

being the sum of four thousand eight hundred and fifty-six dollars and eighty cents, with interest from October 13, 1902.

There can be no doubt that the intentional concealment by the supposed wife that she had been previously married to Fotherby and that her marriage was still in full force was a fraud upon Batty, for which, during the lifetime of the parties, he could have maintained an action of deceit or a petition to annul the marriage. It was a fraud as to the very essentialia of the marriage contract: *Kidney v. Stoddard*, 7 Met. 252; *Stewart v. Wyoming Cattle Rancho Co.*, 128 U. S. 383, 9 Sup. Ct. Rep. 101, 32 L. ed. 439; *Cooley on Torts*, 3d ed., 910, and cases cited; *Reynolds v. Reynolds*, 3 Allen, 605; *Morrill v. Palmer*, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411. See, also, *Van Houten v. Morse*, 162 Mass. 414, 44 Am. St. Rep. 373, 38 N. E. 705, 26 L. R. A. 430, and cases cited.

It is urged by the defendant that the right of action did not survive the death of the person who committed the fraud. It <sup>was</sup> is to be noted that this is not an action at common law to recover damages for fraud, nor in the nature of such an action. It is a suit to recover specific property (or the avails thereof) procured by fraud and still held as a part of the estate of the fraudulent party. It rests upon a general rule, a good statement of which may be found in *Perry on Trusts*, in the following language: "If one party procures the legal title to property from another by fraud or misrepresentation or concealment, . . . equity will convert such party thus obtaining the property into a trustee . . . and this trust . . . [courts of equity] . . . will fasten upon the conscience of the offending party, and will convert him into a trustee of the legal title, and order him to hold it or to execute the trust in such manner as to protect the rights of the defrauded party and promote the safety and interests of society": *Perry on Trusts*, 5th ed., sec. 166. See, also, *Pomeroy's Equity Jurisprudence*, 3d ed., secs. 1044, 1047, and cases there cited. If this case comes within this general rule, then the cause of action survives: *Parker v. Simpson*, 180 Mass. 334, 62 N. E. 401, and cases cited.

It is contended, however, by the defendant that the present case is not within the rule; and in support of this contention he argues that the fraud complained of affected primarily the person defrauded and not his property, that no property was obtained at the time of the fraud nor as a direct result thereof, but that the injuries to his property or property rights were merely incidental (see *Jenkins v. French*, 58 N. H. 532), and that while this loss might properly be considered as an element of damages in an action of deceit, yet of itself it furnishes no new or independent cause of action: See *Payne's Appeal*, 65 Conn. 397, 48 Am. St. Rep. 215, 32 N. E. 948, 33 L. R. A. 418. But we think this objection un-

tenable. While it is true that at the time of the fraud no property passed to the offending party, still the fraud consisted not alone of one single act, but of a continuous series of acts, or rather of a continuous situation. Day by day and hour by hour did this woman, by maintaining in appearance the relation of a lawful wife, renew and repeat this fraud. The concealment was continuous, and the fraud was as continuous as the concealment. It existed at the time of the marriage, and at the respective times when Batty contributed to the common fund. And this suit is not based ~~see~~ upon the concealment when the marriage ceremony took place, but upon that existing when Batty parted with his property. In every proper sense the property, although not obtained at the time the concealment began, was obtained by the concealment existing at the time it was passed to the offending party, and as the direct consequence of the resulting fraud: See *Morrill v. Palmer*, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411.

The master has not found how long before April, 1902, Batty knew of the fraud, and he has not reported the circumstances for the delay of the plaintiff after he knew of it; and we are of opinion that Batty has not been shown to be guilty of laches.

It follows that the plaintiff is entitled to a decree in his favor. The suit being to recover property (or the avails thereof) fraudulently obtained, the provision of the decree that interest should be allowed from October 13, 1902, the time of the death of the supposed wife, was favorable enough to the defendant: *Parker v. Simpson*, 180 Mass. 334, 62 N. E. 401, and cases cited.

Nor should the defendant be allowed in this suit the costs and expenses sustained in the former proceeding of *Har- graves v. Batty*, mentioned in the defendant's brief.

Decrees affirmed.

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*The Property Rights of the Parties to a Void Marriage* are discussed in the notes to *Deeds v. Strode*, 96 Am. St. Rep. 270; *Werner v. Werner*, 68 Am. St. Rep. 375. Where land is conveyed to a man illegally married, but the woman has contributed to the purchase by producing a portion of the money by her labor or by working together with him for the common purpose, she is entitled to a share in the property in proportion to what she has contributed: *Hayworth v. Williams*, 102 Tex. 308, 132 Am. St. Rep. 879. And where a woman in good faith enters into a marriage contract with a man, and they assume and enter into the marital state pursuant to some ceremony or agreement recognized by the law of the place, which marriage would be legal but for the incompetency of the man, which he conceals from her, a status is created justifying a court in rendering a decree annulling the assumed marriage on the complaint of the innocent party, and where the woman has helped acquire and materially save the property, the court has jurisdiction, as between the parties, to dispose of it as in the case of granting a divorce: *Buckley v. Buckley*, 50 Wash. 213, 126 Am. St. Rep. 900.

*As to What Marriages are Void*, see the note to *State v. Lowell*, 79 Am. St. Rep. 361. As to the presumptions in favor of the validity of a marriage, see the note to *Pittinger v. Pittinger*, 89 Am. St. Rep. 198.

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### GOODENOUGH v. LABRIE.

[206 Mass. 599, 92 N. E. 807.]

**MORTGAGE.**—Where a Grantee Assumes a Mortgage on the land as part of the purchase price, the mortgage is primarily a charge upon the purchase money reserved by the grantee to pay it, and the charge takes effect, as between the immediate parties to the contract, upon the land, but only upon the estate therein which the grantor purports to convey. (p. 412.)

**MORTGAGE.**—Assumption by Grantee in Quitclaim Deed.—A grantee in a quitclaim deed who assumes a mortgage on the land as part of the purchase price may purchase and enforce a prior mortgage of which both he and his grantor were ignorant at the time of the execution of the quitclaim deed. (pp. 412, 413.)

Bill by the holder of a mortgage to restrain one Labrie and his daughter from enforcing a prior mortgage on the same land, purchased by Labrie in the name of the daughter, and to have this mortgage adjudged discharged.

H. A. Buzzell, for the plaintiff.

W. R. Heady, for the defendants.

300 KNOWLTON, C. J. The plaintiff is the holder of a mortgage upon real estate and the male defendant is the owner of the equity of redemption. This defendant's title is derived under a series of quitclaim deeds, each reciting the existence of this mortgage, and the later ones containing a recital that the grantee assumes and agrees to pay the mortgage as a part of the purchase price. The first of them, that made by the mortgagor to the first grantee of the equity of redemption, merely states the existence of the mortgage, without anything in regard to the assumption or payment of it. Both the plaintiff and this defendant supposed that this was the first and only mortgage on the property until after the plaintiff had begun proceedings to foreclose it, when it was discovered that there was a prior mortgage duly recorded, upon which about six hundred dollars was due, and that there were sundry other serious defects in the title. On account of the existence of the prior mortgage, the plaintiff discontinued the proceedings for foreclosure, to see what could be done in reference to the title. The defendant took measures to perfect the title except as to these mortgages, and he procured an assignment of the first mortgage to be



made to his daughter, the other defendant, for a consideration furnished by him. He must, therefore, be treated as the owner of the first mortgage. The plaintiff brings this bill, asking that the assignment to the daughter be treated as a discharge of the first mortgage and that she be enjoined from selling, assigning, transferring or foreclosing the mortgage.

From the statement of agreed facts and the inferences drawn from them the judge rightly found that, after the discontinuance of the proceedings to foreclose, each party was free to proceed <sup>601</sup> in the way which seemed to him best to protect his own interests. In connection with these proceedings and the discontinuance of them nothing occurred that affected the rights of the defendants in regard to the first mortgage.

The only question in the case is whether the implied agreement of the first defendant with his grantor to assume and pay the plaintiff's mortgage, founded on the recital in the deed, precludes him from buying and holding the first mortgage. This agreement was not with the plaintiff, and the plaintiff cannot bring an action at law to enforce it: *Coffin v. Adams*, 131 Mass. 133; *Borden v. Boardman*, 157 Mass. 410, 32 N. E. 469, and cases cited. It was not a covenant. The acceptance of the deed merely created an implied contract of the defendant, upon which the grantor can sue in assumpsit to recover any damages which he suffers from the breach of it. But this grantor was under no liability on account of the mortgage, except that founded upon a similar implied contract with his grantor; and the first of these grantors after the conveyance of the equity by the mortgagor was under no liability; for the deed to him did not require him to assume the mortgage. Neither this defendant nor any of the other preceding grantees made any agreement in regard to the first mortgage, for they all, like this plaintiff, were ignorant of its existence. Their only agreement relates specifically to the plaintiff's mortgage, and no one of them made any agreement with the plaintiff himself, but only with a third party.

The nature and effect of such an agreement are considered at length in *Locke v. Homer*, 131 Mass. 93, 41 Am. Rep. 199, and *Rice v. Sanders*, 152 Mass. 108, 23 Am. St. Rep. 804, 24 N. E. 1079, 8 L. R. A. 315. Of the effect of the agreement as between the immediate parties to it we find this language in the latter case: "It is said in many cases that primarily the mortgage is a charge upon the land, but it would be more accurate to say that it is made primarily a charge upon the purchase money reserved by the grantee to pay it." As this purchase money is not required to be furnished at the time by the grantee, but is allowed to remain in his hands, where it is represented by the land, this charge takes effect

upon the land, as between the immediate parties to the contract; that is, it takes effect upon the estate which is conveyed and for which the grantee is to pay. Applying this principle in the present case, even as between the parties <sup>402</sup> to the implied agreement, the plaintiff's mortgage was treated as a charge only upon the estate which the grantor purported to convey, and which, by the terms of the quitclaim deed, was only his right, title and interest in the property, whatever that might prove to be. It now appears that the estate conveyed was subject to the first mortgage, of which they were then ignorant, and, as between the contracting parties, the plaintiff's mortgage was not charged upon so much of the property as is required to satisfy the first mortgage. There was not only no contract between these parties, but there is no privity of contract by way of covenant, nor any privity of estate that creates a legal or equitable estoppel against the defendants, or either of them, to prevent them from holding the first mortgage against the plaintiff after a purchase of it: *McCabe v. Swap*, 14 Allen, 188; *Lydon v. Campbell*, 198 Mass. 29, 84 N. E. 305; 2 *Pomeroy's Equity Jurisprudence*, sec. 798.

Bill dismissed.

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*The Effect of a Grantee's Agreement to Assume a Mortgage on the Premises* is the subject of a note to *Klapworth v. Dressler*, 78 Am. Dec. 72. Where mortgaged property is conveyed by the mortgagor to one who assumes the payment of the mortgage debt, this does not affect the rights of the mortgagee, unless he elects to rely upon such assumption and to accept the vendee as his debtor: *Hull v. Hayward*, 13 S. D. 291, 79 Am. St. Rep. 890. One who, by the terms of his conveyance from a mortgagor of premises, agrees to pay a mortgage thereon as part of the purchase price, makes it his own as effectually as if he had executed it himself: *Farmers' Nat. Bank v. Gates*, 33 Or. 388, 72 Am. St. Rep. 724. See in this connection, *North End Sav. Bank v. Snow*, 197 Mass. 339, 125 Am. St. Rep. 368. If a deed specifies that it is subject to a mortgage (designating it), and that the grantee assumes its payment, this amounts to a covenant that he will pay the note for the security of which the mortgage was given: *Daniels v. Johnson*, 129 Cal. 415, 79 Am. St. Rep. 123. For other authorities on the effect of such agreements, see *Gifford v. Corrigan*, 117 N. Y. 257, 15 Am. St. Rep. 508; *Rice v. Sanders*, 152 Mass. 108, 23 Am. St. Rep. 804; *Bensieck v. Cook*, 110 Mo. 173, 33 Am. St. Rep. 422; *Hopper v. Calhoun*, 52 Kan. 703, 39 Am. St. Rep. 363; *Nelson v. Brown*, 140 Mo. 580, 62 Am. St. Rep. 755; *Ordway v. Downey*, 18 Wash. 412, 63 Am. St. Rep. 892. A grantee of mortgaged premises, who accepts a deed thereto and agrees therein to pay the mortgage debt, is not personally answerable therefor if his immediate grantor was not personally bound: *Young Men's Christian Assn. v. Craft*, 34 Or. 106, 75 Am. St. Rep. 568.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MISSOURI.**

**ST. LOUIS v. ANDERSON.**

[229 Mo. 181, 129 S. W. 528.]

**MUNICIPAL CORPORATION—Suit on Contractor's Bond.—**  
Where work on a sewer is to be paid for in special tax bills against the lots in the district, and the contractor fails to construct the sewer so that the city is compelled to relet the work at a higher price, the loss or burden falls upon the property owners, and the city cannot recover therefor, either as trustee for them or on its own account, upon the bond of the contractor. (p. 416.)

L. E. Walther and B. H. Charles, for the appellant.

Kortjohn & Kortjohn and John M. Wood, for the respondents.

<sup>183</sup> VALLIANT, J. This is a suit on a bond, in the penalty of \$10,000, given to secure the faithful performance of a contract whereby the defendants William M. and Andrew Anderson contracted with the city to construct a certain sewer in accordance with certain specifications, and in which the defendant the United States Fidelity and Guaranty Company was surety for the contractors. The contract was that the Andersons were to construct the sewer for prices that made the total sum of \$96,620.07; but after entering <sup>184</sup> into the contract and giving the bond, they abandoned it, and the city was compelled to let the contract to another party, Hill and Abbot, which it did, at prices that made the total amount \$108,438.75, being \$11,818.68 more than the amount for which the Andersons agreed to do the work. The work, according to each contract, was to be paid for in special tax bills against the lots of land in that sewer district. The work was done under the Hill and Abbot contract, and special tax bills were duly issued in payment for the same. The result of the failure of the Andersons to perform their contract was that the property in the district was taxed \$11,818.68 more than it would have been if they had performed it.

The conditions of the bond were that if the Andersons should faithfully perform their contract according to its terms, and pay to the proper parties all amounts for labor and material employed and used in the performance of the contract, the obligation was to become void; otherwise to remain in full force.

The petition states that because of the failure of the Andersons to perform their contract, the city was compelled to pay Hill and Abbot \$108,438.75 instead of \$96,620.07, the price under the Anderson contract; therefore the city has suffered damage to the amount of \$11,818.68, which is in excess of the penalty of the bond, \$10,000, for which the city prays judgment.

At the trial the death of William M. Anderson was suggested and the plaintiff dismissed as to him; the trial went on as to Andrew Anderson and the surety company and resulted in a judgment for the defendants, from which the plaintiff appealed.

Although the petition states that the city was compelled to pay Hill and Abbot the amount named, and that thereby it was damaged in the sum of the excess over the Anderson contract, yet that was not the literal fact, nor was it intended to be so understood, <sup>185</sup> because the petition on its face shows that the work was paid for in special tax bills.

This court has recently passed judgment on bonds of this kind, and has held that under facts like those above stated the city was not entitled to recover the excess it had been compelled to pay in special tax bills: *St. Louis v. Wright Contracting Co.*, 202 Mo. 451, 101 S. W. 6; *St. Louis v. Wright Contracting Co.*, 210 Mo. 491, 109 S. W. 6. In both those suits the city in its petition assumed to sue as trustee for the property owners whose property had been burdened with the excess in special tax bills, but the court held that the city was not such trustee under the terms of the bond. In the case at bar the city in its petition does not style itself trustee, but seeks a judgment in its own name for the excess of the cost. Counsel for the city seek to distinguish this case from those above mentioned, by the fact that here the city does not, as it did in those cases, call itself a trustee. It makes no difference what name the city takes or what character it assumes, if it recovers it must recover on the facts of the case; if those facts constitute it a trustee, then it is such; otherwise not. If under the facts of this case the Andersons became liable to the property owners who had to pay the excess of tax caused by their failure, and if the conditions of this bond covered that liability, and if under those facts and those conditions the law would create or imply a trusteeship in the city for the use of those property owners, then the city would be such whether called by that name in

the bond or not. This court held in the Wright cases that those facts and conditions did not make the city a trustee for the property owners, therefore the city could not recover for their loss or injury. There is no difference in principle between this case and the Wright cases.

This loss in this case fell not on the city; it was not paid out of the city treasury, nor was the city <sup>186</sup> liable for the excess; the burden fell alone on the property owners. The only theory on which the city could recover for the loss or injury that resulted to the property owners, for the failure of the Andersons, would be that it was a trustee for their use, but such is not the fact in this case. The city cannot, in its own name and for its own benefit, recover for the loss sustained by the property owners, and the facts not constituting it a trustee for their benefit, it cannot recover for them.

It is argued that the condition of the bond calls for a faithful performance of the contract, and therefore it covers all loss resulting from failure to perform, and that is so. Under the facts of this case there has been a breach of the bond, and the obligors are liable for whatever damage has resulted from the breach, but their liability to the city is for the damage the city has sustained, not that sustained by someone else. If the city had, in this instance, sued for damages it had sustained, it would on proof have been entitled to recover nominal damages without proof of specific loss, though of that we say nothing; but since the city has seen fit to sue only for the loss that resulted to the property owners, it is not entitled to recover at all.

The judgment is affirmed.

All concur.

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*As to the Validity and Effect of Bonds Given by Persons Contracting to construct public improvements, see Bell v. Kirkland, 102 Minn. 213, 120 Am. St. Rep. 621; Red Wing Sewer Pipe Co. v. Donnelly, 102 Minn. 192, 120 Am. St. Rep. 619; Dillingham v. City Council of Spartanburg, 75 S. C. 549, 117 Am. St. Rep. 917; Alameda Macadamizing Co. v. Fringle, 130 Cal. 226, 80 Am. St. Rep. 124.*

## STATE v. DENTON.

[229 Mo. 187, 129 S. W. 709.]

**ACCOUNTING—Money Judgment—Jurisdiction of Equity.**—It is within the scope of equity jurisdiction to cause an accounting to be made under some circumstances, and to render judgment for the balance ascertained. But the money judgment is to follow the accounting; and if the conditions surrounding the case are such as to put the accounting beyond the reach of the court, it has no jurisdiction to render a money judgment. (p. 420.)

**ACCOUNTING—Jurisdiction of Equity—Prohibition.**—Ordinarily, an error committed in rendering a money judgment may be corrected on appeal, but if the accounting that must be had before the balance can be ascertained is of a character which the court has no power to make, and would involve the destruction of rights that could not be restored, the remedy by appeal is inadequate, and prohibition lies. (pp. 420, 424.)

**FOREIGN INSURANCE COMPANY.**—A Court will not Entertain Jurisdiction of a suit against a foreign mutual life insurance company, brought by a member thereof for himself and in behalf of others similarly situated who may see fit to come in and share in the suit, to recover alleged balances due on account of premiums paid and misapplied; for before the balance, if any, due the plaintiff can be ascertained, there must be a complete visitation of the corporation, a thorough inquiry into all its affairs, and an ascertainment not only of the condition of the account with the plaintiff, but of the accounts of all its members who have had policies, no matter how numerous they may be or through how many states they may be scattered. (pp. 421-423.)

**DEMURRER—Acts Characterized as Fraudulent.**—A demurrer admits the facts pleaded, but not the characterization thereof as fraudulent, which is only a conclusion. (p. 422.)

**FOREIGN INSURANCE COMPANY—Jurisdiction of Court.**—The fact that the acts of a foreign insurance company complained of are fraudulent does not confer jurisdiction on a court to exercise visitatorial powers, if it otherwise lacks jurisdiction. (p. 422.)

**FOREIGN INSURANCE COMPANY—Jurisdiction of Court.**—If a court cannot render an intelligent judgment for money which the plaintiff claims he has been unlawfully compelled to pay a foreign insurance company in excess of legitimate assessments, without entering into an elaborate accounting which the court has no jurisdiction to make, then the court has no jurisdiction to render the money judgment. (pp. 421, 422.)

**DISCOVERY.**—The Jurisdiction of a Court of Equity cannot be sustained on the ground that the petition is in the nature of a bill for discovery, if the discovery asked is only in aid or as a part of an accounting of which the court has no jurisdiction. (p. 423.)

**FOREIGN RECEIVER.**—The Recognition of a Foreign Receiver is only a matter of comity, and is not extended when the rights of a citizen would be injuriously affected. (p. 424.)

How, Butler & Mitchell and Rosenberger, Taylor & Reed,  
for the relator.

J. H. Lucas and Fyke & Snider, for the respondents.

<sup>191</sup> VALLIANT, J. Relator seeks a writ of prohibition to go against the judge of the circuit court of Henry county to prohibit him entertaining jurisdiction of a suit pending in that court wherein Herman P. Faris is plaintiff and this relator is defendant. The suit was begun by the filing of a petition in the name of the plaintiff for himself and all others similarly situated who might see fit to come in and share in the <sup>192</sup> suit. The petition is in the nature of a bill in equity complaining of relator's alleged mismanagement of its business as a life insurance company, seeking judicial investigation of its affairs and the appointment of a receiver to conduct its business. On return of the summons the insurance company filed a demurrer to the petition, assigning as one of the grounds therefor that the court had no jurisdiction of the cause stated in the petition, which demurrer was considered by the court and overruled, whereupon the insurance company as relator filed this suit in this court. The question of the jurisdiction of the circuit court arises out of the statements in the petition which are substantially as follows:

The Minnesota Mutual Life Insurance Company is a corporation organized under the laws of Minnesota and domiciled at St. Paul in that state, engaged in the business of life insurance, extending into other states, Missouri among the others. The company was originally chartered to do the business of life insurance on the assessment plan—that is to say, on the death of one of its members an assessment was made on the surviving members, and out of the proceeds of such assessment the insurance on the life of the deceased member was paid. On becoming a member everyone paid into the treasury a sum equal in dollars to the number of years of his age, which went into what was called the guarantee fund, to secure the payment of the assessments and to be used in case of necessity in payment of death benefits. While the company was doing business on that plan the plaintiff became a member and took out three policies on his life for two thousand dollars each, paid the fees and amount therefor at the time, and has ever since paid in due course all the assessments levied by the company. And so the company went on in its business for several years and accumulated in the guarantee fund six hundred thousand dollars. But afterward, in 1901, the company, whose original name was The <sup>193</sup> Bankers' Life Association of Minnesota, changed its name to the Minnesota Mutual Life Insurance Company of St. Paul, Minnesota, and changed its plan of doing business, ceased to issue policies on the assessment plan, and conducted its business thereafter as an old-line life insurance company, and issued policies only on a level premium plan. After such change the company endeavored to induce all its old members to surrender their policies and to take



policies on the level premium plan, and did succeed in inducing many—how many plaintiff does not know but seeks a discovery thereof—to make such change. Still a considerable number of the assessment policy-holders, among them the plaintiff, have refused to go into the new scheme, and have held on to their original policies and have continued to pay their assessments. But the ceasing to issue policies on the assessment plan and the inducing of a large number of holders of such policies to surrender theirs has thrown a greater burden on those who have held their originals, in the way of increased assessments, that is to say, not only has the number of members under the assessment plan not increased, but it has diminished, yet the company still levies assessments on the remaining original members not only to pay death benefits occurring in their number, but to pay death benefits on the lives of those who surrendered their assessment policies and took out policies on the level premium plan, although holders of the latter kind were not assessed to pay the death benefits when holders of assessment policies died. It is charged in the petition that this action on the part of the insurance company was done for the fraudulent purpose of forcing the assessment policy-holders to lapse in their membership, whereby the defendant would claim and keep the guarantee fund, whereas that fund could lawfully be used for no other purpose than paying or securing assessment plan policies, and in the original <sup>194</sup> articles of association in force when plaintiff became a member it was expressly so stated, and also that that provision should never be altered or amended without the written consent of every member of the association, which consent has not been given by a large number of members.

It is also charged that the company has failed to apply the guarantee fund to the payment of assessments occurring on the death of members holding assessment policies, and has fraudulently misappropriated, and is continuing to misappropriate, a large part of it, and unless restrained will dissipate the whole fund. That by this unlawful conduct plaintiff has been compelled to pay increased and burdensome assessments. The prayer of the petition is that the defendant company be required to disclose the amount of the guarantee fund at the date it ceased to do business on the assessment plan; the amount on hand now; the disposition it has made of that fund; how it is invested; how many members now living hold policies on the assessment plan; their postoffice addresses; the aggregate of the outstanding assessment plan policies; what amount of money has been received upon assessments collected from members since the change of name; what part of such money has been paid on policies on the old-line plan; to state an account with plaintiff since

he has been a member, showing how much money collected from plaintiff has been appropriated to payment of death losses on old-line policies; that defendant be enjoined from appropriating any of the guarantee fund to payment of policies on the old-line plan, and from making assessments to pay claims other than death losses on the assessment-plan policies; that a receiver be appointed to take charge of the guarantee fund and collect and receive all assessments hereafter made against assessment-plan members, and see that they are applied only to the payment of death losses on assessment policies; that defendants be adjudged <sup>195</sup> to pay plaintiff and all other persons similarly situated who see fit to come in and participate in this litigation all sums collected heretofore and applied to the payment of death losses under policies on the level-premium plan, and for general relief.

The respondent's return to the rule to show cause why a writ of prohibition should not issue admits the allegations of the petition of relator, but avers that the sole object of the petition in the case of Faris against the insurance company, as respondent construes it, is not to have the circuit court exercise a complete visitatorial power over the business and affairs of the relator, but, on the contrary, one of the purposes of the petition is to obtain a money judgment against relator on account of moneys received by it which it ought not to have received and ought not to retain, and that if respondent erred in overruling the demurrers, or should hereafter err in any respect in the progress of that cause, the relator has a complete remedy by appeal.

From this return it may be inferred that the learned judge in overruling the demurrer did not construe the petition as one aimed to bring about a visitation of the affairs of the relator, but only to obtain a money judgment for a balance found to be due plaintiff after such an accounting as a court of equity could cause to be made.

It is within the scope of equity jurisdiction to cause an accounting to be made under some circumstances and to render judgment for the balance ascertained. But the money judgment is to follow the accounting, and if the conditions surrounding the case are such as to put the accounting beyond the reach of the court, it has no jurisdiction to render a money judgment. Ordinarily, an error committed in the rendering of a money judgment may be corrected on appeal, but if the accounting that must be had before the balance can be ascertained is of a character which the court has no power to make, and would involve destruction of <sup>196</sup> rights which could not be restored, an appeal would be of little if any avail. In this case before the balance, if any, that is due the plaintiff could be ascertained, there must be

a complete visitation of the corporation, a thorough inquiring into all of its affairs, and an ascertainment not only of the condition of the account of the corporation with this plaintiff, but of the accounts of all its members who now have, or have ever had, policies on the assessment plan, no matter how numerous they may be or through how many states they may be scattered, because this is a mutual concern and the accounts of all are involved in the account of one. Such an accounting is not beyond the jurisdiction of a court of equity that may have full jurisdiction of the corporation, but is beyond the jurisdiction of a court of equity that has only the limited or qualified jurisdiction over a foreign insurance corporation that is given by our laws to our courts. When license is granted a foreign insurance company to do business in this state, one of the conditions on which the license is granted is that it name an agent on whom service of process may be made, so that it may be called into court to answer a suit on a contract, and our courts have ample jurisdiction to compel performance of obligations by such companies. Nor are our citizens wholly without the right to have the internal affairs of such corporations examined and their methods of business and their ability to perform their obligations ascertained, and their abuses, if any corrected, without going to another state for that purpose; but that power is lodged in the superintendent of insurance, who may, until he has been allowed to make the examination and is satisfied, refuse to grant a license, or, having granted, may for good cause revoke it. But beyond the power of the court to enforce the performance of a contract and beyond the power of the superintendent of insurance to correct the evil, if a citizen of this state wants further redress involving <sup>197</sup> a judicial investigation into the affairs of the foreign corporation of which he is a member, he must go to a court in the state where the corporation is at home.

In the brief for relator we are referred to a decision of the supreme court of the United States holding that the transaction whereby this insurance company changed the character of its business from the assessment to the old-line plan was in conformity to a statute of Minnesota, and was valid: *Wright v. Minnesota M. L. Ins. Co.*, 193 U. S. 657, 24 Sup. Ct. Rep. 549, 48 L. ed. 832. But that question, if there is such a question, is not in this case; we are now concerned only with the question of jurisdiction of our circuit courts over a cause like this.

In *Condon v. Mutual Reserve Assn.*, 89 Md. 99, 73 Am. St. Rep. 169, 42 Atl. 944, 44 L. R. A. 149, the supreme court of Maryland considered a case very like this, and held that the trial court had no jurisdiction. The Maryland court pointed

out the dual capacity of a policy-holder in such a mutual company; he was an insured and, to a certain extent, an insurer, a creditor and a member. The court said: "The mere fact that he is a member of the corporation does not preclude him from asserting against the corporation any right arising out of his contract; but the character of the remedy invoked may measure the limits of the jurisdiction of the tribunal appealed to, when the domicile of the corporation is considered. It is therefore entirely possible that a state of facts which would authorize a court, in the exercise of its visitatorial power, to inquire into the validity of acts affecting the rights of a policy-holder, when done by a corporation located within the jurisdiction of the court, would, as respects a foreign corporation, be wholly insufficient to confer upon the same court jurisdiction to act at all." The complaint of the policy-holder in that case was very much like the complaint in the case at bar: it was charged that the assessments were illegal, excessive and fraudulent, and the prayer was for an <sup>188</sup> accounting, involving the same scope of inquiry as in this case and the appointment of a receiver, but the court said that because it was a New York corporation, the complainant would have to take his complaint to a New York court. Respondent in his brief says that the petition charges fraud, and that the demurrer admits it, but that is hardly so; the demurrer admits the fact pleaded, but not the characterization which is only a conclusion. But even if the acts complained of were fraudulent, they do not, in such case, affect the question of jurisdiction. We quote again from the Maryland court: "An act done with a fraudulent motive is, as an act, precisely identical with the same act done without such a motive, in so far as it relates to this jurisdictional question; because it is the quality or nature of the act, not the incentive that promoted it, or the effect that it produces, which determines whether it does pertain to the internal management of the corporation or not."

That insurance company was assailed with a like suit in Virginia and also in North Carolina, and in both of those states it was held that the court had not jurisdiction: *Taylor v. Mutual Assn.*, 97 Va. 60, 33 S. E. 385, 45 L. R. A. 621; *Howard v. Mutual Assn.*, 125 N. C. 49, 34 S. E. 199, 45 L. R. A. 853.

A court of equity never does a vain act; it never decrees what it cannot compel to be performed. If this were a domestic corporation, the court could decree such an accounting as prayed, appoint its commissioner to go to the office of the corporation, and overlook and examine all its books, appoint a receiver, if it deemed proper, to take possession of all its assets and administer the same under the direction of the court pendente lite, and if the corporation or its

officers should refuse to surrender its books or assets, there would be sufficient executive power forthcoming at the call of the court to enforce its decrees. But the commissioner or the receiver in such case is but the representative of the court; he is, while he keeps within <sup>199</sup> his decree, pro hac vice the court; where he goes the court goes and what he does the court does. Can the circuit court in this case, in the person of its representative, go to Minnesota and take charge of the affairs of this corporation there? If the corporation should refuse to turn over its books to the commissioner or its money to the receiver, what could the court do? A court has no right to put itself in a position where its orders may be treated with contempt; the very fact that it could not force obedience shows its lack of authority to render the judgment.

There are, according to the petition, a large number of holders of policies like those held by plaintiff, scattered perhaps over many states, each of whom has as much right to bring a like suit in his state as the plaintiff has to bring this suit. Each of those many policy-holders would have an interest in each of the many suits, because in a mutual concern the interest of one cannot be determined without determining the interest of all, or at least the basis on which the interest of all must be calculated. It would be a strange system of law that would involve a concern in such confusion. If such were the law, no insurance company would venture to do business outside its own state.

It would be impossible for the circuit court to render an intelligent judgment for the money which the plaintiff says he has been unlawfully compelled to pay in excess of legitimate assessments, without entering into the elaborate accounting above indicated, and since the court has no jurisdiction to make such an accounting, it has no jurisdiction to render such a money judgment. Nor can the jurisdiction be sustained on the ground that the petition is in the nature of a bill for discovery, because the discovery asked is only in aid of the accounting; is in fact but a part of the accounting. "A bill for relief and discovery cannot be sustained solely for the <sup>200</sup> sake of discovery; therefore where, in a bill for discovery and relief, the discovery sought is incidental to the relief sought, a demurrer well taken to the relief holds good as to the discovery also": 14 Cyc. 308.

A receiver appointed by a court of competent jurisdiction in another state is recognized under certain conditions in this state. The law on this point is well stated in two cases cited in respondent's brief—Weil v. Bank of Burr Oak, 76 Mo. App. 34, opinion by Judge Ellison, and Seymour v. Newman, 77 Mo. App. 578, opinion by Judge Bond. In each of those cases the corporation for which the receiver was ap-

pointed was domiciled in the jurisdiction of the court which made the appointment, presumably the bulk of the assets of the bank was in each case within that jurisdiction and a small asset was found here. A reading of those cases shows that the recognition of the foreign receiver is only a matter of comity and is not extended when the rights of a citizen would be injuriously affected. If a court in a foreign state should undertake to appoint a receiver for a Missouri corporation, the bulk of whose assets were in this state, his authority would not be recognized here. In this case the plaintiff claims to hold three policies of two thousand dollars each, not mature, nothing now due on them, yet he asks that to protect his interests a receiver be appointed to go to Minnesota and take possession of the six hundred thousand dollars guarantee fund, to preserve it for the security of his claims and the like claims of all others who will join him in this suit. No such receiver would be or ought to be recognized at the home of the corporation.

The circuit court has no jurisdiction of the cause of action stated in the petition of Herman P. Faris v. The Minnesota Mutual Life Insurance Company, and no amendment of the petition could give the court jurisdiction of that cause; an amendment stating a cause of action within such jurisdiction would be an amendment <sup>201</sup> stating a new or different cause of action; the demurrer should therefore have been sustained and the cause dismissed.

The writ of prohibition is awarded as prayed.

All concur, except Burgess, J., not sitting.

*The Jurisdiction of Courts Over the Internal Affairs of Foreign Corporations* is discussed in the recent cases of *Edwards v. Schillinger*, 245 Ill. 231, 137 Am. St. Rep. 308; *Babcock v. Farwell*, 245 Ill. 14, 137 Am. St. Rep. 284; *State v. De Groat*, 109 Minn. 168, 134 Am. St. Rep. 764; *McCloskey v. Snowden*, 212 Pa. 249, 108 Am. St. Rep. 867. A complaint alleging that excessive assessments levied by a foreign insurance company are illegal and void because, the condition of the death fund not demanding that they should be laid, they were made with the fraudulent purpose of forcing the complainant's policy to lapse, states facts relating to the internal management of such corporation, and the courts of this state will not entertain jurisdiction of it: *Condon v. Mutual Reserve Assn.*, 89 Md. 99, 73 Am. St. Rep. 169.

*Jurisdiction of Foreign Corporations* is the subject of a note to *Abbeville etc. Co. v. Western etc. Co.*, 85 Am. St. Rep. 905.

## STATE v. MITCHELL.

[229 Mo. 683, 129 S. W. 917.]

**CRIMINAL LAW—Waiver of Jurisdiction.**—Where the defendant in a prosecution for seduction appears in person and by counsel, makes no objection to the jurisdiction of the court, and announces ready for trial, this constitutes a waiver of jurisdiction over his person. (p. 430.)

**CRIMINAL LAW—Cross-examination of Defendant.**—Where, on examination in chief of the defendant in seduction, reference is made to his promise to marry the prosecuting witness and his intercourse with her, he cannot, by confining his answers to a particular date, preclude the state from a full and thorough cross-examination upon these subjects. (p. 430.)

**CRIMINAL LAW—Cross-examination of Defendant.**—The defendant in a criminal prosecution need not become a witness, and when he does, he enjoys an advantage over the ordinary witness in that his cross-examination must be confined to the matter with reference to which he testifies, but as to the matter to which he "refers" in his testimony in chief, he is subject to cross-examination and impeachment just as any other witness. (pp. 430, 431.)

**SEDUCTION—A Promise to Marry in the Future** when the promisor has finished a course of study at school, followed by intercourse consented to on the faith thereof, will sustain a criminal prosecution for seduction, whether or not the time for consummating the marriage has expired. (pp. 431, 432.)

**SEDUCTION—Promise to Marry in Future.**—An instruction in a seduction case that if the defendant had intercourse with the prosecuting witness because he promised to marry her after he got through school and because of her love for him, and he in good faith made the promise and intends to carry it out, the jury must acquit, is not the law. The offense does not depend upon the expiration of the time when the marriage was to be consummated. (p. 432.)

**CRIMINAL TRIAL.—An Instruction in a Seduction case** is properly refused, if it undertakes to select certain portions of the evidence, such as letters written by the defendant, and comment upon their force and effect. (p. 433.)

**SEDUCTION—Confining Offense to Particular Date.**—The jury should not be instructed in a seduction case that to authorize a conviction the intercourse must have been on a specified date. If the defendant, under and by a promise to marry, at any time within three years before the filing of the information, debauched the prosecuting witness, he may be convicted. (p. 433.)

**SEDUCTION—What Constitutes.—Illicit Intercourse** permitted by a woman as a mere barter and trade for a promise of marriage is not seduction; there must be the exercise of certain influences upon her affections by reason of the promise, and to some extent the bringing into play of certain arts and blandishments, reasonably sufficient, aided by the promise to marry, to have her yield to the desires of the defendant. (p. 433.)

**APPEAL—Review of Conflicting Testimony.**—An appellate court, where there is substantial testimony supporting the verdict as returned by the jury, will not disturb such finding on the ground that there may be some conflict in the testimony from which the final conclusions of the jury were reached. (p. 434.)



C. P. Johnson and Dalton & Arthur, for the appellant.

Elliott W. Major, attorney general, and John M. Dawson, assistant attorney general, for the state.

<sup>687</sup> FOX, J. This cause is now pending before this court upon appeal by the defendant from a judgment of the circuit court of Dent county, Missouri, convicting him of the seduction of a female of good repute under the age of twenty-one years, under a promise of marriage.

On the tenth day of August, 1909, the prosecuting attorney of Dent county filed with the clerk of the circuit court of said county an information charging the defendant with unlawfully and feloniously seducing and debauching Arzetta Inman, an unmarried female of good repute and under the age of twenty-one years, under promise of marriage. At the regular August term, 1909, of the Dent circuit court, and on the sixteenth day of August, the defendant was duly arraigned and entered his plea of not guilty, and on the following day he was put upon his trial in said court before a jury duly impaneled and sworn to try the cause. At said trial the state introduced evidence tending to prove that Arzetta Inman was an unmarried female, whose mother was deceased, and who resided with her father on a farm in Dent county, and that defendant resided a mile and a half from the prosecutrix; that defendant had been waiting upon Miss Inman from January, 1905, as her suitor, until in January, 1909; that he was visiting the prosecutrix when not away attending school, most every Sunday, and sometimes at evenings during the week; that he continued waiting upon her constantly during said time, and that they became engaged to be married, and had contracted and agreed to marry each other; that they had been <sup>688</sup> going together at least two years when they decided to marry when defendant arrived at the age of twenty-one years.

Prosecutrix testified that the defendant continually told her that he loved her, and she admits that she loved him; that on July 28, 1908, defendant had intercourse with her, after many times begging, persuading and promising to marry her, as she says, "just persuading me into it"; that he told her they were to be married, and if she loved him well enough to wait for him, after he went to school, he did not think she ought to care, as they intended to get married.

The prosecutrix testified that the defendant, by the exercise of arts and blandishments, persuaded her to have sexual intercourse with her, and that she cried about having given up to him after she went to bed that night, and told him about it when he came to see her the next time, and he wanted to again have sexual intercourse with her; that she loved defendant and thought he would do the right thing

about it, and that he promised to marry her, and she thought he loved her, and that she had never had intercourse with any other man. The prosecutrix testified that defendant objected to her keeping company with any other young men during the full time of the courtship between the prosecutrix and defendant; that the prosecutrix, in the month of March, 1909, in conversation with defendant, asked him to keep his promise to marry her, and he said he did not know, that he was going to school and that he could not marry the prosecutrix until after his course of four years' study in his school was completed, and advised her to go to a physician; that he could not give her medicine, as he would be subject to a term in the penitentiary if he did, and advised her to go to Dr. Craig, a physician; that during the time the prosecutrix and the defendant became engaged defendant wrote the prosecutrix a great many letters, some of them being introduced in evidence; that during the courtship defendant gave prosecutrix two rings, a manicure set, a bracelet and other presents. Upon this bracelet defendant had engraved his initials and those of the prosecutrix; that during said period they were constantly together, the defendant taking the prosecutrix to many places and gatherings, such as to church, picnics and encampments, and other public gatherings of that character in that neighborhood. The prosecutrix went to see Dr. Craig at the instance and request of defendant two or three different times. Defendant stated to prosecutrix many times that he would marry her, and would always treat her right before and after he had sexual intercourse with her, and that after fondling and loving her she finally yielded to his solicitations.

Exhibits "A" to "P," inclusive, were letters written by defendant to the prosecutrix and signed with appellant's name. No objections were made to their introduction in evidence, no exceptions saved thereto.

The state further introduced evidence tending to show that the prosecutrix and defendant were seen together at public places often, and that defendant was known in the neighborhood to be the "solid company" of prosecutrix; that the prosecutrix enjoyed a good reputation in the neighborhood in which she resided, for honesty and integrity, virtue and chastity and good behavior.

The letters introduced in evidence were identified as the handwriting of defendant, and defendant admitted that some of the letters introduced were in his handwriting, and does not deny that the others were written by him.

The defendant introduced evidence tending to show that prosecutrix, about the 10th of December, 1908, went to a singing in the neighborhood at the schoolhouse, and that she, defendant's father, Bud Duckworth and others started from

the schoolhouse <sup>690</sup> toward home, and were together for about a half a mile. That when they arrived at defendant's home, Bud Duckworth permitted prosecutrix to ride behind him on his horse from defendant's home to the home of the prosecutrix, a distance of a mile and a half; that no other persons were traveling that way at that time; that the prosecutrix could have had other company from church, as her brother was there. Duckworth was a school teacher in the neighborhood, and this fact is shown as an impropriety on the part of the prosecutrix; that the brother of prosecutrix married defendant's sister, and lived in the same yard in which prosecutrix lived.

The defendant testified in his own behalf that he was present at the home of the prosecutrix on the night of the 28th of July, 1908, together with a few of the friends of prosecutrix; that the party broke up about 10:30, but denied that he had sexual intercourse with prosecutrix on the night of July 28, 1908; that he was attending school at the time of the trial and had three more years to complete his course; that he never "come out and promised prosecutrix that he would marry her," but admitted having sexual intercourse with her several times, but did not remember having had sexual intercourse with her on the night of July 28, 1908; he admitted that they were lovers and had been for four years, and that he called to see her often and that they were on friendly terms; that he had taken her to many entertainments and public places of amusement and entertainment. Defendant admitted that he loved prosecutrix some and had probably told her so; that he didn't know whether or not she believed him when he told her he loved her; admitted that he was at her home nearly every Sunday, but denied that he insisted on her not keeping company with other men; that he accompanied her to church and Sunday-school and to entertainments, and that no one else accompanied her to such places when he was at home; that he <sup>691</sup> saw Edwin Duckworth with her at an ice-cream social, and that he knew at one time that Enoch Floyd had kept company with her, but that he (defendant) accompanied prosecutrix from the ice-cream social to her home; that he had invited prosecutrix to his father's home; that he came home from school on the 20th of December, 1908, and that evening called on the prosecutrix. Defendant stated that he had received a great many letters from prosecutrix, but that he had given them to his attorneys and did not know where they were; that every time he wrote the prosecutrix she answered it; defendant denied that he had ever promised to marry prosecutrix.

At the close of the evidence the court instructed the jury and the cause was submitted to them, and they returned a verdict finding the defendant guilty as charged in the in-

formation, and assessed his punishment at a fine of one thousand dollars and imprisonment in the county jail for one year. Timely motions for new trial and in arrest of judgment were filed and by the court overruled. Judgment was entered in conformity to the verdict, and from this judgment defendant prosecuted this appeal and the record is now before us for consideration.

1. The information upon which the judgment in this cause is predicated charges every essential element of the offense of which the defendant was convicted. It is in such form as has repeatedly met the approval of this court: *State v. O'Keefe*, 141 Mo. 271, 42 S. W. 725; *State v. Eckler*, 106 Mo. 585, 27 Am. St. Rep. 372, 17 S. W. 814; *State v. Brandenburg*, 118 Mo. 181, 40 Am. St. Rep. 362, 23 S. W. 1080.

There is no merit in the insistence of appellant that the circuit court of Dent county had no jurisdiction to try the defendant upon the information as filed by ~~the~~ prosecuting attorney, upon the ground that the justice of the peace in the preliminary examination on the tenth day of August, 1909, recognized the defendant to appear at the August term of the Dent circuit court, and the additional reason that the prosecuting attorney filed the information in this cause against the defendant on the tenth day of August, 1909. The legislature of 1909 (Laws 1909, p. 411) made a change in the time for the regular terms of the Dent county circuit court. One of the changes made was that instead of the October term, 1909, the regular term was changed to the third Monday in August. This act making the change did not go into effect and become operative until August 16, 1909. Upon this state of the record learned counsel for appellant insists that, for the reason that the justice of the peace held the preliminary examination prior to the time when the act of 1909 changing the time of holding the court went into effect, he should have recognized the defendant to appear at the October term, and for the additional reason that the prosecuting attorney on the tenth day of August, 1909, prior to the taking effect of the act which changed the term of Dent county circuit court to the third Monday in August, filed the information in the circuit court of Dent county, Missouri, to the August term, 1909; that this deprived the circuit court of Dent county of jurisdiction to try said cause upon the information filed. It is sufficient to repeat that there is no merit in this insistence. Under the Laws of 1905, page 133, it was made the duty of justices of the peace to recognize defendants upon preliminary examinations in all bailable offenses for their appearance on the first day of the next regular term of the circuit court of such county to answer such charges as may be preferred against them. The information was filed by the prosecuting attorney in the proper office—in the office of the

circuit clerk—and the mere fact that he said “to the August term, 1909,” falls far short of in any way vitiating <sup>693</sup> the sufficiency of the information. But aside from all this, the defendant in this cause appeared in person and by counsel, made no objection to the jurisdiction of the court, announced ready for trial, which, in our opinion, was a complete waiver of jurisdiction over the person. There can be no question but what the court had jurisdiction over the subject matter. We take it that, as before stated, there is no merit in the complaint that the circuit court of Dent county, by reason of the facts herein indicated, did not have jurisdiction both of the subject matter and of the defendant.

2. It is earnestly insisted by learned counsel for appellant that the prosecuting attorney was permitted to cross-examine the defendant upon matters not referred to in his examination in chief. This proposition required an examination of the disclosures of the record. We have analyzed in detail the record upon this proposition, and find that the cross-examination of the defendant upon the questions of his promise of marriage to the prosecuting witness and sexual intercourse with her was entirely proper. Both of those subjects were referred to in his examination in chief, and the mere fact that he made reference to those subjects upon a particular date by no means precludes the state from full and through cross-examination of the defendant upon the subjects referred to in his examination in chief.

Upon this proposition counsel for appellant direct our attention to the cases of *State v. McGraw*, 74 Mo. 573, *State v. Porter*, 75 Mo. 171, *State v. James*, 216 Mo. 394, 115 S. W. 994, in support of the contention that the cross examination of the defendant while a witness upon the stand constitutes reversible error. An examination of those cases will demonstrate that they are entirely unlike the case at bar. In those cases the prosecuting attorney was permitted to cross-examine <sup>694</sup> the defendants upon subjects to which no reference had been made in their examinations in chief. In the case at bar the record, which we have examined in detail, clearly discloses that the defendant in his examination in chief made reference to the subjects of promise of marrying and sexual intercourse with the prosecuting witness, and as before stated, while it is true he undertook to confine his answers to a particular date, yet, under the well-settled rules of law upon this subject, he cannot be permitted by such answers to confine his cross-examination to the narrow channel insisted upon in this case. The rule upon this subject was very appropriately and clearly stated in *State v. Miller*, 190 Mo. 449, 89 S. W. 377, where it was said: “When the statute says, ‘A defendant may be cross-examined as to any matter referred to in his examination in chief and may be

contradicted and impeached as any other witness in the case,' it does not mean that a defendant can take the stand and in answer to one or two well-prepared interrogatories sweep away the whole structure of the state's case and then remain immune from a cross-examination on the issue thus tendered. Cross-examination, from time immemorial, has been the great test of the credibility of any witness. The defendant under our laws need not become a witness, and when he does he enjoys an advantage over the ordinary witness in that his cross-examination must be confined to the matter with reference to which he testifies, but as to the matter to which he 'refers' in his testimony in chief, he is subject to cross-examination and impeachment just as any other witness."

In *State v. Avery*, 113 Mo. 475, 21 S. W. 193, it was very tersely and correctly stated that "cross-examination as used in the statute does not mean a mere categorical review of the matters stated by defendant."

Applying the well-recognized rule applicable to the subject of the cross-examination of a defendant, <sup>695</sup> we are of the opinion that there was no error in the cross-examination indulged in in the case at bar.

It is sufficient to say as to the other cases cited by appellant that we have examined them, and find that they have no application to the subject as disclosed by the record in the case at bar, and fall far short of supporting the contention that the cross-examination of the defendant in this case was in any manner improper or erroneous.

3. It is insisted in the brief of learned counsel for appellant that the trial court committed error in permitting witness Duckworth to testify as to the handwriting of the defendant in the letters offered by the state, purporting to be letters written by the defendant. It is sufficient to say upon that proposition that we have examined the record as applicable to the testimony of witness Duckworth, and our conclusion is that there was no reversible error in permitting him to express his opinion as to the handwriting in these letters. But aside from all this, the defendant himself, upon examination by his own counsel, admitted the writing of at least some of the letters, if not all of them, which were introduced in evidence; hence our conclusion is that there is no merit in the objection to the admission of the letters offered by the state in evidence.

4. It is next insisted that the promise or contract of marriage between the defendant and the prosecuting witness consisted of an agreement to marry in the future, that is, after the defendant had finished a course of study in some school, and that there could be no violation of the criminal statute until after a breach of the contract of marriage. In other words it seems that counsel for appellant insist that there must

not only be a promise of marriage, but that there must be a failure to comply with such promise before there can be a prosecution under the provisions of section 1844, Revised Statutes of 1899. We are unable to give our assent to this insistence. The provisions of this statute clearly had in view the protection of unmarried females of good repute under the age of twenty-one years from designing persons who might seek to seduce or debauch them under or by a promise of marriage. In other words, this statute simply says to the male, "You shall not under or by any promise of marriage accomplish the seduction or debauchery of an unmarried female of good repute under the age of twenty-one years, and if you seduce or debauch under the promise of marriage any unmarried female under twenty-one years of age you shall be deemed guilty of a felony." This statute does not contemplate that there shall be a promise or contract of marriage at a particular or definite time, and if a person seduces or debauches a female prior to the time that the contract of marriage is to be consummated, he would not be guilty of any offense. This statute simply means that the promise of marriage shall not be used as an aid in accomplishing the seduction and debauchery of females of good repute under the age of twenty-one years. If this defendant promised to marry the prosecuting witness at any time in the future, and under or by such promise of marriage he seduced or debauched her, then it makes no difference whether the time the marriage was to be consummated had expired or not—this constitutes no defense to this prosecution.

5. This brings us to the consideration of the instructions. We do not deem it necessary to reproduce the instructions as given by the court, but it is sufficient to say that we have carefully examined the instructions given on the part of the state, as well as those given for the defendant, and in our opinion they fully covered every phase of the case to which the testimony was applicable. As to the instructions requested by the defendant and refused by the court, in our opinion the action of the court in refusing such instructions was entirely proper.

Instruction No. 15 sought to have the court declare the law that if the defendant had sexual intercourse with the prosecuting witness because he promised to marry her after he got through school and because of her love for him, and the defendant in good faith made such promise and intends to carry out this agreement, then the jury must acquit the defendant. This is clearly not the law in this state, and was properly refused. The offense as defined by the statute consists in the seducing and debauching of a female of good repute under the age of twenty-one years under or by a promise of marriage, and the offense is complete when the



promise of marriage is made and under or by the promise the seduction is accomplished, and does not depend upon the expiration of the time when the marriage was to be carried into effect. What has heretofore been said as applicable to that proposition is equally applicable to instruction 15.

Instruction numbered 16 was properly refused, for the reason that it undertakes to select certain portions of the evidence, that is to say, the letters written by the defendant, and comment upon the force and effect of such testimony.

Instruction numbered 17 simply in different phraseology presented the same legal propositions as are embraced in instruction numbered 15.

Instructions numbered 18 and 19 were fully covered by the instructions given by the court.

Instruction numbered 20 directed the jury that it was essential in order to authorize a conviction of defendant that the sexual intercourse with the prosecuting witness had to be indulged on a particular date; that is, the twenty-eighth day of July, 1908. This manifestly ~~see~~ is not the law. If the defendant, under and by a promise of marriage, at any time within three years before the filing of the information seduced and debauched the prosecuting witness, an unmarried female of good repute and under the age of twenty-one years, then the jury would be authorized in finding him guilty.

6. Finally, it is insisted by counsel for appellant that the evidence developed upon the trial of this cause is insufficient to support the verdict. In other words, it is confidently asserted that the testimony fails to show that there was a seduction of the prosecuting witness within the purview of the statute upon which the information is based. Upon this proposition we are cited to *State v. Reeves*, 97 Mo. 668, 10 Am. St. Rep. 1049, 10 S. W. 841, and to numerous other cases, among which is *State v. Meals*, 184 Mo. 244, 83 S. W. 442. It is well settled by the adjudications in this state that if the illicit intercourse was permitted by the prosecuting witness as a mere barter and trade for the promise of marriage, that this is not seduction under the provisions of the statute, but that in order to constitute the offense of seduction under promise of marriage as defined by the statute, there must be the exercise of certain influences upon the affections of the female by reason of the promise of marriage, and there must be to some extent the bringing into play of certain arts and blandishments directed to her, reasonably sufficient, aided by the promise of marriage, to have her yield to his desires. We have examined carefully all the evidence as disclosed by the record—have read it in detail, and in our opinion it fully supports the conclusions reached by the jury that the de-

fendant seduced the prosecuting witness under a promise of marriage. In fact, upon reading the entire testimony we see no escape from the conclusion that the jury could not have reasonably returned any other verdict than that of guilty. The promise of marriage as testified to by the <sup>699</sup> prosecuting witness is fully corroborated, not only by the letters introduced in evidence written by the defendant, but as well by the evidence of other witnesses as to their associations with each other.

As to any conflict in the testimony of the witnesses for the state and the defendant, it is sufficient to say that it is was the province of the jury to settle such conflict. It is firmly settled in the jurisprudence of this state that the appellate court, where there is substantial testimony supporting the verdict as returned by the jury, will not disturb such finding on the ground that there may be some conflict in the testimony from which the final conclusions of the jury were reached.

We have indicated our views upon the leading and controlling propositions as disclosed by the record, which results in the conclusion that the judgment of the trial court should be affirmed, and it is so ordered.

All concur.

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*The Crime of Seduction* is discussed in the notes to *Bradshaw v. Jones*, 76 Am. St. Rep. 672; *State v. Carron*, 87 Am. Dec. 405. As to what promise of marriage will sustain a prosecution, see pages 672-678 of the note to 76 Am. St. Rep. Seduction under promise of marriage is accomplished when the prosecutrix trusted to the defendant's promise that he would never forsake her and to his promise of marriage when she yielded to his embraces to her ruin; the fact that the promise to marry existed long before the seduction can make no difference if he afterward took advantage of it to effect his purpose: *State v. Ring*, 142 N. C. 596, 115 Am. St. Rep. 759. And if a woman, engaged to marry, submits to her intended husband upon his conditional promise to marry her immediately in case he gets her "into trouble," the crime is complete: *State v. O'Hare*, 36 Wash. 516, 104 Am. St. Rep. 970.

*Seduction is Correctly Defined to be the Act of Persuading* or inducing a woman of previous chaste character to depart from the path of virtue by the use of any species of arts, persuasions or wiles, which are calculated to have, and do have, that effect, and resulting in her ultimately submitting her person to the sexual embraces of the person accused: *Greenman v. O'Riley*, 144 Mich. 534, 115 Am. St. Rep. 466.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**NEBRASKA.**

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**SHERIDAN COAL COMPANY v. C. W. HULL COMPANY.**

[87 Neb. 117, 127 N. W. 218.]

**COUNTERCLAIM—Pleading.**—Where the Sufficiency of an Answer to support a counterclaim is not questioned until after judgment, all reasonable intendments should be indulged in support of the pleading. (p. 437.)

**SALE—Acceptance.**—An Affirmative Answer to a Proposition to purchase coal, followed by a delivery of a major part of the fuel referred to, may be taken as satisfactory evidence of an acceptance of the proposition, although the answer indicates there may be a brief delay in the first delivery of the coal. (pp. 437, 438.)

**INSTRUCTIONS.**—Upon Appeal, the District Court's Instructions will be considered together, and the losing party will not be heard to complain that an instruction is not precisely and clearly stated if he did not request a proper instruction upon the subject. (p. 438.)

**APPEAL—Questions of Fact upon Conflicting Evidence** are to be decided by the jury in actions at law, and their finding will not be set aside on the ground of the want of evidence to support it unless it appears that the verdict is manifestly wrong. (p. 438.)

**WITNESSES—Leading Questions.**—Where a Witness is Called to Contradict the testimony of a former witness who has stated that certain things were said, it is within the discretion of the trial court to permit counsel to ask leading questions. (p. 439.)

**EVIDENCE.**—An Unauthorized Declaration of an Agent, made after the transaction to which it relates is completed, is not competent evidence against the principal. (pp. 439, 440.)

**EVIDENCE—Admissions of Agent.**—An Agent of a Corporation having charge and control of an inferior servant of that master may properly testify to the scope of such servant's duties, and if he is permitted to deny that servant's authority to make admissions adverse to their common employer's interests, the error, if any, will be held without prejudice where it clearly appears, independently of that denial, that no such authority was vested in the servant. (p. 440.)

**EVIDENCE—Books of Account.**—Where the Evidence Discloses that a corporation extensively engaged in trade, in the regular course of its business in purchasing merchandise, causes every order to be entered in a book and numbered before it is transmitted to the person with whom the corporation is dealing, and during litigation it becomes important to prove whether an order was written and transmitted, the court in its discretion may, in connection with other

evidence tending to prove that such an order was written and transmitted to the sendee and a proper foundation has been laid by verifying the book and entry therein, permit the corporation to introduce such an entry in evidence. (p. 440.)

**EVIDENCE—Secondary Evidence of Contents of Document.—**

Where a proper foundation has been laid, secondary evidence may be received of the contents of a document which cannot be produced. (p. 440.)

(Syllabi by the court.)

B. N. Robertson, for the appellant.

F. A. Brogan, for the appellee.

<sup>118</sup> ROOT, J. Each party to this suit is a corporation; the plaintiff is engaged in mining and shipping coal, and maintains <sup>119</sup> offices in the city of Omaha; the defendant is a wholesale and retail dealer in coal in said city. The plaintiff demands a balance due upon shipments of coal to defendant, and the latter asserts a counterclaim because, as alleged, the plaintiff failed to deliver to the defendant 1,500 tons of slack coal in 1907. The issue between the parties is whether a contract between them made about July 19, 1907, was oral and for 2,500 tons of coal, or in writing for 4,000 tons thereof. The defendant asserts that the contract is embodied in two letters, one written by the defendant to the plaintiff, and the other by the plaintiff to the defendant, as follows: "C. W. Hull Co., Omaha, Neb., July 19, 1907. Order No. 909. Above number must be shown on invoice. To Sheridan Coal Co., Omaha, Neb. Gentlemen: Please enter the following order and ship as stated below to C. W. Hull Co. at Omaha, Neb., via C. B. & Q., one hundred (100) cars each to contain 40 tons Cherokee slack coal at \$0.60 per ton f. o. b. mine. To be shipped to arrive in Omaha at the rate of two (2) cars or 80 tons per day beginning July 26. Please acknowledge receipt of this order and if you are unable to fill as specified, notify us immediately. Invoice and correspondence relating to this order must invariably bear our order number. Regardless of distinction of shipment, the invoice, bill of lading, notice and all other correspondence pertaining to this shipment must be addressed to us at Omaha, Neb. C. W. Hull Co., By M. E. Serat." "Sheridan Coal Co., Omaha, Neb., July 20, 1907. C. W. Hull Co., Omaha, Neb. Dear Sirs: Your order No. 909. Shipments will begin on this order today at the rate of 80 tons per day. Yours resp., J. H. Rogers, G. S. A."

The defendant further alleges that Rogers is the plaintiff's general sales agent, had authority to execute the contract, and that plaintiff delivered 2,507.75 tons of said coal, but refused to deliver the remaining 1,492.25 tons thereof. The defendant's manager testifies that on July 19, 1907, he caused the letter first copied in this opinion to be written, and signed

it or caused his clerk to attach the <sup>120</sup> witness' signature thereto. There is considerable evidence tending to prove the manner in which the defendant transacts its business, and to the effect that the letter was duly posted after having been addressed to the plaintiff. It is conceded that the second letter was written by the plaintiff and received by the defendant. The litigants disagree as to whether this letter referred to an alleged order given over the telephone or to the letter of July 19th. There is a mass of evidence in the record difficult to reconcile if all the witnesses are gifted with accurate memories and have testified without equivocation or mental reservation.

1. It is insisted that the defendant did not plead sufficient facts in its answer to state a cause of action against the plaintiff, and therefore the court erred in submitting the issue of defendant's damages to the jury. No such question seems to have been raised in the district court. We shall, therefore, construe the pleading liberally in favor of the defendant: *Merrill v. Equitable Farm & Stock Improvement Co.*, 49 Neb. 198, 68 N. W. 365; *Latenser v. Misner*, 56 Neb. 340, 76 N. W. 897.

The plaintiff argues that the letter of July 19th, if written and sent, contained two conditions: (1) The coal is "to be shipped to arrive in Omaha at the rate of two (2) cars or 80 tons per day, beginning July 26"; (2) the receipt of the order must be acknowledged. The plaintiff further urges that the defendant did not acknowledge receipt of the letter of July 19th, but stated that shipments would begin July 20th at the rate of 80 tons per day. It also argues that the letter of July 20th in effect rejected the conditions imposed in the offer, and converted the transaction into a conditional sale. The following is from plaintiff's brief: "If conditional, the plaintiff would not be liable for failure to fulfil the contract unless the 1,492.25 tons of coal actually arrived in Omaha.

... Whether it did so arrive or not the record is silent." We are not inclined to adopt the plaintiff's theory of the legal effect of the letters. It is true, as argued by counsel that <sup>121</sup> in the making of a contract of sale the minds of the parties must assent to the same thing and in the same sense, and that a counter proposition amounts to a rejection of a proposition theretofore made concerning the same subject matter. But what will constitute an acceptance depends frequently upon circumstances. A direct, unequivocal, written acceptance of an offer to purchase is satisfactory evidence of the fact, but, if the parties have not stipulated otherwise, the acceptance need not be in any particular form nor evidenced by express words; the delivery by the vendor of a part of the property referred to in the offer to buy may take the place of words as proof of an acceptance. In the instant

case we shall not assume that coal shipped from the plaintiff's mines via the Chicago, Burlington and Quincy Railway Company July 20th would not reach Omaha on July 26th of that year; but, if there was a delay of a day or two in delivering the initial two cars of coal, the failure to perform that condition contained in the defendant's proposition was waived when it accepted the coal. If the letter of July 20th contained a counter proposition, the plaintiff was asking for more time within which to commence delivering the coal, and if the parties by their conduct, as the jury must have found, accepted the letters as the basis for a sale, it does not lie in the plaintiff's mouth to say no contract ever existed. Upon the pleadings and the proof the court was right in instructing the jury there were but two questions for their determination: (1) Was a written contract made for 4,000 tons of coal, as claimed by the defendant; (2) the amount of the defendant's damage if the contract was made.

2. The plaintiff asserts the court erred in instruction numbered 5 in assuming that the letter of July 19th was in evidence, and in stating that the letter of July 20th is an acceptance of the former communication. We think the instructions taken together properly advised the jury. Two special findings were submitted for their consideration, and they answered that the plaintiff did receive from <sup>122</sup> the defendant the letter of July 19th, and that the letter of July 20th was written in acknowledgment thereof. Instruction 5 is not so clear as might be desired, but we do not believe, when considered with the other instructions and the special findings, it could or did mislead the jury. The plaintiff made no request for instructions, and ought not to complain that any instruction given by the court is indefinite: *Chicago, B. & Q. R. Co. v. Oyster*, 58 Neb. 1, 78 N. W. 359; *Stein v. Vannice*, 44 Neb. 132, 62 N. W. 464. The argument that the entire charge is unfair to the plaintiff has no support in the record.

3. It is argued with great plausibility that the verdict and the answers to the special interrogatories are not sustained by sufficient evidence. There are many facts and circumstances shown by the evidence tending strongly to corroborate the principal actors in the transaction, so the weight of the evidence must be determined by the credibility of the respective witnesses. This subject was for the jury, and is not for this court to deal with. If the jury believed Serat, their verdict is sustained by sufficient evidence. The assignment is not well taken: *O'Leary v. Iskey*, 12 Neb. 136, 10 N. W. 576; *Reid v. Colby*, 26 Neb. 469, 42 N. W. 485; *Freemont etc. R. Co. v. French*, 48 Neb. 638, 67 N. W. 472; *Fisher v. Chambers*, 84 Neb. 92, 120 N. W. 931.

4. Mr. Rogers, the plaintiff's sales agent, testified to a conversation over the telephone with Mr. Serat, the defendant's manager, July 19th, and stated, in substance, that Serat at that time ordered 2,500 tons of coal, and no more. In rebuttal the defendant's counsel propounded the following question, which the witness was permitted to answer over plaintiff's objections: "Mr. Serat, did you on the nineteenth day of July, 1907, call up Mr. Rogers and give him a verbal order for 2,500 tons of Cherokee slack coal?" It is argued that the question is not only leading, but calls for the witness' conclusion; that he should have stated what, if anything, he did and said, and should not have been permitted by a negative answer to give character to the transaction. Serat on cross-examination admitted <sup>123</sup> he had talked over the telephone with Rogers, but said he could not remember the date, and the plaintiff did not press its cross-examination upon this subject. Generally, leading questions should not be propounded on direct examination, nor should a nonexpert witness be asked to state his conclusion concerning the substance of the issue; but where a witness is called to contradict the testimony of a former witness who has stated that certain expressions were used during a conversation, it is not an unusual practice to ask the witness called in rebuttal whether those statements were made: Starkie on Evidence, 10th ed., \*169; Union P. R. Co. v. O'Brien, 161 U. S. 451, 16 Sup. Ct. Rep. 618, 40 L. ed. 766; Norton v. Parsons, 67 Vt. 526, 32 Pac. 481. We have not lost sight of the fact that by a negative answer to this question the witness was not only contradicting the witness Rogers, but testifying against the plaintiff's contention that the contract between the parties was oral and not written; but we think the subject was one within the discretion of the trial judge, and, while we would be as well satisfied had he sustained the objection, we do not consider he committed reversible error in overruling it.

5. Mr. Megeath, the plaintiff's president, testified, in substance, that about August 31st, during a conversation over the telephone with a Mr. Prohaska, one of the defendant's employees, Prohaska inquired whether the plaintiff intended to ship any more coal, and the witness answered in the negative and said the contract had been filled, to which Prohaska responded: "We will consider the order filled." The proof shows that Prohaska was a rate and reconsignment clerk in the defendant's employ, and had nothing to do with the purchase of coal. Subsequently, Serat was recalled, and over the plaintiff's objections was permitted to state that Prohaska had no authority to make admissions to parties from whom Hull & Company purchased coal, and it was no part of his duty to check up the filling of orders. Prohaska's conduct

in no manner induced the plaintiff to perform any act or relinquish any right; his statement was of doubtful <sup>124</sup> materiality, but, in any event, he did not have authority to make an admission involving a construction of the contract: *Gale Sulky Harrow Co. v. Laughlin*, 31 Neb. 103, 47 N. W. 638; 16 Cyc. 1008. Serat was Prohaska's superior, and could properly testify to the scope of the latter's employment and duties. Undoubtedly the court would have committed no error had it sustained the objection to the question calling for Serat's conclusion as to whether Prohaska had authority to make admissions against the defendant's interest; but it clearly appears from the facts that he had no such authority, and the error, if any, is without prejudice.

6. The defendant was permitted over the plaintiff's objections to introduce in evidence the entry upon one line of its order book. The evidence discloses that, whenever the defendant prepares an order for the purchase of coal or material, an entry is made in this book, and that orders are consecutively numbered therein at the time the entries are made. It will be observed that both the letter of July 19th, which the defendant insists was transmitted to the plaintiff, and the letter of July 20th, written by the plaintiff, contains the number "909." The entry admitted in evidence is thus numbered, and the proof shows it was made in the due course of business in the defendant's office. This entry in no manner contradicts the contents of either letter, but it was part of the *res gestae* of the transaction, and has some probative force in connection with the testimony of the witnesses and the fact that the number appears on the plaintiff's letter and on the one testified to by the defendant: *Labaree v. Klosterman*, 33 Neb. 150, 49 N. E. 1102; *Fleming v. Yost*, 137 Ind. 95, 36 N. E. 705; *Place v. Baugher*, 159 Ind. 232, 64 N. E. 852; 1 *Greenleaf on Evidence*, 16th ed., sec. 120.

7. Counsel argue that the court erred in permitting the witness Kennedy to testify that exhibit 1 is a correct copy of the defendant's order 909. A sufficient foundation was laid to show the execution of the order of which exhibit 1 is said to be a copy. There is evidence tending to prove <sup>125</sup> the order was sent to and received by the plaintiff; notice was served upon the plaintiff to produce the original order in court, and it did not do so. The plaintiff's witnesses testified that no such order was received at the office. The copy was competent evidence and properly received in evidence.

A careful consideration of the record and of the briefs of counsel convinces us that the plaintiff has no just cause to complain of the district court, and the judgment of that court is affirmed.



**ADMISSIBILITY IN EVIDENCE OF BOOKS OF ACCOUNT.\***

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**I. General Rule, Its History and Origin.**

The rule of evidence, sometimes referred to as the "shop-book rule," under which the books of account of a party supported by his supplementary oath are made admissible as evidence of goods sold and delivered or of services performed, prevails in most jurisdictions either by virtue of statutory provisions or as a result of the decisions of the court: *Alabama Con. Co. v. Wagnon*, 137 Ala. 388, 34 South. 352; *White v. Whitney*, 82 Cal. 163, 22 Pac. 1138; *Smith v. Law*, 47 Conn. 431; *Cannon v. Kinney*, 3 Harr. (Del.) 317; *Dunbar v. Wright*, 20 Fla. 446; *Blackshear v. Dekle*, 120 Ga. 766, 48 S. E. 311; *New Boston etc. Church v. Emerson*, 66 Ill. 269; *Place v. Baugher*, 159 Ind. 232,

**\*REFERENCE TO MONOGRAPHIC NOTE.**

Admissibility in evidence against third persons of books, reports and the like, other than books of account: 125 Am. St. Rep. 841.

64 N. E. 852; *Clark v. Perry*, 17 Me. 175; *Pratt v. White*, 132 Mass. 477; *In re Bresler*, 155 Mich. 567, 119 N. W. 1104; *Coleman v. Retail Lumberman's Ins. Assn.*, 77 Minn. 31, 79 N. W. 588; *Robinson v. Smith*, 111 Mo. 205, 33 Am. St. Rep. 510, 20 S. W. 29; *Sheehan v. Hennessy*, 65 N. H. 101, 18 Atl. 652; *Corkran v. Rutter*, 76 N. J. L. 375, 69 Atl. 954; *Smith v. Rentz*, 131 N. Y. 169, 30 N. E. 54, 15 L. R. A. 138; *Kugler v. Wiseman*, 20 Ohio, 361; *In re Gillingham*, 220 Pa. 353, 69 Atl. 809; *Curren v. Crawford*, 4 Serg. & R. 3; *Cargill v. Atwood*, 18 R. I. 303, 27 Atl. 214; *Seaboard Air Line Ry. v. Earle*, 86 S. C. 91, 67 S. E. 1069; *Burleson v. Goodman*, 32 Tex. 229; *Bouldin v. Atlantic Ricemills Co.* (Tex. Civ. App.), 86 S. W. 795; *Taplin v. Marcy*, 81 Vt. 428, 71 Atl. 72; *Cascade Lumber Co. v. Aetna Indemnity Co.*, 56 Wash. 503, 106 Pac. 158; *Betts v. Stevens*, 6 Wis. 490; *Reyburn v. Queen City etc. Trust Co.*, 171 Fed. 609.

The rule has, however, been repudiated in a few of the states: *Calder v. Creditors*, 47 La. Ann. 1538, 18 South. 520; *Owings v. Low*, 5 Gill & J. 134; *Gill v. Staylor*, 93 Md. 453, 49 Atl. 650; and was not approved of in some of the earlier decisions in Alabama and Florida: *Godbold v. Blair*, 27 Ala. 592; *Higgs v. Shehee*, 4 Fla. 382. And it has been reluctantly followed in other cases. Thus, in *Larue v. Rowland*, 7 Barb. 107, the court said: "Books of account are received in evidence, only upon the presumption that no other proof exists. They are justly regarded as the weakest and most suspicious kind of evidence. The admission of them at all is a violation of one of the first principles of the law of evidence, which is, that a party shall not himself make evidence in his own favor. The practice of admitting such evidence is, I believe, universally adopted. It is said that it has its origin in a kind of 'moral necessity,' and that such is the general course of business that no proof could be furnished of the frequent small transactions between men, without resorting to the entries which they themselves have made, in the form of accounts. The practice can only be justified upon the ground that, without such evidence, there would, in many cases, be a total failure of proof. It may be added that it has been often doubted, by those, too, who have had the best opportunities for observing the facilities for frauds, which this loose species of evidence affords, and the abuses which, in inferior courts, have been perpetrated under it, whether it would not have been more wise to have excluded such evidence altogether. At the very best, it is but presumptive evidence, and that, too, of the lowest grade. It should always be received with extreme caution, and be subjected to the strictest scrutiny. The common law did reject it altogether. In countries where the civil law prevails, books of account are generally received in evidence, in connection with the oath of the party. But to make them evidence at all, the books must have been kept in a manner so cautious as, in a great degree, to furnish a guaranty against abuse. In many, perhaps most, of the United States, what is called the suppletory oath of the party is required. In this state that practice has not obtained; and I agree with Justice Cowen, that 'frail as such proofs must be, the law can hardly be censured for thinking they would be but little fortified by the suppletory oath of an interested and excited party': See *Sickles v. Mather*, 20 Wend. 72, 32 Am. Dec. 521; *Cowen & Hill's Notes*, 682.

"Notwithstanding what I have said, I admit the necessity which receives this species of evidence. In a country like ours, where the

artisan and the tradesman are compelled, by the usages which have obtained, to give credits to their customers, and yet in very many instances, cannot afford to keep clerks, the customary entries, made in the usual course of business, must, to prevent greater injustice, and when free from all suspicion of dishonesty and unfairness, be received as evidence of the transactions to which they relate. All I claim is, that the true character of the evidence should be appreciated."

Some confusion has existed in respect to the admissibility of books of account in evidence because of the attitude of the early English cases on the subject which the courts attempted to reconcile with the established custom of merchants and the people trading with them to conduct their mercantile transactions, upon the theory that the maintenance of some accurate system of bookkeeping was essential to the proper conduct of a mercantile business.

The origin of the shop-book rule as it is generally understood and administered in this country was, it seems, borrowed not from the English law, but from the law of Holland. Thus, in *Conklin v. Stamler*, 17 How. Pr. 399, the court said: "The practice of allowing the party's books of accounts to be received as sufficient evidence of the existence of the debt, which was contrary to the English rule (3 Blackstone's Commentaries, 368; *Marriage v. Lawrence*, 3 Barn. & Ald. 142, 106 Eng. Reprint, 615), came into use in this state and in New Jersey with the early Dutch colonists, in whose courts merchants and traders were always allowed to exhibit their books of accounts, where it was acknowledged or proved that there had been a dealing between the parties, provided the books had been regularly kept with the proper distinction of persons, things, year, month and day. Full faith and credit were then given to them, especially where they were strengthened by the oath of the party, or where the creditor was dead. (See account of the Dutch tribunals of New York in Introduction to 1 E. D. Smith's Report.) . . . And the practice, long established in the eastern states, of receiving such books as evidence is presumed to have been introduced by the English colonists from Holland, who settled New England: Per Brainard, J., in *Beach agt. Mills*, 5 Conn. 496.

"In the Dutch colonial courts, the parties appeared before the court and made their statement, and if they differed as to a fact which the court thought material, either party might be put to his oath, so that the objection made to this species of evidence was, in these tribunals, of less force, as the party who made the entries could be interrogated in respect to the truth or correctness of each item. In New England they very wisely retained the feature of the supplementary oath of the party substantiating the truth of the entries in connection with the practice of allowing such books as evidence; and where the matter is not regulated by statute, as in Maine and Rhode Island, long usage has established that the books of account must be supported by the oath of the party."

The necessity for some business rule of the character in question was recognized by the courts in the early history of the country, and its announcement was merely a declaration of a custom and usage of which the courts could very properly take notice of as a thing of universal practice. Such was substantially the view taken by the court in *Butler v. Cornwall Iron Co.*, 22 Conn. 335, wherein Mr. Chief Justice Church said: "In this state, from its earliest judicial history,

in actions on book, for the recovery of the price of articles usually sold on credit, and charged by merchants, laborers and farmers on their account-books, these books have not only been admitted on the trial, but, only in excepted cases, have been required, as furnishing the principal and most satisfactory evidence, and this, not merely in aid of the recollection of the party or his clerk: *Sw. Ev.* 81; *Palmer v. Green*, 6 Conn. 14; *Beach v. Mills*, 5 Conn. 493. There is a necessity for this, and it has been felt by every business community, as is proved by the laws and usages of various commercial states and nations by which the books of merchants and others are, to a greater or less extent, relied upon by business men and courts of justice. Bookkeeping, even, has become a matter of study and science, growing out of this necessity and these usages. It is not within the power of memory to recollect the delivery of every article, sold and charged on book, in the usual course of dealings, and it is not expected, either by the vendor or the purchaser; and the very fact that the customer of the merchant receives a credit upon his books, by way of a known account current, furnishes evidence that he consents that these books shall be used, as a sort of record proof of the sale and delivery of the property charged upon them—a part of the *res gestae* of the delivery; the credibility of which depends upon the appearance of the entries, the manner and usages of the bookkeeping, and the general correctness of charges, as proved by corroborative evidence, as was very convincingly done, in this case."

As has been indicated in the decisions reviewed above, the rule allowing books of account to be admitted in evidence is based upon the necessity to prevent a failure of justice in cases where there was but little probability that anybody could be found outside of the immediate parties to the transaction who could give testimony in respect to transactions which, taken singly, were of no great pecuniary importance, but which, taken in the aggregate, were likely to be of sufficient importance to become the subject of litigation: *Alling v. Brazee*, 27 Ill. App. 595; *Silver v. Worcester*, 72 Me. 322; *Pratt v. White*, 132 Mass. 477; *Smith v. Rentz*, 131 N. Y. 169, 30 N. E. 54, 15 L. R. A. 138; *Loneragan v. Whitehead*, 10 Watts, 249; *Missouri Pac. R. Co. v. Johnson* (Tex.), 7 S. W. 838.

## II. Effect of Statutes Permitting Litigants to Testify.

Although in some of the decisions the courts would seem to indicate that the fact that under the common law the parties to an action were not allowed to testify was one of the reasons for allowing the books of account to be introduced in evidence, nevertheless the removal of that disqualification by the statute permitting the litigants to testify does not have the effect of depriving them of the right to introduce their books of account in evidence: *Reviers v. Powell*, 61 Ga. 30, 34 Am. Rep. 94; *Robinson v. Smith*, 111 Mo. 205, 33 Am. St. Rep. 510, 20 S. W. 29; *Swain v. Cheney*, 41 N. H. 232; *Tomlinson v. Borst*, 30 Barb. 42; *Smith v. Smith*, 163 N. Y. 168, 57 N. E. 300, 52 L. R. A. 545. To a contrary effect, *Henderson v. Morris*, 5 Or. 24. But in several cases it has been said that such books are not admissible where the transaction from its nature admits of more satisfactory evidence, and that the courts should take great care not to enlarge the rule under which such books are admitted: *Kerns v. McKean*, 76 Cal. 87, 18 Pac. 122; *Carr v. Sellers*, 100 Pac. 169, 45

Am. Rep. 370. And in Michigan it has been held that the statute permitting litigants to testify does away with the rule requiring testimony of witnesses, not parties, that they have settled by the books of account and found them correct, as a condition precedent to admitting the books in evidence: *In re Bresler's Estate*, 155 Mich. 567, 119 N. W. 1104.

### III. Effect of Statutory Provisions Relative to the Admissibility.

It would, of course, be impractical in an article of this character to note the many variations in the rule of admissibility of books of account caused by the variant statutes of different states. Perhaps the greatest change effected by the modern statutes affecting this subject is in respect to extending the range of admissibility, regardless of whether the party seeking to introduce the books in evidence is a merchant or not: *Dunbar v. Wright*, 20 Fla. 446; *Coleman v. Retail Lumberman's Ins. Assn.*, 77 Minn. 81, 79 N. W. 538. So, also, under the statutes in some states the party offering the books in evidence is allowed to prove his own books, whether kept by himself or a clerk: *House v. Beak*, 141 Ill. 290, 33 Am. St. Rep. 307, 30 N. E. 1065; *Perry State Bank v. Elledge*, 99 Ill. App. 307. Ordinarily, however, such statutes are merely supplementary to the general rule relative to the subject: *McKenzie v. King* (N. M.), 93 Pac. 703. They do not abrogate the common-law rule relating to the subject, but simply enlarge it: *Perry State Bank v. Elledge*, 99 Ill. App. 307.

### IV. Whether Admissibility of Books of Account Precludes Oral Testimony.

The fact that books of account may be introduced will not preclude oral evidence as to the transactions recited in them, since the books are not the only competent evidence: *Godbold v. Blair*, 27 Ala. 592; *Bush v. Fourcher*, 3 Ga. App. 43, 59 S. E. 459; *Christman v. Pearson*, 100 Iowa, 634, 69 N. W. 1055; *Town of Concord v. Concord Bank*, 16 N. H. 26.

### V. General Requisites to Admissibility.

a. *In General*.—One of the requisites required, at least by the older decisions, was that the books be supported by the suppletory oath of the party in order to be admissible in evidence: *Kirby v. Watt*, 19 Ill. 393; *In re Shingle etc. Co.*, 118 La. 242, 42 South. 789; *Dwinel v. Pottle*, 31 Me. 167; *Missouri etc. R. Co. v. Davis*, 24 Okl. 677, 104 Pac. 34; *Seaboard etc. Ry. v. Earle*, 86 S. C. 91, 67 S. E. 1069; *Forsee v. Matlock*, 7 Heisk. (Tenn.) 421; *Townsend v. Coleman*, 18 Tex. 418, 20 Tex. 817; *Reyburn v. Queen City etc. Trust Co.*, 171 Fed. 609. But the necessity for the suppletory oath was obviated under certain circumstances by proof of the handwriting of the person who kept the books: *Leighton v. Manson*, 14 Me. 208; *Odell v. Culbert*, 9 Watts & S. 66, 42 Am. Rep. 317. This exception to the rule requiring a suppletory oath is applied in cases where the books of account of a deceased person are offered in evidence: *Pratt v. White*, 132 Mass. 477; *Sheehan v. Hennessey*, 65 N. H. 101, 18 Atl. 652. Likewise where the person who made the entries has since become insane: *Holbrook v. Gay*, 6 Cush. (Mass.) 215.

The books must also be identified as the account-books of the party whose books they pretend to be: *Smith v. Smith*, 163 N. Y. 168, 57 N. E. 300, 52 L. R. A. 545.

In some of the earlier decisions it was stated that in order to render the books admissible it must be shown that the party had no clerk: *Jackson v. Evans*, 8 Mich. 476; *Tomlinson v. Borst*, 30 Barb. 42. But the mere fact that the party had a clerk was held immaterial, where it was shown that the entries were, as a matter of fact, made by the party himself and not the clerk: *Dunlap v. Hooper*, 66 Ga. 211; *Wheeler v. Smith*, 18 Wis. 651. But in perhaps the majority of jurisdictions the party is allowed, under statutory provisions, to introduce the books in evidence upon proper proof of their correctness, regardless of whether they are kept by himself or by a clerk: *House v. Beak*, 141 Ill. 290, 33 Am. St. Rep. 307, 30 N. E. 1065; *Webb v. Michener*, 32 Minn. 48, 19 N. W. 82.

**b. Business or Occupation to Which the Books must Relate.**—The rule of admissibility generally applies to every business or occupation in which the keeping of books of account are necessary in order to keep a record of the items or transactions which form the basis for the charge. Thus it is applied to tradesmen or mechanics: *Tomlinson v. Borst*, 30 Barb. 42; *Petrie v. Lynch*, 1 Nott. & McC. (S. C.) 130; *Burleson v. Goodman*, 32 Tex. 229; to merchants: *Bass v. Gobert*, 113 Ga. 262, 38 S. E. 834; *Foster v. Sinkler*, 1 Bay (S. C.) 40; to printers: *Thomas v. Dyott*, 1 Nott. & McC. (S. C.) 186; to the keepers of saw and grist mills: *Exum v. Davis*, 10 Rich. (S. C.) 357; *Gordan v. Arnold*, 1 McCord (S. C.), 517; to physicians: *Weaver v. Morgan*, 49 Ala. 142; *Simmons v. Means*, 8 Smedes & M. (Miss.) 397; *Clarke v. Smith*, 46 Barb. 30; *McBride v. Watts*, 1 McCord (S. C.), 384; and also to attorneys: *Waterhouse v. Fogg*, 38 Me. 425; *Rexford v. Comstock*, 3 N. Y. Supp. 876; *Charlton v. Lawry*, 1 N. C. 30, 1 Mart. 26; though not where the book is a mere pocket docket in which the attorney entered the name and the case in which he acted as counsel: *Briggs v. Town of Georgia*, 15 Vt. 61.

The rule of admissibility has, however, been refused in a few of the very early cases in respect to the books of account of a farmer or planter: *Jeter v. Martin*, 2 Brev. 156; also to those of a journeyman shoemaker: *Schall v. Eisner*, 58 Ga. 190; and also to those of a peddler: *Thayer v. Deen*, 2 Hill (S. C.), 677.

But under the modern statutes relative to the subject there are very few occupations or lines of business, the books of account of which are not admissible when a proper foundation for their introduction has been laid.

**c. Necessity to Show Delivery of Goods or Performance of Services.**—In many of the older cases it was required of the party seeking to introduce his books of account that he prove the delivery of the goods charged or the actual performance of the services charged: *Godfrey v. Codman*, 32 Me. 162; *Adkinson v. Simmons*, 33 N. C. 416; *Thomson v. Porter*, 4 Strob. Eq. 58, 53 Am. Dec. 653; *Neville v. Northcutt*, 7 Cold. 294; *Baldrige v. Penland*, 68 Tex. 441, 4 S. W. 565. Although in some jurisdictions it was held sufficient to show merely the delivery of some of the goods charged or the performance of merely part of the services charged: *Ingersoll v. Banister*, 41 Ill. 388; *Conklin v. Stamler*, 17 How. Pr. 399; *Vosburgh v. Thayer*, 12 Johns. 461.

**d. Necessity for Charges to be Contemporaneous With Transactions.**—One of the requirements in order to render books of account admissible is that the entries in such books appear to have been made

at or near the time of the transaction to which they relate. It is difficult to lay down any rule as to just how soon after the transaction the entries should be made, other than to say that they should be made within a reasonable time thereafter. What is such reasonable time depends upon the nature of the occupation or business and the general manner in which the parties conduct it: *Lane v. May* etc. *Hardware Co.*, 121 Ala. 296, 25 South. 809; *Murray v. Dickens*, 149 Ala. 240, 42 South. 1031; *Watrous v. Cunningham*, 71 Cal. 30, 11 Pac. 811; *Mahoney v. Hartford etc. Corp.*, 82 Conn. 280, 73 Atl. 766; *Hooker v. Johnson*, 6 Fla. 730; *Petit v. Teal*, 57 Ga. 145; *Farner v. Turner*, 1 Iowa, 53; *Dwinel v. Pottle*, 31 Me. 167; *Davis v. Sanford*, 9 Allen, 216; *Cogswell v. Dolliver*, 2 Mass. 217, 3 Am. Dec. 45; *Bader v. Schult*, 118 Mo. App. 22, 94 S. W. 834; *Cummings v. Nichols*, 13 N. H. 420, 38 Am. Dec. 501; *Bay v. Cook*, 22 N. J. L. 343; *Griesheimer v. Tanenbaum*, 124 N. Y. 650, 26 N. E. 957; *Drumm-Flato Com. Co. v. Edmisson*, 17 Okl. 344, 87 Pac. 311; *Walter v. Bollman*, 3 Watts, 544; *Curran v. Crawford*, 4 Serg. & R. 3; *Toomer v. Gadsden*, 4 Strob. 193; *Baldrige v. Penland*, 68 Tex. 441, 4 S. W. 565; *Bouldin v. Atlantic Ricemills Co. (Tex. Civ. App.)*, 86 S. W. 795; *Rowan v. Chenoweth*, 49 W. Va. 287, 87 Am. St. Rep. 796, 38 S. E. 544; *Kamm v. Rees*, 177 Fed. 14.

Where entries are made in the books whenever reported as paid or received, it is a substantial compliance with the rule that they should be made at the time of the transaction: *Lemma v. Blanding*, 139 Wis. 156, 120 N. W. 842.

The reason for requiring the entries to be made at or near the time of the transaction is for the purpose of raising a presumption that they were honestly and fairly kept: *Lewis v. England*, 14 Wyo. 128, 82 Pac. 869, 2 L. R. A., N. S., 401.

Entries made on the day after the transaction have been held made contemporaneously with the transaction: *Ingraham v. Bockins*, 9 Serg. & R. 285, 11 Am. Dec. 730; so, also, if made on the second day after the transaction: *Hartley v. Brookes*, 6 Whart. 189; and even when made three days after the transaction: *Landis v. Turner*, 14 Cal. 573; *Bay v. Cook*, 22 N. J. L. 343. And in one case a delay of a month in making the entries was held insufficient to render the book inadmissible: *Bedlich v. Bauerlee*, 98 Ill. 134, 38 Am. Rep. 87. Although in another case a delay of two weeks was held fatal to admissibility: *Kessler v. McConachy*, 1 Rawle, 435; and in another case a delay of five days was held too long after the transaction to render the books admissible: *Forsythe v. Norcross*, 5 Watts (Pa.), 432, 30 Am. Dec. 334; so, also, where the entries are made several months after the transaction, the book is not admissible: *Wells v. Hobson*, 91 Mo. App. 379.

While the entries must be made at or near the time of the transaction, yet no precise time is fixed by law when they should be made, and it will be deemed sufficient if they be made within a reasonable time. In this respect every case must be made to depend upon its own peculiar circumstances, having regard to the situation of the parties, the kind of business, the mode of conducting it, and the time and manner of making the entries: *Murray v. Dickens*, 149 Ala. 240, 42 South. 1031. In the case just cited the court remarked: "It must be admitted that the cases are in some confusion on this subject, but from an examination of them the above seems to be a reasonable deduction. There are a number of cases where loose mem-

oranda were first made, and then afterward transferred to a permanent book, and the general trend of decisions is that the loose memoranda are not the entry, but mere help to the party to remember, and the entry in the permanent book is the original entry, so that it seems the rule would be the same, whether there were any memorandum or not. In those cases it is held that, in order to admit the entries in the book, it is necessary, not only that the party who made the entry shall swear that the entry was made in accordance with the memoranda, but also that the party who made the memoranda should testify to the correctness of the memorandum when he made it. This testimony we have in the case now under consideration. It is also held in a number of them that unless some reason is shown why the entry was not made in a day or two, either from the nature of the business or otherwise, the entry will not be deemed to be contemporaneous within the meaning of the law; but the cases recognize that circumstances may be such as to justify the delay in making the entry for as long a time as a week: *Redlich v. Bauerlee*, 98 Ill. 134, 38 Am. Rep. 87; *Kent v. Garvin*, 67 Mass. 148; *Vicary v. Moore*, 2 Watts (Pa.), 451, 27 Am. Dec. 323; *Forsythe v. Norcross*, 5 Watts (Pa.), 432, 30 Am. Dec. 334. As stated in the *Redlich* case: 'It suffices if it be within a reasonable time, so that it may appear to have taken place while the memory of the fact was recent, or the source from which knowledge of it was derived is unimpaired.' So, considering the nature of the business in this case, the fact that the boat made weekly trips and there was no opportunity to make the entries until the report came in at the end of the week, that the contract itself provided for weekly reports, and that the service was such as could be easily remembered for that period, we hold that the entries were made within a reasonable time, and admissible."

On the other hand, the entry should not be made in the book of account before the sale is completed: *Laird v. Campbell*, 100 Pa. 159; although the entry will not be deemed prematurely made if made at the time of delivering the goods to a carrier to be transported: *Klein v. Rush*, 5 Watts & S. (Pa.) 377.

**e. Necessity for the Correctness of the Books to be Established.—**Under the general rule relative to this subject, it is necessary to show by those who have dealt and settled with the party from his books of account that he keeps fair and honest books of account: *Cheever v. Brown*, 30 Ga. 904; *Patrick v. Jack*, 82 Ill. 81; *Mott v. Ingalsbe*, 136 App. Div. 140, 120 N. Y. Supp. 151; *Smith v. Smith*, 163 N. Y. 168, 57 N. E. 300, 52 L. R. A. 545. Under this rule the person so testifying to the honesty and fairness of the books of account must be able to identify the books of account under which his settlements were made: *Bower v. Smith*, 8 Ga. 74; *Jackson v. Evans*, 8 Mich. 476; *McGoldrick v. Traphagen*, 88 N. Y. 334.

Under the later decisions the correctness of the entries in books of account may be proved by the person who made them, or by anyone who is able of his own knowledge to testify to their correctness: *Johnson Coal Co. v. Forcade*, 136 Ill. App. 21; *In re Receivership of Dugdamonia Shingle etc. Co.*, 118 La. 242, 42 South. 789; *Countryman v. Bunker*, 101 Mich. 218, 59 N. W. 422; *Missouri etc. Ry. Co. v. Davis*, 24 Okl. 677, 104 Pac. 34; *Jones v. De Muth*, 137 Wis. 120, 118 N. W. 542; *Taplin v. Marcy*, 81 Vt. 428, 71 Atl. 72.



The general rule in this respect is that the entries in the book should be proved by the clerk or servant who made them, if he is alive and can be produced: *Powell v. State*, 84 Ala. 444, 4 South. 719; *St. Louis etc. Ry. Co. v. White etc. Machine Co.*, 78 Ark. 1, 93 S. W. 58, 8 Ann. Cas. 208; *Kerns v. McKean*, 76 Cal. 87, 18 Pac. 122; *Farrington v. Tucker*, 6 Colo. 557; *Union Bank v. Call*, 5 Fla. 409; *Bracken v. Dillon*, 64 Ga. 243, 37 Am. Rep. 70; *Barnes v. Simmons*, 27 Ill. 512, 81 Am. Dec. 248; *Ford v. St. Louis etc. R. Co.*, 54 Iowa, 723, 7 N. W. 126; *Hastie v. Burrage*, 69 Kan. 560, 77 Pac. 268; *Owings v. Low*, 5 Gill & J. 134; *Browning v. Flanagan*, 22 N. J. L. 567; *Ocean Nat. Bank v. Carll*, 55 N. Y. 440; *Sloan v. McDowell*, 75 N. C. 29; *Arnold v. Penn*, 11 Tex. Civ. 325, 32 S. W. 353; *Burnham v. Adams*, 5 Vt. 313; *Courtney v. Commonwealth*, 5 Rand. (Va.) 666; *Vinal v. Gilman*, 21 W. Va. 301, 45 Am. Rep. 562; *Marsh v. Case*, 30 Wis. 531; *Chaffee v. United States*, 18 Wall. 516, 21 L. ed. 908; *Rayburn v. Queen City etc. Trust Co.*, 171 Fed. 609.

The practice followed in this respect is shown in the opinion of the court in *Atchison etc. Ry. Co. v. Williams*, 38 Tex. Civ. 405, 86 S. W. 38, the court saying: "The bookkeeper in the commission house at the point of destination selling appellee's cattle was permitted to testify to the prices and weights of the cattle as shown by his books, and he attached to his deposition a copy of the account sales, showing such weights and prices. The prices at which the cattle were sold appear to have been established by the testimony of the salesman in exact accord with the price as shown in the account sales, but objection is made to the account sales because the weights of the cattle were not established by the person who actually weighed them. The facts, however, show that in making sales the custom was for the weigher to indorse the weights of the cattle weighed upon slips of paper, which were, during the regular course of business, delivered to the bookkeeper, and such weights were then entered upon the books. The bookkeeper testified that his books were correctly kept, and that the weights and prices shown in the account sales were correct, as shown by his books. It was further shown that the person who did the actual weighing could not be found, he being no longer in the employ of the commission house selling the cattle. We feel no hesitation in saying that the account sales was admissible. It is common knowledge that in the cattle markets of the country great numbers of cattle are constantly and daily sold, and it could certainly not be expected that those who weigh them would be prepared to testify as to the separate weights of the cattle weighed by them. The slips upon which these weights were indorsed at the time are evidently not intended to be for preservation; and when, as shown here to have been the case, they are made at the time, and presented in regular course of the business to the person whose duty it is to enter such weights upon a book for preservation in an enduring form, we do not think such slips constitute the best evidence. At least, neither the slips, nor the person who did the actual weighing, is essential in the establishment of the weights. The weights and prices, as preserved by the clerk or officer making the official entries, are accepted by the parties at the time as correct, and are acted upon by them in the settlement of the transaction."

What is sufficient proof of the verity of books of account is a question which must be left almost entirely to the discretion of the trial court: *Seaboard Air Line Ry. v. Earle*, 86 S. C. 91, 67 S. E. 1069. Their correctness may be shown by the fact that the opposite party had on several occasions through its agents inspected the books, and had accepted annual statements of receipts and disbursements made up from the books: *McGrath v. Stein*, 148 Ala. 370, 42 South. 454.

In the case of *Murray v. Dickens*, 149 Ala. 240, 42 South. 1031, the court said: "While it is true that the expression is found in the authorities that the person making the entry must have knowledge of the correctness of the item, yet it will be found that in those cases there was no proof by anyone else of the correctness of the item, and it would seem, in reason, that if one party testifies that he knew of the correctness of the item and gave it correctly to the other, and the other testifies that he entered it as it was given to him, that that would amount to the same thing as if the party who made the entry should swear that he knew of the correctness of the item. So it is laid down that 'entries made by a party from data furnished, or memoranda kept by an employee to assist his memory in making a report or return will be admissible, if supplemented by the oath of the party and the testimony of the servant making the memoranda or furnishing the information': 17 Cyc. 386; *Miller v. Shay*, 145 Mass. 162, 1 Am. St. Rep. 449, 13 N. E. 468; *Smith v. Law*, 47 Conn. 431; *Harwood v. Mulry*, 8 Gray (Mass.), 250; *Barker v. Haskell*, 9 Cush. (Mass.) 218; *Morris v. Briggs*, 3 Cush. (Mass.) 342; *Smith v. Sanford*, 12 Pick. (Mass.) 139, 22 Am. Dec. 415; *Hoover v. Gehr*, 62 Pa. 136; *Post v. Kenerson*, 72 Vt. 341, 82 Am. St. Rep. 948, 47 Atl. 1072, 52 L. R. A. 578, note; *Curtis v. Bradley*, 65 Conn. 99, 48 Am. St. Rep. 177, 31 Atl. 591, 28 L. R. A. 143; *Bay v. Cook*, 22 N. J. L. 343, 355. The book in this case was not subject to this objection."

The fact that books of account contain some errors will not, in the absence of evidence that they have been fraudulently falsified, render them inadmissible: *Levine v. Lancashire Ins. Co.*, 66 Minn. 138, 68 N. W. 855.

**f. Necessity for the Charge to Relate to the Business or Occupation of the Party.**—The general rule is that the entries in the books of account should relate to the business or occupation of the person whose books they are, and not to transactions of such person having no relation to his regular business or occupation: *Avery v. Avery*, 49 Ala. 193; *Petit v. Teal*, 57 Ga. 145; *Galbraith v. Starks*, 117 Ky. 915, 79 S. W. 1191; *Horine v. New York Life Ins. Co.*, 27 Ky. Law Rep. 893, 87 S. W. 274; *Stuckslager v. Neel*, 123 Pa. 53, 16 Atl. 94; *Fulton's Estate*, 178 Pa. 78, 35 Atl. 880, 35 L. R. A. 133; *Charlestown Institution v. Farmers' etc. Bank*, 73 S. C. 545, 54 S. E. 216; *Baldridge v. Penland*, 68 Tex. 441, 4 S. W. 565.

In *Rogers v. O'Barr* (Tex. Civ. App.), 81 S. W. 750, the admissibility of account-books was attacked upon the ground that certain items by way of charges for coupon-books were not such items as came within the rule admitting entries made in books of original entry, because it was claimed that a coupon-book is of no value and constitutes no indebtedness until the coupons are exchanged for goods, wares or merchandise, it being but an agreement to extend credit. The court, however, allowed the books in evidence, saying: "We do

not agree with appellant's contention. A coupon-book being a book which, in the usual course of a merchant's business, is sold to a customer, and by which he is entitled to goods of the value of the amount of such coupon-book, the same would constitute such an indebtedness between the merchant and such customer as would be proper to be charged upon the books of such merchant, the same as the price of the same goods, the amount called for in the coupon-book being the price of the goods delivered to him when the book is delivered up to the merchant."

But the admissibility of the book in respect to proper items will not be lost because of the fact that the book contains some entries not connected with the regular business of the party: *Yick Wo. v. Underhill*, 5 Cal. App. 519, 90 Pac. 967.

**g. Necessity for Entries to be Original Ones Made in Regular Course of Business.**

**1. Entries Made in Regular Course of Business.**—One of the general requirements for the admissibility of books of accounts, and the one which we regard as one of the most essential requirements, is that the entries in such books be made in the regular course of the business, under such circumstances as to import trustworthiness. The entries should be made in the ordinary course of business and as a part of the party's system of keeping his accounts: *Armstrong v. Landers*, 1 Penne. (Del.) 449, 42 Atl. 617; *Kibbe v. Bancroft*, 77 Ill. 18; *Farner v. Turner*, 1 Iowa, 53; *Gibson v. Seney*, 138 Iowa, 383, 116 N. W. 325; *Riley v. Boehm*, 167 Mass. 183, 45 N. E. 84; *Martin v. Nichols*, 54 Mo. App. 594; *Cummings v. Nichols*, 13 N. H. 420, 38 Am. Dec. 501; *Roberts v. Rice*, 69 N. H. 472, 45 Atl. 237; *Corkran v. Taylor*, 77 N. J. L. 195, 71 Atl. 124; *Eberhardt v. Schuster*, 10 Abb. N. C. (N. Y.) 374; *Walter v. Bollman*, 8 Watts, 544; *Toomer v. Gadsden*, 4 Strob. (S. C.) 193; *Cascade Lumber Co. v. Aetna Indemnity Co.*, 56 Wash. 503, 106 Pac. 158; *United States v. Greene*, 146 Fed. 793.

In *Culver v. Marks*, 122 Ind. 554, 17 Am. St. Rep. 377, 23 N. E. 1086, 7 L. R. A. 489, the court very pertinently observed: "In 1 Wharton on Evidence, third edition, section 238, it is said: 'An accountant or other business agent may be regarded as a member of a well-adjusted business machine, noting in the proper time and in a proper way what it is his duty to note. If he has no personal motive to swerve him, the inference is that what he does in this way he does accurately; and his evidence, if there be nothing to impeach it, rises in authority precisely to the extent to which he is to be regarded as a mechanical and self-forgetting register of the events of which his accounts are offered to prove. Hence it is that the memoranda or book entries of an officer, agent, or business man, when in the course of his duties, become evidence after his decease, or after he has passed out of the range of process, or become incompetent to testify to the truth of such entries; subject, however, to be excluded, if it appear that in making the entries he was not registering, but manufacturing, current facts.'

"The rule as stated by Greenleaf and Wharton, is well supported by authorities: *Sickles v. Mather*, 20 Wend. 72, 32 Am. Dec. 521. In the case of *Faxon v. Hollis*, 13 Mass. 427, the book of the blacksmith, kept in ledger form, the items being first noted down on a

slate and then entered in the book, was held to be competent evidence: *Reynolds v. Manning*, 15 Md. 510; *Kelsea v. Fletcher*, 48 N. H. 282; *Coolidge v. Bingham*, 5 Met. 68; *New Haven Co. v. Goodwin*, 42 Conn. 230. In *Alter v. Berghaus*, 8 Watts, 77, it is held that the absence of a witness from the state, so far as it affects the admissibility of secondary evidence, has the same effect as his death. This is in relation to the admission in evidence of original entries in books made by such absent person. We think the evidence is clearly admissible, but we might add that, as regards the books kept by bookkeepers and officers of national banks, by section 5209, Revised Statutes of the United States, it is made a penal offense to make a false entry in any such books; so that these entries were not only made as original entries in the due course of business, but the persons making them were liable to criminal prosecution, and, upon conviction, to suffer imprisonment, if they made a false entry."

Thus it will be seen that the fact that the entries are made by clerks in the regular routine of their employment, and under the natural impulse of an employee to perform his duties accurately, is a safeguard toward the accuracy of the entry. And under the systems of bookkeeping in modern business houses the mechanical precision with which the numerous employees record the various transactions without any personal motive to misrepresent the facts of the transaction makes the modern book of accounts the very highest form of evidence in respect to such transactions which are the proper subject matter for a book of account.

Inasmuch as the regularity of making entries in the book is one of the essential requirements of using the book in evidence, it is held that a book which contains an entry of but a single transaction is not admissible as a book of accounts: *Ingersoll v. Banister*, 41 Ill. 388; *Metzger v. Burnett*, 5 Kan. App. 374, 48 Pac. 599; *Ryan v. Dunphy*, 4 Mont. 356, 47 Am. Rep. 355, 5 Pac. 324. So, also, where the first entries in a book of accounts, which extended from 1874 to 1881, had the same appearance of freshness and legibility as the last ones, though all were written in pencil, it is proper to reject the book as evidence: *Dunbar v. Wright*, 20 Fla. 446.

In *Diamant v. Colloty*, 66 N. J. L. 295, 49 Atl. 445, 808, the court held that a book of accounts made up in the usual course of business from reports of work done and material used, made in the course of a system employed in carrying on the business, was admissible, the court saying: "The day-book was competent evidence. The entries therein appear to have been made within a reasonable time after it was ascertained that the proper charges were against the defendant. The work in question was carried on at a long distance from the plaintiff's store and place where his books and bookkeeper were, and the items of materials and labor might not be ascertained so as to be capable of proper entry in any book as a charge to the customer until some time after the job was completed. The entries in this book appear to have been made in the usual course of business, according to the system and method adopted by the plaintiff. The entries were made in the day-book from information derived largely from these slips or reports, and, the book being competent evidence, the slips, as the source of information, together with the ledger, which was a condensation of the day-book, all forming together part of a system of carrying on business, all became competent testimony

when all were admitted in evidence. We find no error in the admission of the slips and day-book."

So, also, books of account made up in the usual course of business in part from written reports by employees of the amount of time and materials consumed on certain work on blanks called time sheets, are competent, with or without the reports, to prove claims for the work and materials: *Corkran v. Rutter*, 76 N. J. L. 375, 69 Atl. 954. The court, in giving the reasons for so holding said: "We think it clear that, if no slips at all had been used, these books would be entirely competent under a system of workmen reporting orally to the bookkeeper the number of hours consumed and materials used. Business could not go on unless the employer could rely on the statements of employees in such matters; and every book account in a business of any magnitude is necessarily made up in large measure of entries based on reports of employees. The system of making such reports in writing has the manifest advantages among many of keeping a check on the workmen, avoiding disputes between them and the employer by making a permanent record of the work, and facilitating the work of the office clerks. But we fail to see that the adoption of such a system requires the production and offer of the slips as imparting any competency to the books or limiting their availability as evidence. No doubt, the existence of slips to support part of a book account and the absence of any to support the rest of it, all entries being under one system, might tend to impeach the value of the book account as evidence, but this goes to weight, not to competency."

2. *Original Entries.*—In addition to the requirement that the entries in the book of account be made in the regular course of business, it is equally essential that they constitute the party's original entries or first permanent records of the transactions in question, in order to be admissible in evidence: *Stone v. San Francisco Brick Co.*, 13 Cal. App. 203, 109 Pac. 103; *Hooker v. Johnson*, 6 Fla. 730; *McDavid v. Ellis*, 78 Ill. App. 381; *Hancock v. Hintrager*, 60 Iowa, 374, 14 N. W. 725; *Frick v. Kabaker*, 116 Iowa, 494, 90 N. W. 498; *Lawhorn v. Carter*, 11 Bush, 7; *Witherell v. Swan*, 32 Me. 247; *Hoogewerff v. Flack*, 101 Md. 371, 61 Atl. 184; *Gould v. Hartley*, 187 Mass. 561, 73 N. E. 656; *Anchor Milling Co. v. Walsh*, 108 Mo. 277, 32 Am. St. Rep. 600, 18 S. W. 904; *Avery v. Tucker*, 137 Mo. App. 423, 118 S. W. 672; *Pollard v. Turner*, 22 Neb. 366, 35 N. W. 192; *Winne v. Hills*, 91 Hun, 89, 36 N. Y. Supp. 683; *Breinig v. Meitzler*, 23 Pa. 156; *Flato v. Brod*, 37 Tex. 734; *Bouldin v. Atlantic Bicemills Co.* (Tex. Civ. App.), 86 S. W. 795; *Drumm-Flato Commission Co. v. Edmisson*, 208 U. S. 534, 28 Sup. Ct. Rep. 367, 52 L. ed. 606.

In the earlier decisions considerable strictness was exercised by the courts in applying the above rule to the books of accounts used by merchants and others, whose books came within the rule. But the former strict notions of what constituted original entries has been gradually modified so as to fit the growing necessities of new business conditions. Inasmuch as under the modern methods of conducting large and extensive business houses the information relative to the transactions constituting the book accounts must pass through various hands before being permanently recorded, some system of providing temporary memoranda preparatory to the permanent records is necessary in order to insure accuracy. It would be imprac-

licable to preserve for any great length of time the tags, slips or other tokens constituting such original memoranda, and impossible, in view of the ever-changing army of employees, to obtain the testimony of the person who made the temporary memoranda or conducted the transaction. Hence, following the rule of necessity which originated the admissibility of books of account in evidence, the courts do not regard such temporary memoranda as the original entries, but look to the permanent records as such original entries when properly verified by a suppletory oath: *Landis v. Turnip*, 14 Cal. 573; *Smith v. Law*, 47 Conn. 431; *Remington Mach. Co. v. Wilmington Candy Co.*, 6 Penne. (Del.) 288, 66 Atl. 465; *Grady v. Thigpin*, 6 Fla. 668; *Taylor v. Tucker*, 1 Ga. 231; *Redlich v. Bauerlee*, 98 Ill. 134, 38 Am. Rep. 87; *Place v. Baugher*, 159 Ind. 232, 64 N. E. 852; *State v. Stephenson*, 69 Kan. 405, 105 Am. St. Rep. 171, 76 Pac. 905, 2 Ann. Cas. 841; *Hall v. Glidden*, 39 Me. 445; *Smith v. Sandford*, 12 Pick. 139, 22 Am. Dec. 415; *Miller v. Shay*, 145 Mass. 162, 1 Am. St. Rep. 449, 13 N. E. 468; *Jackson v. Evans*, 8 Mich. 476; *Afflick v. Streeter*, 136 Mo. App. 712, 119 S. W. 28; *State v. Shinborn*, 46 N. H. 497, 88 Am. Dec. 224; *Corkran v. Taylor*, 77 N. J. L. 195, 71 Atl. 124; *McGoldrick v. Traphagen*, 88 N. Y. 334; *Ingraham v. Brockins*, 9 Serg. & R. 285, 11 Am. Dec. 730; *Seaboard etc. R. Co. v. Earle*, 86 S. C. 91, 67 S. E. 1069; *Barclay v. Deyerle* (Tex. Civ.), 116 S. W. 123.

It is, of course, necessary that a proper foundation for the introduction of such books of accounts should be laid in order that their verity may be established, but when this is done by the most complete and satisfactory evidence, which, from the nature of the business, can be obtained, then the reason which permits the best evidence to be given should be held applicable to such books of accounts, when properly authenticated, as to any other class of evidence. In applying this rule to modern systems of bookkeeping in large business houses, the courts bear in mind the ancient but valuable maxim that: "Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself."

In *Seaboard Air Line Ry. v. Earle*, 86 S. C. 91, 67 S. E. 1069, the court said: "We agree fully with the referee that it would be a practical denial of justice to require the plaintiff to produce all the way-bills, tickets, reports, and other innumerable memoranda made by its multitude of employees. The entries made of the aggregations of these on the plaintiff's books of original entry, kept in good faith for the purpose of showing the course of its business and its profits and losses, are admissible as evidence of such transactions: 2 Wigmore on Evidence, sec. 1230; *Boston & W. R. Co. v. Dana*, 1 Gray (Mass.), 83; *Louisville Bridge Co. v. Louisville etc. R. Co.*, 116 Ky. 258, 75 S. W. 285. The defendant is, of course, not to be precluded from calling for any particular documents in the possession of the plaintiff which in the opinion of the referee tend to elucidate the accounts or books of the plaintiff, or bear on any of the questions at issue."

The fact that slips or memoranda were made out by persons delivering and receiving material on behalf of persons engaged in the business of building contractors, and that such slips were used by the bookkeeper in making the original entries in the books, does not take away the character of the books as books of original entry: *Cascade Lumber Co. v. Aetna Indemnity Co.*, 56 Wash. 503, 106 Pac. 158.

"Mere temporary memorandum-books used by the salesmen, and transferred nightly from penciled entries of theirs to the permanent ink book of the daily sales, are not the books of original entries so as to exclude such permanent book, but the latter is the book contemplated by the statute": *Bracken v. Dillon*, 64 Ga. 250, 37 Am. Rep. 70.

But the fact that a book containing original entries also contains some entries which are not original will not affect its admissibility in respect to transactions concerning which it contains original entries: *Armstrong v. Landers*, 1 Penne. (Del.) 449, 42 Atl. 617; *Chisholm v. Beaman Mach. Co.*, 160 Ill. 101, 43 N. E. 796; *Wallenweber v. Ketterlinus*, 17 Pa. 389. The court in *Ives v. Niles*, 5 Watts (Pa.), 323, in allowing such a book in evidence, said: "The objection made to this is, that the book, although it contained original entries, yet it also contained entries admitted not to be original, but transcribed from something else. These latter entries, however, were not offered to be read in evidence, nor were they admitted. We think the objection quite too nice and refined. If it were to prevail it would destroy the practical use of the rule in regard to the admission of such evidence; because, if no entries were permitted to be given in evidence to a jury, but such as shall be established at least by the oath of the party, to have been made in a book containing nothing but original entries, the most of such evidence would be excluded; for, I apprehend, there are but few such books. It might as well be insisted on that no entries should be admitted in evidence unless they appeared to be made in a book where every entry throughout the whole book would be admissible against the party thereby charged, upon the oath of the party making the charge, provided it were in his handwriting. Now, if this were to be allowed, it might lead to a preliminary examination of every man's account contained in the book, in order to ascertain first, before it could be admitted to be used in evidence to the jury, whether all the entries contained in it were original or not. The inconvenience and delay that would necessarily attend the application of such a test are a sufficient answer to the ground of the exception here; and it is certainly every day's practice to admit original entries made in a book containing transcribed entries, as was the case in this instance, to be read in evidence to the jury. Besides, if it be the book in which the party has been accustomed to make all his original entries for the time being, it does not destroy or change the character of the book as a book of original entries, and render it less worthy of credit, that he has occasionally made other entries in it; nor is any good reason perceived why it should, for it is only those entries proved by oath to be original that are rendered admissible; and the circumstance of his admitting that there are certain entries among the rest made against the same person, which are not original, and which he designates, would rather seem to add to his credibility and that of his book than to detract from either. We therefore think the objection to the admission of the book in evidence has not been sustained."

### 3. What Books of Account are Books of Original Entry.

**A. Immateriality of Form or Name.**—No particular form of keeping accounts is prescribed by law in order to render them admissible in evidence. Their admissibility is to be determined from their appearance and character, the employment and education of the one

who kept them, the manner in which other similar accounts were entered in the book, and the general circumstances of the case. The same degree of formality and regularity is not expected of the books of account of a person of limited education as of those of an expert bookkeeper: *Bush v. Foucher*, 3 Ga. App. 43, 59 S. E. 459; *Holden v. Spier*, 65 Kan. 412, 70 Pac. 348; *Cather v. Damerell*, 5 Neb. (Unof.) 490, 99 N. W. 35; *Lewis v. England*, 14 Wyo. 128, 82 Pac. 869, 2 L. R. A., N. S., 401. In the case last cited the court said: "The law prescribes no regular mode or method in which accounts must be kept in order to make them competent as evidence. The question of competency must be determined by the appearance and character of the book; regard being had to the degree of education of the party, the nature of his business, the manner of his charges against other people, and all other surrounding circumstances. The material, form, and construction of the book offered in evidence as the book of original entries are unimportant, provided such books be capable of perpetuating a record of events, and the entries are made in conformity with the general rules governing the admissibility of such entries. Thus a notched stick, a shingle, or scrap of paper have been received as books': 9 Am. & Eng. Ency. of Law, 2d ed., p. 917, and cases cited. Certain essential requirements, however, must be observed in order to justify the reception of books of account as evidence. It must appear that they were the regular methods of keeping accounts adopted by the party, containing the regular entries of his transactions in the usual course of business, and made so near the time of transaction as to establish the presumption that they were fairly and honestly made."

The general rule as to the form in which the books of account should be kept was also well stated by Mr. Chief Justice Parker in *Cummings v. Nichols*, 13 N. H. 420, 38 Am. Dec. 501. He said: "There is no particular form in which the book of a party must be kept, in order to its admission as evidence, in support of his account. But it must be kept in such a mode as to show, of itself, a charge against the adverse party, and the nature of that charge, so that the book, in connection with the party's oath that the book is his original book of entries, that the charges are in his handwriting, that they were made at the time they purport to have been made, and at or near the times of delivery of the articles, or the performances of the services, will show the nature of the claim, without further evidence from the party to interpret the meaning of arbitrary characters, the signification of which is known only to himself. It may be in such characters as are in use by persons of a particular trade or profession, and which would not be readily understood by persons not conversant with the subject matter; and in such case, evidence of other persons may be admitted to explain the meaning usually attached to characters of that description. But in ordinary cases, the suppletory evidence of the party, in support of his book, goes no further than to the particulars above specified."

The fact that a book of account is made up in the usual course of business from slips, reports or memoranda furnished by the employees who conducted the transactions does not detract from its character as a book of original entry, where it is the first permanent record of the transactions entered in it: *Murray v. Dickens*, 149 Ala. 240, 42 South. 1031; *Landis v. Turner*, 14 Cal. 573; *Mahoney v. Hartford etc. Corp.*, 82 Conn. 280, 73 Atl. 766; *Remington Mach. Co. v.*



Wilmington Candy Co., 6 Penne. (Del.) 288, 66 Atl. 465; Wright v. Charbonneau, 122 Ill. App. 52; Jay County Commrs. v. Brewington, 74 Ind. 7; Hall v. Glidden, 39 Me. 445; Pettey v. Benoit, 193 Mass. 233, 79 N. E. 245; Meyer v. Brown, 130 Mich. 449, 90 N. W. 285; Levine v. Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855; Drumm-Flato Com. Co. v. Gerlach Bank, 107 Mo. App. 426, 81 S. W. 503; State v. Shinborn, 46 N. H. 497, 88 Am. Dec. 224; Diamant v. Collopy, 66 N. J. L. 295, 49 Atl. 445, 808; Bloomington Min. Co. v. Brooklyn etc. Ice Co., 58 App. Div. 66, 68 N. Y. Supp. 699, affirmed in 171 N. Y. 673, 64 N. E. 1118; Atchison etc. Ry. Co. v. Williams, 38 Tex. Civ. 405, 86 S. W. 38; Cascade Lumber Co. v. Aetna Indemnity Co., 56 Wash. 503, 106 Pac. 158.

Some of the earlier cases, however, did not regard a book of accounts, made up from memoranda or information derived from an employee, as a book entitled to be admitted in evidence: Thomas v. Price, 30 Md. 483; Rumsey v. New York etc. Tel. Co., 49 N. J. L. 322, 8 Atl. 290; Venning v. Hacker, 2 Hill (S. C.), 584; Kessler v. McConachy, 1 Rawle, 435.

The reports or information upon which the permanent books of account are based should be such as are made in the regular course of the business, and of that nature which import verity by reason of being made in the performance of a duty. Thus accounts for the lighting of a theater, made up from newspaper reports of when the theater was used, are not sufficient: Union Electric Co. v. Seattle Theater Co., 18 Wash. 213, 51 Pac. 367. In the case just cited the court said: "These books purport to show the number of nightly performances during each month, the entries themselves being made at the end of the month from data collected from different sources, viz., from an examination from columns of a daily newspaper, which it was assumed reported correctly the number of performances at the theater, and also from the statements of respondents, collectors, etc. It further appears that from month to month bills, made from the books, purporting to show the number of performances occurring during the preceding month, were presented at the box office and otherwise; and the books were offered and received as admissions of correctness of such charges. We think the books were entirely incompetent, and that the objection to their introduction should have been sustained. The entries were not contemporaneous to the facts to which they pertained, were no part of the *res gestae*, and did not relate to matters within the personal knowledge of the party making them, but they were made at remote periods, and from sources of information that were not authentic."

**B. Status of Ledgers, Day-books, Journals, Cash and Other Business Records.**—That a book of account is kept in ledger form is not a valid objection to its admissibility as a book of original entry: Bush v. Fourcher, 3 Ga. App. 43, 59 S. E. 459; Becker v. Donaldson, 133 Ga. 864, 67 S. E. 92. If entries in a book of account are made at or near the various times purporting to have been detailed therein, such entries are original entries, even though made in a ledger instead of a day-book, for the law does not prescribe the mode of recording items of debt and credit or require that any particular system of bookkeeping shall be followed: State v. Stephenson, 69 Kan. 405, 105 Am. St. Rep. 171, 76 Pac. 905, 2 Ann. Cas. 841; Richardson v. Benes, 115 Ill. App. 532; Wells v. Hatch, 43 N. H. 246; Farley v. Gibbs, 51 Hun, 643, 4 N. Y. Supp. 353; Raski v. Wise (Or.), 107 Pac. 984;

Rehrer v. Zeigler, 3 Watts & S. 258; Gifford v. Thomas' Estate, 62 Vt. 34, 19 Atl. 1088; Lewis v. England, 14 Wyo. 128, 82 Pac. 869, 2 L. R. A., N. S., 401.

But where a book kept in ledger form contains merely transfers from a blotter or day-book, and the entries made therein are not such as can be classed as original entries, it is not admissible as a book of account: First Nat. Bank v. Chaffin, 118 Ala. 246, 24 South. 80; Armour Packing Co. v. Vietch-Young Produce Co. (Ala.), 39 South. 680; San Francisco Teaming Co. v. Gray, 11 Cal. App. 314, 104 Pac. 999; Jones v. Henshall, 3 Colo. App. 448, 34 Pac. 254; Bell Tel. Co. v. Geary, 143 Ill. App. 311; Fitzgerald v. McCarty, 55 Iowa, 702, 8 N. W. 646; Way v. Cross, 95 Iowa, 258, 63 N. W. 691; Estes v. Jackson, 21 Ky. Law Rep. 859, 53 S. W. 271; Hoogewerff v. Flack, 101 Md. 371, 61 Atl. 184; Durkheimer v. Heilner, 24 Or. 270, 33 Pac. 401, 34 Pac. 475; In re Huston's Estate, 167 Pa. 217, 31 Atl. 553; Holloway v. White-Dunham Shoe Co., 151 Fed. 216, 80 C. C. A. 568, 10 L. R. A., N. S., 704.

Where it appears from a day-book that the entries therein have been transferred to a ledger, the latter book should be produced in connection with the day-book: Prince v. Swett, 2 Mass. 569; Bonnell v. Mawha, 37 N. J. L. 198. Where charges are made on slips of paper and the same day transferred to a day-book, the day-book becomes a book of original entries: Plummer v. Struby-Estabrooke Mercantile Co., 23 Colo. 190, 47 Pac. 294.

Account-books called journals which were made by transcribing the data from the stubs of checks retained in the check-books after the checks had been detached, several days after the issuance of the checks, are not admissible. Such a case is distinguishable from one where entries have been made daily and in the usual course of business from loose memoranda made from slips of paper or upon slates kept for temporary purposes only: Woolsey v. Bohn, 41 Minn. 235, 42 N. W. 1022. Likewise where the entries in a journal do not purport to be copies of original slips or memoranda, but merely the results of several computations by the bookkeeper from figures afforded by scale bills and receipts which appear to be still in existence, they are not admissible: Putnam v. Grant, 101 Me. 240, 63 Atl. 816.

Cash-books in which the entries were made at the time of the transactions evidenced by them are admissible in evidence: Woolsey v. Bohn, 41 Minn. 235, 42 N. W. 1022. In the case cited the court said: "They were original entries. The statute upon the subject relates to 'books of account kept for that purpose,' and containing 'the original entries of charges for moneys paid,' etc., but it does not prescribe the form in which they shall be kept, nor the degree of definiteness to be observed in making entries. The statute, recognizing the universal and necessary custom of preserving in permanent form a memorial of business transactions which could not ordinarily be retained in the mind has been so framed as to have a very general application. The account-book of an illiterate laborer, as well as those of the tradesman or banker, are admissible in evidence, if within the statutory conditions, the purpose of which was to secure authenticity and credibility in respect to the evidence, rather than to prescribe the form of it. Whatever be its form, it is only evidence prima facie of what is shown by it. Suppletory proof may often be required to make such evidence relevant to a particular case. The fact that the entries of payments in these books were not in

the form of charges against Woolsey, showing upon their face that he was debited with such sums, did not render the books inadmissible."

A blank check-book from which checks when filled are removed, with a memorandum entered on the margin or stub remaining in the book of the name of the payee, amount, date and purpose of issuing the check, is not a book which is admissible as a book of account: *Carter v. Fischer*, 127 Ala. 52, 28 South. 376; *Simons v. Steele*, 82 App. Div. 202, 81 N. Y. Supp. 737, affirmed in 177 N. Y. 542, 69 N. E. 1131; *Wilson v. Goodin*, *Wright (Ohio)*, 219; *Watts v. Shewell*, 31 Ohio St. 331. But such a book has been allowed in evidence to show payment through a check: *Fulkerson v. Long*, 63 Mo. App. 268.

Collection and note registers are not ordinarily regarded as books of account within the rule of admissibility: *Labaree v. Klosterman*, 33 Neb. 150, 49 N. W. 1102; *Martin v. Scott*, 12 Neb. 42, 10 N. W. 532; *Baines v. Coos Bay etc. Nav. Co.*, 49 Or. 192, 89 Pac. 371. But a note discount register has been allowed in evidence, upon testimony by the bookkeeper that he had the note before him when he made the entry, and that the entry was made in the usual course of business and in the discharge of his duty: *Wallabout Bank v. Peyton*, 123 App. Div. 727, 108 N. Y. Supp. 42.

In *San Francisco Teaming Co. v. Gray*, 11 Cal. App. 314, 104 Pac. 999, the court refused to admit in evidence entries in a work book in which it appeared that the entries were based solely on a memorandum of oral statements of teamsters to the bookkeeper, who had no personal knowledge of the work done by the teamsters or of the facts entered in the books. The teamsters were not called as witnesses.

And in another case on an issue as to the number of men that plaintiff had hauled from a certain place to defendant's camp, plaintiff's book in which he had entered the names of the men sent out by him up to a certain date was allowed in evidence upon his testimony that it was correctly kept, but it was not allowed to prove the number of men hauled after that date, because after that time he had copied the names in the book from the waybills showing who was hauled: *Idol v. San Francisco Const. Co.*, 1 Cal. App. 92, 81 Pac. 665.

Diaries and small memorandum-books do not generally belong to the class of books which are admissible as books of original entry: *Hart v. Livingston*, 29 Iowa, 217; *Costello v. Crowell*, 139 Mass. 588, 2 N. E. 698; *Fish v. Adams*, 37 Mich. 598; *Richardson v. Emery*, 23 N. H. 220; *In re Diggins' Estate*, 68 Vt. 198, 34 Atl. 696.

#### **h. Effect of Books Being Mutilated or Incomplete.**

1. **Necessity for Books to Contain Complete Accounts.**—Irregularities in account-books sufficient to justify their exclusion must be gross and palpable: *Bush v. Fourcher*, 3 Ga. App. 43, 59 S. E. 459. Books of account must, however, appear to embrace all of the items of account between the parties which are proper subjects of entry: *Countryman v. Bunker*, 101 Mich. 218, 59 N. W. 422; *Dugan v. Longstaff*, 52 Misc. Rep. 288, 102 N. Y. Supp. 1120.

The account-book must be introduced in evidence in its entirety: *Mulloy v. Mulloy*, 131 Mo. App. 654, 111 S. W. 843. Loose leaves or sheets or unconnected scraps of paper containing entries of the account cannot, ordinarily, be introduced in evidence: *Donaldson v. Donaldson*, 237 Ill. 318, 86 N. E. 604; *Carter v. Catchings (Miss.)*, 48 South. 515; *Jones v. Jones*, 21 N. H. 219; *Lindenthal v. Hatch*, 61

N. J. L. 29, 39 Atl. 662; Thomson v. McKelvey, 13 Serg. & R. 126; Queen City etc. Trust Co. v. Reyburn, 163 Fed. 597. Yet in several instances separate sheets of paper containing accounts have been admitted in evidence: Taylor v. Tucker, 1 Ga. 231. The fly-leaf of a Bible containing only one account was held a sufficient book of account under a Missouri statute: Stephan v. Metger, 95 Mo. App. 609, 69 S. W. 625.

Where the books of a new partnership are contained in the books of an old partnership, but separately, and all the partners have access to the books, they are admissible in evidence in an action between the partners to prove partnership accounts: Clark v. Gridley, 49 Cal. 105. If a book of account is the only one that a person keeps, the fact that it also contains memoranda in reference to other matters will not destroy its admissibility: Handy v. Smith, 77 Conn. 165, 58 Atl. 694. A book of account containing charges in several successive years and all against one person, without any intervening charge, is not sufficient to go to the jury: Swing v. Sparks, 7 N. J. L. 59. But the fact that some parol testimony is necessary in order to fully explain an account will not make it insufficient to be put in evidence: McMillan v. Insurance Co. of North America, 78 S. C. 433, 58 S. E. 1020, 1135.

**2. Manner of Entering the Charge.**—The charges in the book must be specific and particular. The lumping of charges renders the book inadmissible: Williams v. Abercrombie, Dud. (Ga.) 252; Earle v. Sawyer, 6 Cush. 142; Carr v. Sellers, 100 Pa. 169, 45 Am. Rep. 370; McKnight v. Newell, 207 Pa. 562, 57 Atl. 39; Cargill v. Atwood, 18 R. I. 303, 27 Atl. 214; Lance v. McKenzie, 2 Bail. (S. C.) 449; Petrie v. Lynch, 1 Nott. & McC. (S. C.) 130.

In Putnam v. Grant, 101 Me. 240, 63 Atl. 816, the court, in discussing the necessity to itemize the charges in the books of account, said: "These entries do not purport to itemize the transactions to which they relate, but in connection with them an express reference is made 'to Invoice-book, pages 367 and 368.' The bookkeeper also testified that the 'scale bills and receipts' were the sources from which he obtained the items constituting the 'lumped sums' credited in the journal. The situation is clearly distinguishable from the common instance where the entries have been copied into a journal from a slate or slips of paper or other temporary records which have been obliterated or destroyed. In such a case the journal may be admitted as original evidence: Hall v. Glidden, 39 Me. 445, and cases cited. 'The first regular and collected record is the original one, and it is immaterial that it was made up from casual or scattered memoranda preceding it: 2 Wigmore on Evidence, sec. 1558. In the case at bar the entries in the journal do not purport to be copies of original slips or memoranda; they simply claim to record the results of the several computations made by the bookkeeper from figures afforded by the 'scale bills and receipts.' Furthermore, so far as appears, the original papers are still in existence. In contending for the admissibility of the journal as a book of original credits, it was conceded at the trial, as shown by the report of the evidence, that the items from which the 'lumped credits' in the journal were made up could be 'worked out by taking time enough, taking all the original scale bills and notes.'

"In Rumsey v. New York etc. Tel. Co., 49 N. J. L. 322, 8 Atl. 290, the action was to recover for the rent and services of a telephone.

It appears that the number of each service was entered at the time upon a slip, and these slips were sent to the main office, where the gross number of calls for each month was entered in a book, and after the lapse of three months the slips were destroyed. It was held that as the entries introduced were only footings of each month's detailed statement contained in the original memoranda sent to the office, the books had no claim to originality, and however useful they might be to refresh the memory of the bookkeeper, they were not admissible as independent evidence. It will be noticed that the facts were strikingly analogous to those at bar, and although it affirmatively appeared that the slips had been destroyed, the books were excluded. Indeed, the general rule is too familiar and well settled to require the citation of authorities, that when the entries do not itemize the transactions recorded, but in fact comprise the details of several transactions, the book is not admissible as independent evidence: 2 Ency. of Ev. 618; *Earle v. Sawyer*, 6 Cush. (Mass.) 142; *Henshaw v. Davis*, 5 Cush. (Mass.) 145; *Cargill v. Atwood*, 18 B. L. 303, 27 Atl. 214; *Nichols v. Haynes*, 78 Pa. 174; *Corr v. Sellers*, 100 Pa. 169, 45 Am. Rep. 370."

And in laying down the rule against the lumping of charges, the court, in *Morrow v. Missouri Pac. Ry. Co.*, 140 Mo. App. 200, 123 S. W. 1034, observed: "In a milling establishment of the size of the plaintiffs, of twenty years' standing, with a capacity of from one hundred and seventy-five to two hundred barrels of flour per day, with a large payroll, in which the plaintiffs were partners, and in which there would usually be a settlement of the accounts of the partnership at stated intervals, it is a matter of common knowledge that such a business, under modern methods and conditions, could not be carried on successfully without a set of books in charge of a bookkeeper. Such books would contain record entries of the business, an itemized account of the amount of the gross receipts, and the amount of expenditures and the capital invested. Yet in this case no such books were produced in evidence, but the evidence of profits rests wholly upon a statement of a lump sum by one of the plaintiffs in the case. The existence of such a set of books, showing the condition of their milling business from time to time, is presumed, and that they are in possession of the plaintiffs. It is the presumption of law that the usual and ordinary course of business has been pursued in a business transaction: *Ivy v. Yancey*, 129 Mo. 501, 31 S. W. 937; *Long v. Joplin Mining & Smelting Co.*, 68 Mo. 431. Such books would have been competent evidence in behalf of the plaintiffs. The 'American rule,' or 'shop-book rule,' is that account-books of original entries, fair on their face and shown to be kept in the usual course of business, are competent evidence: *Robinson v. Smith*, 111 Mo. 205, 33 Am. St. Rep. 510, 20 S. W. 29; *Anchor Milling Co. v. Walsh*, 108 Mo. 277, 32 Am. St. Rep. 600, 18 S. W. 904. These books, as usually kept, would contain entries which no memory could accurately preserve, and would show the very essential facts upon which the plaintiffs could recover, if at all, for the loss of profits in their business."

It has, however, been held that it is sufficient if the date of the month be affixed to the charge, even though the exact day be not, if it is regular in other respects: *Cummings v. Nichols*, 13 N. H. 420, 38 Am. Dec. 501. In another case entries in a pocket memorandum-book which were not dated, and nothing appearing in the

book which would show when they were made, was rejected as not a shop book of account kept in the usual course of business on which entries of sales were made in their order: *Little v. Berry* (Ky.), 113 S. W. 902. Though, on the other hand, it was held in an early case in Georgia that the fact that an account fails to show the date of the transaction is not fatal to its admissibility, inasmuch as the date may be established by other evidence: *Doster v. Brown*, 25 Ga. 24, 71 Am. Dec. 153. The fact that the dates of the entries are not all in chronological order and the appearance of the ink would indicate that the entries were made simultaneously will not render the books inadmissible where there is a showing by the keeper of the books that the items not in order were dates of credit. The want of chronological order would, however, go to the weight which should attach to the entries: *Moore v. Morris*, 1 Penne. (Del.) 412, 41 Atl. 889.

The fact that a book of account is kept in Chinese characters is no objection to its admissibility: *Yick Wo v. Underhill*, 5 Cal. App. 519, 90 Pac. 967. That a small book in which the plaintiff, who was unable to write, entered by marks the number of loads of sand delivered to defendant, does not affect its admissibility, where the book was supported by his suppletory oath and was not otherwise objectionable: *Miller v. Shay*, 145 Mass. 162, 1 Am. St. Rep. 449, 13 N. E. 468.

In an action by real estate brokers for commissions, where the question at issue is whether they had authority to sell at the price named, an entry in their books of the price agreed upon, made by them in the presence of defendant and at the time of their conversation with him, is admissible, though written in cipher: *Monroe v. Snow*, 131 Ill. 126, 23 N. E. 401. And the fact that well-known abbreviations are used in making the charges is no objection to their admissibility: *Bay v. Cook*, 22 N. J. L. 343.

It is essential to the admission of books of account in evidence that the charges should be in such a state that they may be presumed to be the minutes of the daily business of the party: *Prince v. Smith*, 4 Mass. 455. These general requirements were well shown in the case of *Labaree v. Klosterman*, 33 Neb. 150, 49 N. W. 1102, the court saying: "The material inquiry, therefore, is, were these books admissible in evidence under section 346 of the Civil Code? It provides that 'books of account, containing charges by one party against the other, made in the ordinary course of business, are receivable in evidence only under the following circumstances, subject to all just exceptions as to their credibility: First. The books must show a continuous dealing with persons generally, on several items of charges at different times against the other party, in the same book. Second. It must be shown, by the party's oath, or otherwise, that they are his books of original entries. Third. It must be shown in like manner that the charges were made at or near the time of the transaction therein entered, unless satisfactory reasons appear for not making such proof. Fourth. The charges must also be verified by the party or the clerk who made the entries, to the effect that they believe them just and true, or a sufficient reason must be given why the verification is not made.' Neither of the books contains charges against the plaintiff, Mr. Lewis, nor anyone else. Each page contains several columns, and numerous lines across the page. There is a heading at the top of each column to explain the entries therein.

The heading is as follows: 'No., payer's name, P. O. address, kind of claim, date of instrument, amount, interest from, due when, from whom received, their number, original payee's name, when received, to whom we remit, P. O. address.' The purpose of making the entries in these books, or 'Registers,' as they are called, was to keep track of collections received by the firm, and loans made by it. Neither of the books received in evidence is a 'book of account,' within the meaning of the section quoted above. The same question was decided adversely to the defendants in error in *Martin v. Scott*, 12 Neb. 42, 10 N. W. 532. The defendant offered in evidence the note register or bills receivable of the decedent's bank, which was admitted over the objection of the plaintiff. The court, in the opinion, say: 'The note register, or collection register, or, as it is called in this case, the "book of bills receivable," kept by a bank or banker is not a "book of account," in the sense in which that term is used, either in the statute or at common law, as they do not contain "charges by one party against the other made in the ordinary course of business." And in no case are account-books evidence of any transactions even between the parties other than goods, wares, or merchandise, sold or delivered, and work, labor, or services performed.'"

It is no objection to a book of original entries that the entries therein are written in lead pencil: *Gibson v. Bailey*, 54 Mass. 537; *True v. Bryant*, 32 N. H. 241; *Hill v. Scott*, 12 Pa. 168.

A book of account showing no mutual course of dealing between the parties and containing but a single entry, or charge of money lent, is not admissible in evidence: *Carman v. Dunham*, 11 N. J. L. 189. The memorandum-books of a peddler in which he made his entries for the most part in pencil, and carried about in his pocket, is not admissible as a merchant's book of account: *Thayer v. Deen*, 2 Hill (S. C.), 677. A memorandum-book in which all the charges against the defendant were entered in one leaf, with no intervening charges, is admissible in evidence on the suppletory oath of the party: *Gibson v. Bailey*, 54 Mass. 537. But an old book, laid aside as a book of accounts, and used only for one entry of a late transaction, is not admissible in evidence in respect to the latter transaction: *Kibbe v. Bancroft*, 77 Ill. 18. The fact that a book is kept in a tabular form does not militate against its admissibility in evidence: *Mathes v. Robinson*, 49 Mass. 269, 41 Am. Rep. 505.

**3. Mutilations and Alterations.**—Where books of account bear on their face suspicious alterations or erasures, they should not be admitted in evidence, unless the suspicious circumstances are satisfactorily explained as in the case of other documents: *Caldwell v. McDermit*, 17 Cal. 464; *Doster v. Brown*, 25 Ga. 24, 71 Am. Dec. 153; *Cogswell v. Dolliver*, 2 Mass. 217, 3 Am. Dec. 45; *Pratt v. White*, 132 Mass. 477; *Campbell v. Holland*, 22 Neb. 587, 35 N. W. 871; *Churchman v. Smith*, 6 Whart. 146, 36 Am. Dec. 211; *McNulty's Appeal*, 135 Pa. 210, 19 Atl. 936; *Baldrige v. Penland*, 68 Tex. 441, 4 S. W. 565; *Bartlett v. Morgan*, 4 Wash. 723, 31 Pac. 22. But where the interlineations are in respect to a matter which is not material, it will not militate against the admissibility of the books: *Martin v. Victor etc. Mining Co.*, 18 Nev. 303, 3 Pac. 488.

Books of account in which some of the leaves have been cut or torn out are not competent evidence to prove an account: *Lovelock v. Gregg*, 14 Colo. 53, 23 Pac. 86; *Harrold v. Smith*, 107 Ga. 849, 33

S. E. 640; *Hartwell v. Bice*, 67 Mass. 587; *Robinson v. Hoyt*, 39 Mich. 405; *State v. Grant*, 74 Mo. 33; *Hough v. Doyle*, 4 Rawle (Pa.), 291; *Johnson v. Fry*, 88 Va. 695, 12 S. E. 973, 14 S. E. 183; though such books have been allowed in evidence, leaving the question of their credibility with the jury: *Jones v. De Kay*, 3 N. J. L. 955; *McCluskey v. Falke*, 4 Rob. (27 N. Y. Super. Ct.) 87.

But the fact that a book is merely shop-worn and the covers and some outside leaves lost, there being nothing to indicate any fraud or purpose of destroying any of the entries, is not sufficient to exclude it as evidence of those entries shown by it: *Weigle v. Brantigam*, 74 Ill. App. 285. In the case just cited, the court said: "The objection to their admission in this case was based upon the fact that said books were in a dilapidated condition. They had originally only paper covers, and the entries were mostly made in pencil. They had become shop-worn, had been used and handled in several lawsuits, and the outside covers and some outside pages had been lost, and a few interior leaves were gone. The threads binding the leaves together had in some cases become loosened, and plaintiff's daughter testified she had fastened some leaves together with pins in the exact position where they belonged in the book. Plaintiff produced his ledgers posted from said books, so that defendant might have the advantage of all credits, if any there were, upon the lost leaves. There was nothing to indicate there had been any fraud or any purpose to destroy entries, but only the natural results of hard usage upon books which were originally cheaply made. The reason for sustaining the objection seems to have been the possibility that there were credits to defendant upon said missing leaves, of which their loss would deprive her.

"We are of opinion that the possible loss of credits to defendant under the circumstances stated was not a sufficient reason for rejecting the entries so testified to by plaintiff; that any objection based upon such possibility of the existence of credits on said leaves was sufficiently overcome by the production of the ledgers for the benefit of the defendant, and that plaintiff was not bound to preserve her credits upon his day-book. If any charges against defendant were upon said missing leaves, it is plaintiff, not defendant, who will be the loser. We are of opinion the condition of said books was not a justification for the exclusion of the entries so proved, but only a matter going to their weight and credibility with the jury. In *Jones v. De Kay*, 3 N. J. L. 955, the account-book offered was of a suspicious cast, and some leaves had been cut out. It was held it was admissible in evidence, and that the credit due it was for the determination of the jury. If the doctrine here contended for by appellee were sustained, the accidental loss of a single leaf from a book of original entries would absolutely destroy the value of the entire book as evidence, no matter how strongly the remaining parts of the book might be supported by the testimony of those who made the entries and sold and delivered the goods."

1. **Distinction Between Books of Account of Individual and Corporation.**—A distinction between books of account of an individual and those of a corporation was raised in the case of *Hurwitz v. Gross*, 5 Cal. App. 614, to the effect that the books of account of a corporation constitute its "memory" of the transactions conducted by it, while such books of an individual constitute merely secondary or supplementary evidence of the facts therein stated, the court



saying: "Questions relating to the correctness and accuracy of books sought to be introduced in evidence have generally arisen in cases where the books are introduced on behalf of the party keeping them, and are in the nature of self-prepared and self-preserving declarations. They were permitted to be introduced at common law only because the party could not testify in his own behalf, and when parties to an action were first permitted to testify, it was held by some of the courts that the books of a party could no longer be admitted in evidence: *Roche v. Ware*, 71 Cal. 377, 60 Am. Rep. 539, 12 Pac. 284. Books of account so belonging to the parties to the litigation are said to be in the nature of secondary or supplementary evidence of the facts therein stated (*Bushnell v. Simpson*, 119 Cal. 661, 51 Pac. 1080), but have been held admissible, when preliminary proof has been made, to support a claim against the estate of a deceased person where the claimant cannot be a witness to testify to his own claim: *Cowdery v. McChesney*, 124 Cal. 363, 57 Pac. 221; *City Sav. Bank v. Enos*, 135 Cal. 172, 67 Pac. 52. The question of who may make the preliminary proof and the limitations upon the parties' testimony in such cases appears to be still open to discussion in this state: *Stuart v. Lord*, 138 Cal. 677, 72 Pac. 142. In *White v. Whitney*, 82 Cal. 166, 22 Pac. 1138, the rule is adopted from *Wharton on Evidence*, that 'a tradesman's book of original entries is, in most jurisdictions, received in evidence as prima facie proof, when supported by the tradesman's oath,' and cases in this state are cited which, it is said, sanction, although they do not expressly declare, this rule.

"We think, however, that a different rule should be applied to the books here under consideration from that which is applied to the books of a party to the litigation producing them to serve his own purposes and aid his own claim. The exhibits here admitted are the records of the business transactions of a corporation required by law to be kept by all corporations for profit: Civ. Code, sec. 377. They constitute the 'memory' of the transactions of the corporations. Having been produced as the regularly kept and original books of the corporation, identified as such by their proper custodians, they are admissible in evidence: *City Sav. Bank v. Enos*, 135 Cal. 172, 67 Pac. 52. The exhibits were, therefore, entitled to be admitted upon the preliminary proof given."

#### VI. Purposes for Which Books of Account may be Introduced in Evidence.

a. *In General*.—As will be seen from the many cases in which books of account have been admitted in evidence, the primary purpose of their admissibility in evidence is for the purpose of showing that goods were sold and delivered or that certain services were performed: *Alabama Construction Co. v. Wagnon*, 137 Ala. 388, 34 South. 352; *White v. Whitney*, 82 Cal. 163, 22 Pac. 1138; *Smith v. Law*, 47 Conn. 431; *Cannon v. Kinney*, 3 Harr. 317; *Dunbar v. Wright*, 20 Fla. 446; *Blackshear v. Dekle*, 120 Ga. 766, 48 S. E. 311; *New Boston etc. Church v. Emerson*, 66 Ill. 269; *Place v. Baugher*, 159 Ind. 232, 64 N. E. 852; *Shea v. Sewerage etc. Board*, 124 La. 299, 50 South. 166; *Clark v. Perry*, 17 Me. 175; *Pratt v. White*, 132 Mass. 477; *In re Bresler*, 155 Mich. 567, 119 N. W. 1104; *Coleman v. Retail Lumberman's etc. Assn.*, 77 Minn. 31, 79 N. W. 588; *Avery v. Tricker*, 137 Mo. App. 428, 118 S. W. 672; *Sheehan v. Hennessey*,

65 N. H. 101, 18 Atl. 652; *Rush v. Hance*, 3 N. J. L. 860; *Smith v. Rentz*, 131 N. Y. 169, 30 N. E. 54, 15 L. R. A. 138; *Kugler v. Wiseman*, 20 Ohio, 361; *Curren v. Crawford*, 4 Serg. & R. 3; *Cargill v. Atwood*, 18 R. I. 303, 27 Atl. 214; *Crosland Co. v. Pearson* (S. C.), 68 S. E. 625; *Burleson v. Goodman*, 32 Tex. 229; *Taplin v. Marcy*, 81 Vt. 428, 71 Atl. 72; *Cascade Lumber Co. v. Aetna Indemnity Co.*, 56 Wash. 503, 106 Pac. 158; *Betts v. Stevens*, 6 Wis. 400; *Reyburn v. Queen City etc. Trust Co.*, 171 Fed. 609.

And in some cases it is stated that the so-called shop-book rule is limited to charges for goods or articles sold and delivered or services performed: *Snow Hardware Co. v. Laveman*, 131 Ala. 221, 31 South. 19; *Waldron v. Priest*, 96 Me. 36, 51 Atl. 235; *Luttrell v. Parry* (Tex. Civ.), 129 S. W. 865. The books of the purchaser of the goods or of the person for whom the work was performed are not ordinarily admissible in his favor: *Summers v. McKim*, 12 Serg. & R. 405; *Dailey v. Sonnerborn*, 35 Tex. 60.

But as will be seen in the latter part of this subdivision, there are circumstances under which such books of accounts are admitted as admissions against interest on the part of the keeper of the books, or as part of the *res gestae* of the transaction. Some apparent confusion exists among the authorities in respect to the admissibility of such books for the purposes of corroboration. An examination, however, of the reasons given for the admission of the books in evidence for such purposes will, where the reasons are stated, show that they were admitted on the theory of an admission against interest, or as part of the *res gestae*, or under some special statutory provision.

**b. Cash Items, Payments or Advances.**—The general rule is that books of account are not admissible for the purpose of showing cash items or transactions, such as money lent, paid or advanced, where the doing of such things is not a matter in the regular course of business of the party: *Townsend v. Townsend*, 5 Harr. (Del.) 125; *Ruggles v. Gatton*, 50 Ill. 412; *Rothschild v. Sessell*, 103 Ill. App. 274; *Veiths v. Hagge*, 8 Iowa, 163; *Shaffer v. McCrackin*, 90 Iowa, 578, 48 Am. St. Rep. 465, 58 N. W. 910; *Brannin v. Freee*, 12 B. Mon. (Ky.) 506; *Prince v. Smith*, 4 Mass. 455; *Maine v. Harper*, 86 Mass. 115; *Cooley v. Collins*, 186 Mass. 507, 71 N. E. 979; *Richards v. Burroughs*, 62 Mich. 117, 28 N. W. 755; *Gregory v. Jones*, 101 Mo. App. 270, 73 S. W. 899; *Richardson v. Emery*, 23 N. H. 220; *Wilson v. Wilson*, 6 N. J. L. 95; *Hauser v. Leviness*, 62 N. J. L. 518, 41 Atl. 724; *Irvine v. Wortendyke*, 2 E. D. Smith (N. Y.), 374; *Law v. Payne*, 4 N. Y. 247; *Brown v. Bronson*, 93 App. Div. 312, 87 N. Y. Supp. 872; *Juniata Bank v. Brown*, 5 Serg. & R. 226; *Williams v. Gregg*, 2 Strob. Eq. (S. C.) 297; *Callaway v. McMillian*, 11 Heisk. (Tenn.) 557; *Cole v. Dial*, 8 Tex. 347; *Mings v. Griggsby Construction Co.* (Tex. Civ. App.), 106 S. W. 192; *Parris v. Bellows*, 52 Vt. 351.

But such books of account are admissible to prove cash advances, loans and other cash items, where the entries in respect to such transactions are made in the regular course of the business of the party, and not merely as casual transactions foreign to the general character of the business conducted by him: *Le Franc v. Hewitt*, 7 Cal. 186; *Beall v. Rust*, 68 Ga. 774; *Orcutt v. Hanson*, 70 Iowa, 604, 31 N. W. 950; *Smith v. Rentz*, 131 N. Y. 169, 30 N. E. 54, 15 L. R. A. 138; *Cram v. Spear*, 8 Ohio, 494; *Cargill v. Atwood*, 18 R. I. 303, 27 Atl. 214; *Union School Furniture Co. v. Mason*, 3 S. D. 147, 52

N. W. 671; Tucker v. Bradley, 33 Vt. 324; Gleason v. Kinney, 65 Vt. 560, 27 Atl. 208.

In *Reyburn v. Queen City etc. Trust Co.*, 171 Fed. 609, the court, in discussing this question, said: "The rule in regard to the admission of books of original entries supported by the oath of the party to prove the transactions therein contained is a very old one in this country, and existed in England as an ancient rule of the common law. It was adopted by courts as a rule of necessity, as in many cases without it the administration of justice would have been at fault. It was recognized as a rule of convenience that facilitated the ordinary transaction of business, and has found a secure place in the jurisprudence of this country, whether as a doctrine of the common law of evidence or as an enactment of the statute law. The reasons upon which this rule rests strongly support the admission in evidence of the book entries of those engaged in banking, or whose principal business is in money and cash transactions, whether as individuals or as corporations. The same necessity and the same convenience recommend the rule in the one case as in the other." And in answering the objection that under the old rule entries in respect to cash items were not admissible, the court observed: "It may be admitted that this exception to the rule is as old as the rule itself, which referred originally only to items of purchase and sale, or of work and labor performed, which made up so large a part of the daily business of a community. Items of money loaned or money advanced were exceptional, and ordinarily were easily proved by receipts or other evidence than the book account. In the development of the shop-book, that has taken place in this country and later in England, some modification as to the exclusion of such items has been made, to which we need not now refer. It is only necessary to say that the reasons upon which books of original entry, as to sales of merchandise and as to work and labor performed, were admitted, has been long applied to the books kept by banks and those whose business is altogether or chiefly concerned with the care of money, and in dealing with debits and credits for the same. Indeed, the reasons of necessity and convenience are stronger in the latter case than in the former, and the fundamental ground of circumstantial trustworthiness attaching to the entries made in regular course by a large banking corporation is more apparent than in the cases originally embraced within the rule as to shop or tradesmen's books. A large banking institution must of necessity be organized in departments, and the integrity of its transactions must depend on the accuracy and fidelity with which those in charge of the records thereof perform their work. Indeed, the whole business of such an institution may be said to rest on properly made entries in proper books, and that such entries are, in a sense, themselves ultimate facts to be received under certain circumstances as probative facts, and both the necessity and convenience of the business world require that under a wise judicial discretion they should constitute legal *prima facie* evidence of the transactions to which they relate. They constitute, in most cases, the best evidence that is attainable, and as a matter of fact such entries when regularly and fairly kept in the ordinary course of business, regarding debits and credits from day to day, are more reliable than fallible human memory could possibly be, as to any given transaction which they purport to record, especially where a

considerable interval of time has elapsed between the giving of the testimony and the transaction referred to."

So, also, in *Harmon v. Decker*, 41 Or. 587, 93 Am. St. Rep. 748, 68 Pac. 11, 1111, the court in discussing the admissibility of books of account to show charges in decedent's accounts for cash advanced to and checks in favor of other persons, said: "While books of original entry are admissible to prove the price, sale and delivery of articles, and the performance of labor or the rendition of service, because such entries are made in the usual course of business, such books are generally inadmissible to prove the loan of large sums of money, because transactions of this character are usually evidenced by promissory notes, checks and bills of exchange. Thus, in *Veiths v. Hagge*, 8 Iowa, 163, the defendant, by way of setoff to the plaintiff's action, pleaded an account which contained, among others, several items charged against the plaintiff as 'cash \$100' and 'cash \$146.' After having produced the necessary preliminary evidence in verification of his books of account, and after having proved by one Jensen, who was defendant's clerk from March, 1855, to March, 1856, that plaintiff during that time was a customer of the defendant, and in the habit of borrowing sums of money of him from time to time, which were charged in said books of account, without offering any other evidence in support of said cash items, the defendant offered to prove the same by said books. The court charged the jury that 'cash, except in small items, to the amount of ten dollars or thereabouts, which appear to have been furnished in the course of ordinary dealing between the parties, is not the subject of the book account, and cannot be proved by the books alone. But, to entitle the defendant to recover for such items, there must be other evidence than what the books furnished. If there is evidence, other than the books, that the money was loaned to the plaintiff, items of such character the jury will allow.'

"Mr. Justice Stockton, in speaking for the court in deciding the case, after reviewing many decisions from other states supporting this principle, says: 'We think the general rule is clearly established by these authorities that a charge for "money paid" or "money lent" cannot be proved by the party's book of accounts; that such transactions are not usually the subject of a charge in account; and that charges of that nature are not such as are made in the ordinary course of business by one party against another.' To the same effect, see *Lyman v. Bechtel*, 55 Iowa, 437, 7 N. W. 673; *Culver v. Marks*, 122 Ind. 554, 17 Am. St. Rep. 377, 23 N. E. 1086, 7 L. R. A. 489; *Lehmann v. Rothbarth*, 111 Ill. 185; *Kelton v. Hill*, 58 Me. 114; *Winner v. Bauman*, 28 Wis. 563.

"While the loan of large sums of money is usually evidenced in the manner indicated, and the payment thereof by receipts, these items may be proved by the books of a banker or broker, when such is in pursuance of his ordinary business method: *Union School Furniture Co. v. Mason*, 3 S. D. 147, 52 N. W. 671. What shall be considered as a large sum of money, the loan of which cannot be established by the mere production of books of account, will probably ever remain problematical. The growth of commercial enterprise must necessarily expand the methods of transacting the business pertaining thereto, including the mode of evidencing such facts, and as courts are not called upon to make, but to enforce, the rules adopted by experience, it would seem to follow that what a few

years ago would have been regarded as a large sum of money must now be considered as a mere bagatelle, so that the standard as formerly fixed cannot longer remain as guides of precedence. Admitting that Gasquet was not a banker, and conceding that he was only a general merchant, we are not prepared, nor is it necessary to say that the sum of three hundred dollars advanced to Karewski, and the smaller sum involved in this appeal, were 'large sums' within the meaning of the rule discussed by the authorities, to which attention is called."

In a few of the states small sums of money charged upon the books of account in connection with other charges for goods delivered or services performed have been held to be within the rule allowing such books in evidence to prove the charges contained in them: Bagley v. Roberson, 57 Ga. 148; Dunn v. Whitney, 10 Me. 9; Waldron v. Priest, 96 Me. 36, 51 Atl. 235; Davis v. Sanford, 9 Allen, 216; Bassett v. Spofford, 11 N. H. 167; Remick v. Rumery, 69 N. H. 601, 45 Atl. 574; Page v. Hazelton, 74 N. H. 252, 66 Atl. 1049. In some states, under statutory provisions, such small sums, not to exceed charges of a definite amount, usually about five dollars, are allowed to be proved by the books of account: Charlton v. Lawry, 1 N. C. 30, 1 Mart. 26; Bland v. Warren, 65 N. C. 372; Forsee v. Matlock, 7 Heisk. (Tenn.) 421; Brown v. Warner, 116 Wis. 358, 93 N. W. 17; Dohmen v. Blum's Estate, 137 Wis. 560, 119 N. W. 349. But under the Wisconsin statute which provides that account-books shall not be admitted as evidence of any item of money delivered at one time exceeding five dollars, entries in defendant's books showing payment to his agent of money exceeding five dollars to purchase a tax certificate, which purchase the defendant claimed operated as a redemption, were not admissible in an action by plaintiff on a covenant against encumbrances to recover the amount paid in redemption of the certificate: Kellogg Lumber etc. Co. v. Webster Mfg. Co., 140 Wis. 341, 122 N. W. 737.

Book entries of advancements made by a testator are admissible in partition or other proceedings under the will: Whisler v. Whisler, 117 Iowa, 712, 89 N. W. 1110; Hill's Guardian v. Hill, 122 Ky. 681, 29 Ky. Law Rep. 201, 92 S. W. 924; In re Bresler's Estate, 155 Mich. 567, 119 N. W. 1104; although in some jurisdictions it has been held that it must be shown that the entries in the books were made contemporaneously with the advancements, and used in connection with other evidence tending to prove the fact: Nelson v. Nelson, 90 Mo. 460, 2 S. W. 413; Lawrence v. Lindsay, 68 N. Y. 103.

**c. To Establish Negative Proposition.**—It has been stated in a general way that books of account are admissible only as affirmative evidence, and not for the purpose of establishing a negative proposition: Kerns v. McKean, 76 Cal. 87, 18 Pac. 122; Kearns v. Dean, 77 Cal. 555, 19 Pac. 817; Lawhorn v. Carter, 11 Bush, 7; Schwarze v. Roessler, 40 Ill. App. 474; Riley v. Boehm, 167 Mass. 183, 45 N. E. 84; Boor v. Moschell, 55 Hun, 604, 8 N. Y. Supp. 583; Klein v. Rush, 5 Watts & S. (Pa.) 377; Winner v. Bauman, 28 Wis. 563.

But there are decisions holding that such books of account may constitute some evidence of a negative proposition: Lawrence v. Stiles, 16 Ill. App. 489; Ford v. Cunningham, 87 Cal. 209, 25 Pac. 403. And it has been said that books of account constitute some evidence of the nonpayment of a claim, where no credit or evidence of a payment appears on the books: Union School Furn. Co. v.

Mason, 3 S. D. 147, 52 N. W. 671; Huebener v. Childs, 180 Mass. 483, 62 N. E. 729.

**d. Special Agreements.**—Entries in books of account setting forth the terms of a special agreement are not admissible in evidence for the purpose of proving such agreement. The reason for this rule is that books of account are only admitted in evidence because of a necessity to resort to such evidence because of the nature of the transactions which naturally are the subject of book accounts, and when the subject admits of better evidence, such evidence must be resorted to: Jeffries v. Castleman, 68 Ala. 432; Ward v. Powell, 3 Harr. (Del.) 379; Lyman v. Bechtel, 55 Iowa, 437, 7 N. W. 673; Hynes v. Campbell, 6 T. B. Mon. 292; Dauser v. Boyle, 16 N. J. L. 395; Griesheimer v. Tanenbaum, 124 N. Y. 650, 26 N. E. 957; Horton v. Wood, 66 Hun, 632, 21 N. Y. Supp. 178; Fifth Mut. Bldg. Soc. v. Holt, 184 Pa. 572, 39 Atl. 293; Pritchard v. McOwen, 1 Nott. & McC. 131, note; McPherson v. Neuffer, 11 Rich. (S. C.) 267.

The shop-book rule is confined to goods sold and delivered or work and labor performed, and is not applicable to special contracts. In *Luttrell v. Parry* (Tex. Civ.), 129 S. W. 865, the court, in so holding, said: "A memorandum of the terms of a special contract entered on an order-book kept for that purpose might be for the convenience of the particular person and an orderly conduct of his business, but it is not the usual method of preserving the evidence of the making of the contract. It is merely a memorandum of something to be done by him subsequent to the time of the entry. Consequently, as the point is made here, the entry in the book has the effect simply of showing appellee's version of a parol contract."

It is improper to permit a party to introduce in evidence an entry in his books showing his version of a parol contract: *Collins v. Shaw*, 124 Mich. 474, 83 N. W. 146. An entry by an attorney in his account-book, "agreed fee to be one-half," is not admissible, since it is a mere memorandum of a special contract, and has no proper place in an account-book: *Batcheller v. Whittier*, 12 Cal. App. 262, 107 Pac. 141. A book of accounts is not competent to prove demands which are based on a written lease: *Wait v. Krewson*, 59 N. J. L. 71, 35 Atl. 742.

The authorities, however, are in conflict as to whether the performance or nonperformance of a contract can be shown by means of entries in books of account. Thus it has been held that under a special contract to deliver goods periodically in the future, the seller cannot prove the deliveries by his books of account. Such deliveries must be proved by independent evidence: *Baxter v. Leith*, 28 Ohio St. 84; *Hall v. Chambersburg Woolen Co.*, 187 Pa. 18, 67 Am. St. Rep. 563, 40 Atl. 986, 52 L. R. A. 689; *Whelpley v. Higly*, Bray. (Vt.) 39. So, also, the fact that the vendee had failed to make the payments required by his contract of purchase of land cannot be proved by books of account: *Kerns v. McKean*, 76 Cal. 87, 18 Pac. 122. Work and labor done under the terms of a special contract, it is said, are not properly provable by entries in a book of account: *Earle v. Sawyer*, 6 Cush. 142; *Schnader v. Schnader*, 26 Pa. 384. And it has been held that the building of a certain number of rods of fence at a specified price per rod cannot be proved by an entry in a book of accounts, since better evidence of the facts is presumed to exist: *Towle v. Blake*, 38 Me. 95.

But a distinction exists, although the authorities do not appear to always make it clear, where the books are introduced merely to aid in the making of computations under the terms of the contract, such, for example, as showing the number of loads of gravel delivered under a contract to furnish the gravel necessary for a certain purpose, or other like contracts. Hence it is held, where the contract itself is otherwise proved, that it is proper to show the amount of work done under it by means of entries in books of account: *Kendall v. Field*, 14 Me. 30, 30 Am. Dec. 728. And where it is necessary to show the amount of earth excavated under a contract for such excavation, the books of account of the contractor are admissible in that connection: *Walker v. Curtis*, 116 Mass. 98. Likewise where a contract existed between plaintiff and defendant, under which the defendant was to furnish the materials necessary to carry on a certain enterprise and account to the plaintiff for a certain share of the sums received, while the plaintiff was to furnish certain work, the books of account of the parties are admissible for the purpose of ascertaining the shares of the respective parties: *Morgans v. Adel* (Cal.), 18 Pac. 247.

So, also, where there was no question that sand and gravel had been furnished according to the contract of the party, and the only question was how many loads were furnished, an account of the loads furnished, made from the reports of the foreman of the party delivering the sand and gravel, is admissible to show the amount of material furnished: *Kuennan v. United States Fidelity etc. Co.*, 159 Mich. 122, 123 N. W. 799. In the case just cited the court said: "It is a reasonable, if not necessary, inference from the testimony that the contractor kept account of the material delivered by plaintiff, and that the two accounts, when comparisons were made, agreed. Without questioning the rule that performance of a contract to deliver articles may not be proved by books of account, or the one that when goods are delivered by agents and entries in the books are made from their memoranda or statements, the agents or someone having knowledge must be called to prove delivery, we are of the opinion that the spirit and reason of the rules were not violated in holding that the books of account were admissible in evidence. Practically, there was a single fact to be established by the account, and that one not whether plaintiff performed his agreement with the contractor, but how many loads of material were required to do it. This fact, from necessity, must be proven by some memorandum produced is so convincing that it would be unreasonable to doubt it."

Books of account of a corporation are not admissible to prove that money received from stockholders of the corporation was paid for treasury stock, which was never delivered to them, upon a special agreement to take it for fifty cents on the dollar, which obligation was denied: *Jacobs v. Mergenthaler*, 149 Mich. 1, 112 N. W. 492. But in a suit by a corporation to enforce specific performance of an oral contract to convey land, the entries on the journal of the corporation showing that the land had been sold to the corporation on that date pursuant to a resolution of the corporation exchanging a certain amount of its stock for the land, is admissible in evidence: *Meridian Oil Co. v. Dunham*, 5 Cal. App. 367, 90 Pac. 469.

Where a party abandons his right to recover under his special contract, and seeks to recover merely for goods, wares and mer-

chandise under the common counts, his books of account are admissible in evidence: *McWilliams v. Cosby*, 4 Ired. 110; *McDaniel v. Webster*, 2 *Houst. (Del.)* 305. But it was held in a New York case that where work done under a special contract became matter of account by reason of the rescission of the contract, the books of account were not admissible: *Merrill v. Ithaca etc. R. Co.*, 16 *Wend.* 586, 30 *Am. Dec.* 130.

e. **To Corroborate or Contradict Other Testimony.**—Books of account are sometimes admissible not in their capacity as books of accounts, but for the purpose of corroborating or contradicting the testimony of some witness in the same manner as any other document or writing would be admissible under similar circumstances: *Waldron v. Evans*, 1 *Dak.* 11, 46 *N. W.* 607; *Petit v. Teal*, 57 *Ga.* 145; *Perry State Bank v. Elledge*, 99 *Ill. App.* 307; *Moshier v. Frost*, 110 *Ill.* 206; *Ryan v. Miller*, 153 *Ill.* 138, 38 *N. E.* 642; *McCullough v. McCullough*, 12 *Ind.* 487; *Davenport v. Cummings*, 15 *Iowa*, 219; *Gill v. Staylor*, 93 *Md.* 453, 49 *Atl.* 650; *Wright v. Towle*, 67 *Mich.* 255, 34 *N. W.* 578; *St. Paul etc. Ins. Co. v. Gotthelf*, 35 *Neb.* 351, 53 *N. W.* 137; *Cahill v. Hirschman*, 6 *Neb.* 57; *Ladd v. Dudley*, 45 *N. H.* 61; *Nat. Ulster Co. Bank v. Madden*, 41 *Hun.* 113; *Fain v. Edwards*, 33 *N. C. (11 Ired.)* 305; *Mayes v. Brumaux*, 3 *Yeates*, 30; *Patton's Admr. v. Ash*, 7 *Serg. & R.* 116; *Black v. Shooler*, 2 *McCord*, 293.

There are, however, decisions holding that books of account are not admissible for such purposes, especially where they are offered for corroboration, since they would contravene the rule that a party should not make evidence for himself: *Cornville v. Brighton*, 35 *Me.* 141; *Alger v. Thompson*, 83 *Mass.* 453; *Bentley v. Ward*, 116 *Mass.* 333; *Baird v. Fletcher*, 50 *Vt.* 603.

f. **As Constituting Part of the Res Gestae.**—Contemporaneous original entries in books of account have in some instances been admitted in evidence, on the theory of being part of the *res gestae* of the indebtedness or transaction, where they form a link in the chain of evidence: *Louisville etc. R. Co. v. McGuire*, 79 *Ala.* 395; *Sill v. Reese*, 47 *Cal.* 294; *Reviere v. Powell*, 61 *Ga.* 30, 34 *Am. Rep.* 94; *Bush v. Fourcher*, 3 *Ga. App.* 43, 59 *S. E.* 459; *McDavid v. Ellis*, 78 *Ill. App.* 381; *Dreiske v. Jones & Adams Co.*, 133 *Ill. App.* 572; *Oelrichs v. Ford*, 21 *Md.* 489; *Gubernator v. Rettalack*, 86 *Mo. App.* 184; *Stephan v. Metzger*, 95 *Mo. App.* 609, 69 *S. W.* 625; *Robinson v. Smith*, 111 *Mo.* 205, 33 *Am. St. Rep.* 510, 20 *S. W.* 29; *Moore v. Meacham*, 10 *N. Y.* 207. But of course the entries must cover the transactions which constitute the main issue in the case: *Sypher v. Savery*, 39 *Iowa*, 258; *McKeen v. Providence County Sav. Bank*, 24 *R. I.* 542, 54 *Atl.* 49. Thus, in an action against a railroad company on account of its failure to transport goods according to its contract, a freight-book kept by the company showing a statement of the contract and the waybill is competent as part of the *res gestae* to prove the contract: *Jacksonville etc. R. Co. v. Hall*, 2 *Ill. App.* 618. So, also, where the issue is when a partnership began to transact business, books identified as those of the partnership and proved to have been correctly kept are admissible as part of the *res gestae* to show the date of the first entries: *Cody v. First Nat. Bank*, 103 *Ga.* 789, 30 *S. E.* 281.



Where the evidence discloses that a corporation extensively engaged in trade, in the regular course of its business in purchasing merchandise, causes every order to be entered in a book and numbered before it is transmitted to the person with whom the corporation is dealing, and during litigation it becomes important to prove whether an order was written and transmitted, the court in its discretion may, in connection with other evidence tending to prove that such an order was written and transmitted to the sendee, when a proper foundation has been laid by verifying the book and entry therein, permit the corporation to introduce such an entry in evidence: *Sheridan Coal Co. v. C. W. Hull Co.*, 87 Neb. 117, ante, p. 435, 127 N. W. 218. The entry in such a case is really a part of the *res gestae*, and has some probative force in connection with the testimony of the witnesses and the fact that the number of the order was mentioned in subsequent correspondence between the parties.

In *Fleming v. Yost*, 137 Ind. 95, 36 N. E. 705, which was a suit to set aside a conveyance of certain real estate on the ground of being in fraud of creditors, the court allowed in evidence the entries in the books of account of the grantee to corroborate the grantee's assertion that the consideration, which was denied, was made up from such charges. The evidence was admitted upon the ground that it was part of the *res gestae*. The court, in discussing the question of its admissibility, said: "The creditors were not parties to the transfer in any way, and, if they subsequently bring suit to set aside the conveyance, the position they thereby take against the grantee is that they are entitled to judgments on their claims against the grantor, which shall be declared liens against the land, because the conveyance thereof is fraudulent and void; that is, they proceed against the grantee through and under the grantor, and the grantee, in his defense, may introduce all the acts and declarations which are connected with the transaction. In *Bump on Fraudulent Conveyances*, third edition, page 581, it is said: 'Declarations and acts of the debtor are admissible in evidence in favor of the grantee, as well as of the creditors. The acts and declarations of the grantee which accompany the transfer stand on the same footing. So far as the acts and declarations of the parties form a part of, and assist in giving character to, the transaction, they constitute a part of the *res gestae*, and are competent evidence.' In a suit by creditors of the husband to reach land conveyed to the wife, the declarations of the third person who gave her the money, letters from her business agent to her, her letters to the agent, and her own declarations, are all competent in support of her title, as part of the *res gestae*: *Abbott's Trial Evidence*, p. 170; *Hamies v. Hazlett*, 54 Pa. 133; *Claussen v. La Trauz*, 1 Iowa, 226; *Bank v. Kennedy*, 17 Wall. 19, 21 L. ed. 551. Where a party himself testifies to a loan, his own entry of the fact of payment, made contemporaneously with the fact, and as a part of the *res gestae*, is admissible: *Abbott's Trial Evidence*, pp. 245, 253, 264, 269, 275, 326; *Huntzinger v. Jones*, 60 Pa. 170. In *Beaver v. Taylor*, 1 Wall. 637, 17 L. ed. 601, the plaintiff was allowed to give in evidence the letters of his correspondents, who made payments on his behalf, and the entries which the plaintiff thereupon made in his own books, not as matters binding the defendant, but as a part of the *res gestae* necessary to the complete proof of the act of the plaintiff in making the payment. We cite *Munroe v. Snow*, 131 Ill. 126, 23 N. E. 401; *Pallman v.*

Smith, 135 Pa. 188, 19 Atl. 891; *Martin v. Mining Co.*, 19 Nev. 180, 3 Pac. 161; *Ross v. Brusie*, 70 Cal. 465, 11 Pac. 760. In *Pollak v. Searcy*, 84 Ala. 259, 4 South. 137, the firm of Blake & Searcy had conveyed their merchandise, by sale absolute in form, to George W. Searcy, in discharge of an alleged debt to him. The real issue in this case was whether or not the debt asserted was bona fide and the sale absolute, reserving no interest or benefit to the sellers. There was no question but the debt claimed, if genuine, was equal in amount to full value of the stock. Pollak & Co. were creditors of Blake & Searcy before and at the end of the transfer, and soon thereafter they attached the goods as the property of the vendors. In support of the bona fides of the consideration, entries in the books of Blake & Searcy showing an account between them and the purchasers were admitted, not to prove their own truth, but as a part of the *res gestae* of the act under investigation."

**g. As Being an Admission Against Interest.**—Entries in a party's books of account are admissible against him as admissions against interest: *Banning v. Marlean*, 121 Cal. 240, 53 Pac. 692; *Plummer v. Struby-Estabrooke Mercantile Co.*, 23 Colo. 190, 47 Pac. 294; *Agricultural Ins. Co. v. Keeler*, 44 Conn. 161; *Kent v. Richardson*, 8 Idaho, 750, 71 Pac. 117; *Second Borrowers etc. Bldg. Assn. v. Cochrane*, 103 Ill. App. 29; *Milhollen v. McDonald etc. Mfg. Co.*, 137 Iowa, 114, 112 N. W. 812; *Beyle v. Reid*, 31 Kan. 113, 1 Pac. 264; *Spears v. Spears*, 27 La. Ann. 537; *Succession of Moise*, 107 La. 717, 31 South. 990; *Ward v. Leitch*, 30 Md. 326; *Richardson v. Anderson*, 109 Md. 641, 130 Am. St. Rep. 543, 72 Atl. 485, 25 L. R. A., N. S., 393; *Bell v. Smith*, 99 Mass. 617; *Nolan v. Garrison*, 151 Mich. 138, 115 N. W. 58; *Hanson v. Jones*, 20 Mo. App. 595; *Steam Stonecutter Co. v. Scott*, 157 Mo. 520, 57 S. W. 1076; *German Nat. Bank v. Leonard*, 40 Neb. 676, 59 N. W. 107; *Globe Sav. Bank v. Nat. Bank of Commerce*, 64 Neb. 413, 89 N. W. 1030; *Currier v. Boston etc. R. Co.*, 31 N. H. 209; *Bird v. Magowan (N. J. Ch.)*, 43 Atl. 278; *Lucas v. Thompson*, 75 Hun, 584, 27 N. Y. Supp. 659; *Goetting v. Weber*, 71 App. Div. 503, 75 N. Y. Supp. 890; *Stetson v. New Orleans City Bank*, 12 Ohio St. 577; *Kane v. Schuylkill Fire Ins. Co.*, 199 Pa. 198, 48 Atl. 989; *State Bank v. Johnson*, 1 Mill (S. C.), 404, 12 Am. Dec. 645; *Daniels v. Fowler*, 123 N. C. 35, 31 S. E. 598.

As will be seen from the case of *Knapp v. St. Louis Trust Co.*, 199 Mo. 640, 98 S. W. 70, the courts go quite far in allowing books of account in evidence where the items are in the nature of admissions against interest. In that case the court said: "In *Higham v. Ridgway*, 10 East, 109, the proposition now urged by the appellant received great consideration by the court of king's bench in 1808. In that case the question was as to the date of the birth of a child. There was offered in evidence an entry from the book of a man midwife, in which he had entered a charge, stating the services, and acknowledged the receipt of the payment. It was objected to and discussed at great length by counsel pro and con, and it was held by the court, all the judges concurring, that the entry was admissible as evidence of the birth and the time as well as the receipt of the payment. Lord Ellenborough, C. J., said: 'I think the evidence here was properly admitted upon the broad principle of which receiver's books have been admitted, namely, that the entry was made in the prejudice of the party making it. . . . It is idle to say that the word 'paid' only shall be admitted in evidence without

the context which explains to what it refers.' Le Blanc, J., states: 'But here the entries were made by a person, who, so far from having any interest to make them, had an interest in the other way, and such entries against the interest of the party making them are clearly evidence of the fact stated, on the authority of *Warren v. Greenville*, and of all those cases where the books of receivers have been admitted.' Gross and Bayley, JJ., concurred in separate opinions to the same effect. In *Taylor v. Witham*, L. R. 3 Ch. D. 605, Jessel, M. R., in admitting the entry in evidence, said: 'It is, no doubt, an established rule in the courts of this country that an entry against the interest of the man who made it is received in evidence after his death for all purposes. . . . If I at once admit the entry as being naturally and prima facie against interest, I should say the use that had been made of it is quite immaterial; that is, according to all the authorities.' And this statement of the law is accepted as correct by Greenleaf in the sixteenth edition of that work (section 152): *Percival v. Nanson*, 7 Ex. 1. It was said by Pollock, C. B.: 'If the entry is admitted as being against the interest of the party making it, it carries with it the whole statement.' In *Smith v. Blakey*, L. R. 2 Q. B. 326, it was said by Blackburn, J.: 'And no doubt when entries are against the pecuniary interest of the person making them, and never could be made available for the person himself, there is such a probability of their truth that such statements have been admitted after the death of the person making them, as evidence against third persons, not merely of the precise fact which is against interest, but of matters involved in, or kept up with, the statement': *Higham v. Ridgway*, 10 East, 109, 103 Eng. Reprint, 717. In 16 Cyc., page 1218, it is said: 'Declarations against interest are not only received as evidence of the fact directly asserted, but of incidental facts fairly embraced within the scope of the declaration.' In view of this practically unanimous statement of the rule, we think that the entries were admissible, not only for the purpose of showing that at certain dates Dr. McWilliams rendered medical services to Mrs. Gaffey, and was paid therefor, but also for the purpose of showing that he treated her for hyperaemia of the brain and for softening of the brain and paralysis, and the circuit court erred in holding otherwise."

Where the secretary of a savings bank is on trial for embezzlement of its funds, its books of account are admissible in evidence against him, since he is one of its officers, and the books are evidences of the transactions of the bank and record the acts of its officers. By their records all officers must be bound, whether made by them individually or by other agents of the institution whose duty it was to keep them: *Humphrey v. People*, 18 Hun, 393.

h. **As Memoranda to Refresh the Memory.**—Books of account may be used by a witness who has made them, to refresh his memory in the same manner as other memoranda, and he may, after so refreshing his memory, testify to the facts recited in the book as of his own knowledge. Under such circumstances the books of account are merely memoranda made contemporaneous with the transactions in controversy: *Moynahan v. Perkins*, 36 Colo. 481, 85 Pac. 1132, 10 Ann. Cas. 1061; *Johnson v. State*, 125 Ga. 243, 54 S. E. 184; *Wilber v. Scherer*, 13 Ind. App. 428, 41 N. E. 837; *Mayberry v. Holbrook*, 182 Mass. 463, 65 N. E. 849; *St. Paul etc. Ins. Co. v. Gotthelf*, 35 Neb. 351, 53 N. W. 137; *Friendly v. Lee*, 20 Or. 202, 25 Pac. 396.

In the Oregon case last cited, the court in applying the rule above stated, said: "As evidence *ipso facto*, the entry was excluded, but, as a memorandum made contemporaneous with the transaction, the witness was permitted to refresh his memory by an examination of it, and, when his memory was thus refreshed, to testify to the fact of the date of his own knowledge. In *Best on Evidence*, note to section 224, it is said that a witness will be permitted to refresh his memory by an examination of memoranda reasonably contemporaneous with the transactions to which they relate, regarding dates, figures, results of calculating and the like, whether such memoranda be made by himself or by any other person. The admissibility, then, of the entry in the cash-book, to show the date of the transaction, is not to be determined by the legal theory upon which book accounts, shown to be correct, are admissible as original evidence, but whether, upon the facts, the memorandum made at the time of the transaction in the cash-book was admissible in evidence in connection with the testimony of the plaintiff. That a witness may refer to a memorandum made by him to refresh his memory is a familiar principle. Our code provides that 'a witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew the same was correctly stated in the writing. But in either case the writing must be produced, and be inspected by the adverse party, who may, if he choose, cross-examine the witness upon it, and read it to the jury. So, also, a witness may testify from such writing, although he retain no recollection of the particular facts, but such evidence shall be received with caution': *Hill's Code*, sec. 836. Lord Ellenborough said that 'it is not the memorandum which is evidence, but the recollection of the witness': *Henry v. Lee*, 2 Chit. (Eng.) 124. And in *Commonwealth v. Jeffs*, 132 Mass. 6, *Endicott, J.*, said: 'We are not aware of any case where it has been held that the memorandum could be put in evidence simply because it refreshed the memory of the witness: *Commonwealth v. Ford*, 130 Mass. 64, 39 Am. Rep. 426. In that case, and in many of the cases cited therein, it is stated that the memorandum *per se* cannot be used in evidence.' In *Field v. Thompson*, 119 Mass. 151, it was held that the memorandum was not competent, and that it could not be put in evidence in confirmation of the recollection of the witness: *Rapalje on Witnesses*, secs. 280, 284. Be that as it may, the memorandum itself is not admissible in evidence, except in cases where the witness at the testifying has no recollection of what took place further than he accurately reduced the whole transaction to writing: 1 *Greenleaf on Evidence*, sec. 437; *Wood. Pr. Ev.*, sec. 134. As indispensable to the admission of such testimony, there must be proof that the witness who made the memorandum has no recollection of the matters stated therein, independent of the written paper. When he has such recollection, the evidence is admissible. In *Howard v. McDonough*, 77 N. Y. 593, the court laid down the rule as to the use of memoranda as follows: '(1) A witness may, for the purpose of refreshing his memory, use any memorandum, whether made by himself or another, written or printed, and, when the memory has been refreshed, he must testify to the facts of his own knowledge, the memorandum itself not being evidence. (2) When a witness has so far forgotten the facts that he cannot recall them, and he testifies that he once knew them and

made a memorandum of them at the time or soon after they transpired, which he intended to make correctly, and which he believes to be correct, such memorandum in his own handwriting may be received as evidence of the facts therein contained, although the witness has no present recollection of them.' The rule was thus stated by Clopton, J., in *Jaques v. Horton*, 76 Ala. 243: 'If the witness, after examining the memorandum, cannot state the facts from independent recollection, but can testify that he knew the contents of the memorandum at or about the time it was made, and knew them to be true, the memorandum and the testimony of the witness are admissible. In other words, the entries or memoranda of transactions made by a witness are admissible only when the memory of the witness is at fault': *Thompson on Trials*, sec. 402, subd. 4, and note of authorities."

Where a witness who made the entries in the book is not able to recollect the facts of the transaction after having his mind refreshed, still if he can testify that he knew the facts at the time of making the entries and made the entries in the book at or near the time of the transaction, they may be received as evidence of facts therein stated, in connection with other testimony: *Costello v. Crowell*, 133 Mass. 352; *Rathborne v. Hatch*, 80 App. Div. 115, 80 N. Y. Supp. 347; *Jackson v. State*, 49 Tex. Cr. 248, 91 S. W. 574.

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### QUIMBY v. BEE BUILDING COMPANY.

[87 Neb. 193, 127 N. W. 118.]

**PASSENGER ELEVATOR—Care Required in Operating.**—One who installs passenger elevators in his building for the use of his tenants and the public generally is subject to the same degree of care in transporting and protecting his passengers as is imposed upon common carriers. (p. 479.)

**CARRIER OF PASSENGERS—Degree of Care Exacted.**—Common carriers of passengers should be held to the strictest accountability, and be required to exercise the highest degree of care and forethought of which the human mind is capable. This rule is founded on principles of public policy and enforced by the courts for the protection of the public. (pp. 480, 481.)

**TRIAL.—Instructions Given by the Trial Court and set out in the opinion sustained.** (p. 481.)

**TRIAL.—Instructions Requested by the Defendant and refused by the court and set out in the opinion held properly refused.** (pp. 481, 482.)

**PASSENGER ELEVATOR—Duty to Warn Passengers.**—It is the duty of an elevator conductor to warn passengers, whether children or adults, to stand back from the door when the elevator is in motion, and he cannot justify his failure to do so on the ground that he is giving his attention to running the car. (By the editor.) (pp. 481, 482.)

**TRIAL.—Sufficiency of Evidence.—Evidence Examined and set out in the opinion held sufficient to sustain the verdict of the jury.** (p. 482.)

(Syllabi by the court except when stated to be by the editor.)

Greene, Breckenridge & Matters, for the appellant.

Weaver & Giller, for the appellee.

<sup>193</sup> FAWCETT, J. Plaintiff, a boy twelve years of age, who, during the summer vacation of school, was acting as a messenger boy for the Postal Telegraph Company, was injured in <sup>194</sup> one of the passenger elevators of defendant. From a judgment in his favor for such injury, defendant appeals.

The evidence shows that the floor of defendant's building, at each landing, projects some two or more inches into the elevator shaft and inside of the wire network surrounding the shaft. The space between the floor of the elevator at the opening thereof and the floor of the building is just enough to permit the elevator to pass; so that, if a person standing at the door of the elevator should permit his foot to extend even a very little over the edge of the elevator floor, it would be caught by the lower part of the floor landing above as he ascended. At the time of the injury complained of, plaintiff entered the elevator for the purpose of being carried to a floor above, where he desired to deliver a message. The evidence is somewhat conflicting as to whether he entered the elevator at the first or second floor, but we regard that as immaterial. When the elevator reached the third floor, plaintiff's foot was caught between the elevator floor and the projection above noted, and he received the injury complained of. Plaintiff testified that, when he entered the elevator, he "just turned around and leaned against the side of the elevator—was going to get out right away as soon as I got to the floor I wanted off on"; that he stood near the door all the time. It is evident that while standing there his foot was partially extended beyond the edge of the elevator floor. The elevator conductor testified that plaintiff "stepped clear in the car, something unusual, then stepped back. There being rubber on the floor I did not hear him." This plaintiff denied. The elevator conductor also testified that the boy had been going up and down the elevator for about a month; that he had several times cautioned him to stand back from the door, and on one occasion had pushed him back. He admits that he did not give plaintiff any such direction or caution at the time of the injury. On cross-examination he testified that he had been running an elevator for eight years; that it is dangerous for people to stand up near the door, as <sup>195</sup> elevators pass up and down, and especially as they go up, and that it was his duty to caution people to step back whenever he saw them "up in front." Plaintiff insists that the construction of the building and elevator as above outlined was negligent, and that defendant's agent in charge of the elevator was neg-

ligent in permitting the plaintiff, who was only a boy, to stand in what he, the conductor, knew was a place of danger.

The fourth instruction given by the court on its own motion is as follows: "You are instructed it was the duty of the defendant, the Bee Building Company, to use the greatest amount of human care and skill consistent with the operation of said elevators to prevent injuries to its passengers while they were being transported from one part of the building to the other. It is also the duty of the defendant to use greater care and caution in transporting passengers of tender age than when carrying adults or passengers of mature years, but in this case there is no presumption of negligence from the mere fact that said Walter Quimby was a passenger and received an injury while being carried by the elevator." Defendant seriously objects to all but the last clause of this instruction, on the ground that it imposed too great a burden upon defendant; that it in fact imposed upon defendant an obligation which was impossible of performance. In this contention we are unable to concur. One who installs passenger elevators in his building for the use of his tenants and the public generally is subject to the same degree of care in transporting and protecting his passengers as is imposed upon common carriers.

In *Marker v. Mitchell*, 54 Fed. 637, the syllabus reads: "A landlord who runs an elevator for the use of his tenants and their visitors thereby becomes a common carrier, and is charged with the highest degree of care which human foresight can suggest, both as to the machinery and the conduct of his servants; and an instruction that he owes to persons thus put completely under his control 'the highest degree of care consistent with the possibility <sup>100</sup> of injury,' while unfortunate in the choice of words, does not misstate the law, and, being explained by the context, is no ground for reversal." In discussing this instruction in the opinion, Taft, Circuit Judge, said: "I am of opinion that the language used by the court was not fortunate. The highest degree of care consistent with the possibility of injury is rather a blind expression, but it seems to me that it was sufficiently explained by the context in the charge, and that it did not, therefore, mislead the jury. 'Consistent with the possibility of injury,' as thus explained, meant 'commensurate with or proportionate to the possibility of injury in the use of the elevator.' The theory of the court was that the liability of Mitchell in the running of a passenger elevator was the same as that of a common carrier, and the standard for a common carrier is the highest degree of care which human foresight can suggest. This view is sustained by the case of *Goodsell v. Taylor*, 41 Minn. 207, 16 Am. St. Rep. 700, 42 N. W. 873, 4 L. R. A. 673, and by the case of *Treadwell v. Whittier*, 80

Cal. 574, 13 Am. St. Rep. 175, 22 Pac. 266. It is contended that such a rule applies to the machinery used, but does not apply to the conduct of the employees of a common carrier. No case has been cited which makes this distinction. On the contrary, the opinion of the supreme court of the United States in *Stokes v. Saltonstall*, 13 Pet. (U. S.) \*181, 10 L. ed. 115, considered in connection with the facts of that case, seems to refute the contention."

In the Minnesota case (*Goodsell v. Taylor*, 41 Minn. 207, 16 Am. St. Rep. 700, 42 N. W. 873, 4 L. R. A. 673) cited by Judge Taft, Gilfillan, C. J., says: "The relation between the owner and manager of an elevator for passengers and those carried in it is similar to that between an ordinary common carrier of passengers and those carried by him. The same reason exists for requiring on the part of the owner the utmost human care and foresight, and for making him responsible for the slightest degree of negligence."

In the syllabus of the California case (*Treadwell v. Whittier*, 80 Cal. 574, 13 Am. St. Rep. 175, 22 Pac. 266), cited by Judge Taft, it is held: "Persons operating an elevator in lifting passengers are to be treated as carriers of passengers, and the same duties and responsibilities rest on them as to care and diligence as on the carriers of passengers by stage-coach or railway. Though not insurers of the absolute safety of the passengers, they are bound to the utmost care and diligence of very cautious persons, as far as human care and foresight can go, and are responsible for injury occasioned by the slightest neglect against which human prudence and foresight might have guarded. The responsibility is proportioned to the danger, and is of the highest character in the case of those who operate elevators for lifting persons from one level to another."

In *Western Union Tel. Co. v. Woods*, 88 Ill. App. 375, the syllabus reads:

"(1) Persons operating elevators are carriers of passengers, and the same rules applicable to other carriers of passengers are applicable to those operating elevators for raising and lowering persons from one floor to another in buildings. It is the duty of such carriers of passengers to use extraordinary care in and about the operation of such elevators so as to prevent injury to persons therein.

"(2) A carrier of passengers by elevator is bound to exercise the highest degree of human care, vigilance and foresight which is reasonable under the circumstances, and in view of the character of the mode of conveyance adopted, reasonably to guard against accidents."

In *Chicago, B. & Q. R. Co. v. Landauer*, 39 Neb. 803, 58 N. W. 434, in speaking of the rule as applied to common carriers, we said: "Common carriers of passengers should be



held to the strictest accountability and be required to exercise the highest degree of care and forethought of which the human mind is capable. This rule is founded on principles of public policy and enforced by the courts for the protection of the traveling public." In *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890, 38 Am. St. Rep. 753, 55 N. W. 270, 20 L. R. A. 316, we applied the rule to street railway companies, and held: "Where a passenger, <sup>198</sup> without negligence on his part, is injured by the derailment of the car in which he is traveling, the carrier, to overcome the presumption of negligence caused by such derailment, must show that the accident was produced by causes wholly beyond its control, and that it had not been guilty of the slightest negligence contributing thereto, and that by the exercise of the utmost human care, diligence, and foresight the casualty could not have been prevented." That case is cited by Sullivan, J., and its doctrine reaffirmed in *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672, 69 Am. St. Rep. 736, 74 N. W. 1074. In the light of the above authorities, the giving of instruction No. 4 was not error.

Instruction No. 5 is also complained of. It reads: "If you find from a preponderance of the evidence that the defendant, the Bee Building Company, failed to exercise that high degree of care and caution required of them while carrying said Walter Quimby, and the defendant negligently permitted said Walter Quimby to become injured on account of a failure on its part to properly care for said Walter Quimby while a passenger, and you further find that the injuries of said Walter Quimby were the direct result of such negligence on the part of said defendant, then you are instructed that your verdict should be for the plaintiff." We are unable to discover any error in this instruction.

Defendant also complains because the court refused to give instructions 2, 3 and 4, requested by defendant. No. 2 reads: "There is no presumption that the defendant was negligent from the fact that the plaintiff was injured in the elevator, and you must find from a preponderance of the testimony that the defendant in some manner failed to exercise the highest possible care consistent with the operation of the elevator, and that the failure to exercise such care was the proximate cause of plaintiff's injury." This instruction was fairly covered by the last clause of No. 4, given by the court on its own motion.

Instruction No. 3 states: "The defendant did not <sup>199</sup> insure the safety of the plaintiff as a passenger in its elevator, unless the plaintiff kept himself and all parts of his body within the elevator proper; and the defendant owed the plaintiff no duty, under the facts shown by the evidence in this case, to protect him from the consequences of his own

carelessness in putting his foot over the edge of the floor, if you find that he was careless in so doing." Instruction No. 4 is to the same effect. It reads: "It is not necessary that the plaintiff's conduct should be negligent in order to bar his recovery. If by his voluntary action he put his feet in a place where injury would probably result to him, the elevator conductor was not bound, in any and all events, to push the plaintiff away from the door, unless he knew that the plaintiff was in such position of danger." In *East Saginaw City R. Co. v. Bohn*, 27 Mich. 503, the syllabus reads: "While the company would not be liable to a person of suitable age and discretion who, being warned of the danger in riding upon the front platform of the car, should persist in doing so, yet, in case of a child, lacking such discretion, and to whom, consequently, negligence could not be imputed, it would be the duty of the officers of the company not to stop with a warning, but to compel such child to occupy the proper place in the car." One of the children in that case was a boy twelve and a half years of age. The two instructions above noted are clearly erroneous, in announcing the doctrine that the elevator conductor owed plaintiff, a boy twelve years of age, no duty. We think the very opposite of that is true. This elevator conductor knew that it was dangerous to stand near the door of the elevator when it was in motion. He knew that it was his duty to warn passengers, whether children or adults, to stand back from the door. He failed to give such warning to plaintiff, who, at the time, was the only passenger in the car. He seeks to justify his conduct by saying that he was giving his attention to the running of his car. But it is a matter of common knowledge that such a car is managed by the manipulation <sup>200</sup> of a lever, which is done with one hand, and that the conductor has the free play of his eyes and of his other hand, by the diligent use of which he can guard against just such accidents as happened in this case. We think the case was properly submitted to the jury, and that it was warranted in finding the defendant guilty of negligence in not properly warning and safeguarding this boy while a passenger in its elevator, regardless of the question as to whether or not there was negligence in its construction.

The judgment of the district court is affirmed.

*The Liability of Owners of Passenger Elevators* is the subject of a note to *Southern B. & L. Assn. v. Dawson*, 56 Am. St. Rep. 806-810. According to some authorities, persons operating elevators in buildings for the purpose of carrying persons from one story to another are common carriers of passengers, required to exercise the highest and utmost care and diligence to prevent injury to them: *Springer v. Ford*, 189 Ill. 430, 82 Am. St. Rep. 464. According to other authorities, the owner of a building, who maintains and operates an elevator therein to carry passengers, is bound only to exercise reasonable care.

Hence he is not bound to use the utmost care as to every defect which would be liable to occasion great danger or loss of life, nor is he "subject to the same rule that applies to a railroad company in regard to its roadbed, engine and other similar machinery: *Griffen v. Manice*, 166 N. Y. 188, 82 Am. St. Rep. 630. In *Edwards v. Manufacturers' Building Co.*, 27 R. I. 248, 114 Am. St. Rep. 37, it is decided that a landlord who maintains a passenger elevator in his private building is not a common carrier, and is required to exercise only reasonable care for the safety of persons using it, such as employees of a tenant, who enter the premises by implied invitation.

## SWOBODA v. UNION PACIFIC RAILROAD COMPANY.

[87 Neb. 200, 127 N. W. 215.]

**FELLOW-SERVANTS—Constitutionality of Employer's Liability Act.**—The employer's liability act of 1907 (Comp. Stats., c. 21, sec. 3), providing that every railway company operating a railway engine, car or train in the state of Nebraska shall be liable to any of its employees, who at the time of injury are engaged in construction or repair work, or in the use and operation of any engine, car or train for said company, for all damages which may result from the negligence of any of its officers, agents, or employees, is a valid law under the constitution of Nebraska, and is not repugnant to the fourteenth amendment of the federal constitution. (pp. 487, 488.)

**FELLOW-SERVANTS—Employees in Railway Repair Work.** Evidence examined and set out in the opinion held sufficient to show that plaintiff at the time of his injury was engaged in construction or repair work within the meaning of such act. (pp. 488, 489.)

**FELLOW-SERVANTS—Employees in Railway Repair Work.**—A man employed in railway shops in placing washers under a steam hammer and removing them when flattened by a blow of the hammer, the washers being for use in the repair of the cars and engines of the railway company, is engaged in "construction or repair work," within the meaning of the statute providing that railway companies shall be liable for injuries suffered by employees through the negligence of other employees "engaged in construction or repair work." (By the editor.) (pp. 483, 489.)

(Syllabi by the court except when stated to be by the editor.)

N. H. Loomis, Edson Rich, James E. Rait and E. H. Crocker, for the appellant.

Smyth, Smith & Schall, for the appellee.

<sup>201</sup> **FAWCETT, J.** This case involves a construction of section 3, chapter 21, Compiled Statutes of 1909, adopted in 1907, commonly called the "employer's liability act." One of the departments of defendant's shops in the city of Omaha is known as the blacksmith-shop. Plaintiff was employed therein as a helper. He and another helper, Carl Gall, were operating a steam hammer weighing about five hundred pounds, in flattening iron washers. Gall was operating the hammer by means of levers. Plaintiff stood in front of the hammer, placing and removing the washers on a steel die of the hammer. One blow was required to

flatten each washer. As the hammer lifted, plaintiff would remove the flattened washer with his hand, and replace another for the next stroke of the hammer. The negligence alleged is that Gall, who was controlling the hammer, carelessly and negligently caused it to descend while plaintiff's right hand was thereunder, and while plaintiff, in the exercise of due care and in the performance of his duties, was endeavoring to remove from the plate a washer theretofore placed by him thereon. The evidence shows that the washers then being made were for general use by defendant in the repair of its engines and cars; that when cars or engines are being repaired and a bolt goes through a piece of wood, one of these washers is always placed at the head of the bolt; that the shop in which plaintiff was working employs about one hundred and thirty-five men; that there are twenty-nine blacksmiths who work the forges, four driving hammers, five bolt machines, two shears, about twenty-two furnaces in operation, nine power hammers, and two similar to the one in question. The foremen of the shop, when asked what they did in the way of repairing iron work on cars, answered: "Every article which is made of metal; we repair every article of iron or steel; do the necessary repairing or make new where it is ordered"; that when engines are to be repaired they are taken to the machine-shop and stripped down to the base, and whatever is necessary to be repaired on the engines is <sup>202</sup> sent to the blacksmith-shop, "and we repair those things and take them back to the machine-shop and put them back on the engine"; that any part of the iron work or metal parts of an engine that get out of repair are sent to that shop to be repaired; that they also do the repairing or iron work on freight-cars, box-cars, passenger-cars and engines, and also construct new parts of cars and engines.

The defenses relied upon are that the work upon which plaintiff was engaged at the time of his injury was not "construction" or "repair work," as such words are used under the employer's liability act; that plaintiff's injuries were received by and through the carelessness of his fellow-servant contributing thereto; that the employer's liability act, under which plaintiff is seeking to recover, is violative of section 1 of article 14 of amendments to the constitution of the United States; and that "said act by its provisions makes railroad companies liable for injuries to employees resulting from the negligence of fellow-servants and coemployees when such injured employees are injured in construction and repair work not involving the dangers and hazards peculiar to the business of constructing, maintaining, and operating railroads, when no such liability is attached by the state of Nebraska to other employers for

similar hazards, thereby depriving railroad companies of the equal protection of the laws accorded to all other litigants, persons, or corporations within the state of Nebraska, and violating that part of section 1 of the fourteenth article of amendments to the constitution, which provides 'no state shall make or enforce any law, . . . nor deny to any person within its jurisdiction the equal protection of the laws.' "

From a judgment in favor of plaintiff, defendant appeals.

Section 3, chapter 21, Compiled Statutes of 1909, provides: "That every railway company operating a railway engine, car or train in the state of Nebraska shall be liable to any of its employees, who at the time of injury are engaged in construction or repair work, or in the use and operation <sup>203</sup> of any engine, car or train for said company, . . . for all damages which may result from negligence of any of its officers, agents, or employees, or by reason of any defects or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works." Counsel for defendant in their brief clearly state their position as follows: "The defendant contends that this statute affects only such employees as are injured through a risk or hazard incident and peculiar to the business of constructing, repairing and operating railroads, and that, while the statute on its face is broad enough to cover other employees, if extended beyond railroad hazards, it is violative of the fourteenth amendment to the constitution of the United States, for the reason that the state of Nebraska cannot impose burdens or restrictions upon railroad companies with reference to personal injuries unless all employers are equally affected by the statute in cases where the injuries arise in the same manner."

Authorities are not wanting to sustain defendant's contention. They are cited and ably presented in defendant's brief. But the clear weight of authority and the better reasoning is the other way. It would be interesting to review the authorities, but that has been so ably done by the supreme court of the United States, and other courts, in the cases cited below, that we shall not enter into a general review of the cases.

In *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. Rep. 1161, 32 L. ed. 107, the syllabus reads: (1) "The law of Kansas making a railroad company liable to an employee for the negligence or mismanagement of other employees or agents of the same company is not in conflict with the fourteenth amendment to the constitution of the United States, in that it deprives the company of its property without due process of law, and denies to it the equal protection of the laws."

(2) "Legislation which is special in its character is not obnoxious to the last clause of the fourteenth amendment, <sup>204</sup> if all persons subject to it are treated alike, under similar circumstances and conditions, in respect both of the privileges conferred and the liabilities imposed."

Instruction No. 8, given by the court below, and complained of by defendant here, was evidently taken from the opinion in this case. The instruction in almost identical language is quoted by Mr. Justice Field, and approved.

In *Tullis v. Lake Erie & W. R. Co.*, 175 U. S. 348, 20 Sup. Ct. Rep. 136, 44 L. ed. 192, the court say: "Considering this statute as applying to railroad corporations only, we think it cannot be regarded as in conflict with the fourteenth amendment." The opinion by Mr. Chief Justice Fuller then reviews a number of the cases on the subject, among them *Peirce v. Van Dusen*, 78 Fed. 693, 24 C. C. A. 280, 69 L. R. A. 705, which, considering the prominence of the judges who decided it, we will briefly refer to. The opinion was by Harlan, Circuit Justice, and associated with him were Circuit Judges Taft (now President) and Lurton (now associate justice of the supreme court). The third paragraph of the syllabus reads: "The third section of said statute, altering the rule as to the liability of an employer for the negligence of fellow-servants, as it applies to all railroad corporations operating railroads in the state, and to all of a given class of railroad employees, is not repugnant to the provision of the constitution of Ohio that all laws of a general nature shall have uniform operation throughout the state." To show that the same argument was made before these eminent judges as is being made here, we quote from the opinion (page 701): "But it is contended that the Ohio statute is repugnant to the provision of the constitution of Ohio declaring that 'all laws of a general nature shall have uniform operation throughout the state': Article 2, section 26. The argument made in support of this view by the learned counsel for the receiver may be thus summarized: That the act imposed a liability for damages for the negligence of fellow-servants only as against a railroad company operating a railroad within Ohio; that it confers a right <sup>205</sup> of action only upon employees of such railroad companies; that no other employer is subject to the liability, and no other employee is given the right; that the act selects from the general class of employers railroad companies operating railroads, and imposes upon them a special burden; that the act is special class legislation, not uniform throughout the state, and applies to no person or company engaged in any other occupation employing servants, although the occupation be equally hazardous. Consequently, the act is special in its operation and effect, is confined to

particular corporations engaged in a specific business, does not cover the whole subject of the relations of master and servant, and is not, therefore, of a general nature, and of uniform operation throughout the state, within the meaning of the constitution of Ohio." The opinion then reviews the cases cited by counsel in support of their contention, and on page 704, concludes: "We do not deem it necessary to pursue this subject further. We think it clear that the Ohio statute is not obnoxious to the constitutional provision requiring all laws of a general nature to have a uniform operation throughout the state. As it applies to all railroad corporations operating railroads within the state, it is, within the meaning of the state constitution, general in its nature; and, as it applies to all of a given class of railroad employees, it operates uniformly throughout the state."

In *Nicholson v. Transylvania R. Co.*, 138 N. C. 516, 51 S. E. 40, the court, in considering a statute giving any employee of a railroad "operating" in that state a cause of action for injuries suffered because of the negligence of a fellow-servant, on page 519, say: "But the act applies only to employees of a 'railroad operating,' not that such employees must be operating the trains, but they must be employees in some department of its work, of a railroad which is being operated. Such business is a distinct, well-known business, with many risks peculiar to itself, and all the employees in such business, whether running trains, building or repairing bridges, laying tracks, working <sup>206</sup> in the shops or doing any work in the service of an 'operating railroad,' are classified and exempted from the rule which requires employees to assume the risk of all injuries which may be caused by the negligence of a fellow-servant."

In *Georgia Railroad & Banking Co. v. Ivey*, 73 Ga. 499, in considering a similar statute, the court say: "This is no special law. It is a law applicable to all railroad companies and their employees, whether employed in running trains or not. It would be more special and less general if applicable only to those engaged in running the trains. It is a general law embracing in its terms all railroads and their employees."

Without pursuing the subject further, it is sufficient to say that statutes similar to ours are sustained and held not in conflict with the fourteenth amendment to the constitution of the United States, or with state constitutions against special or class legislation, in the following cases: *Ditberner v. Chicago etc. R. Co.*, 47 Wis. 138, 2 N. W. 69; *Kane v. Erie R. Co.*, 133 Fed. 681, 67 C. C. A. 653, 68 L. R. A. 788; *Erie R. Co. v. Kane*, 155 Fed. 118, 83 C. C. A. 564; *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. Rep. 243, 41 L. ed. 611; *Campbell v. Cook*, 86 Tex. 630, 40 Am. St. Rep.

878, 26 S. W. 486; *Hancock v. Norfolk & W. R. Co.*, 124 N. C. 222, 32 S. E. 679, and a very extended discussion of the subject in *Callahan v. St. Louis etc. R. Co.*, 170 Mo. 473, 94 Am. St. Rep. 746, 71 S. W. 208, 60 L. R. A. 249. We have also announced the same doctrine in *Insurance Co. of North America v. Bachler*, 44 Neb. 549, 62 N. W. 911, where we had under consideration the provisions of the valued policy law, which allows the taxing of an attorney's fee in cases where a recovery is had by the assured. We there said: "It is said that this act is class legislation because it applies only to insurance companies; but where a law is general and uniform throughout the state, and operates alike upon all persons and localities of a class, it is not objectionable as wanting uniformity of operation."

The defendant's contention that plaintiff is not within the class protected by the statute because he was not injured through a risk or hazard incident and peculiar to <sup>207</sup> the business of constructing, repairing and operating railroads is not sustained by the wording of the statute. The statute reads: "That every railway company operating a railway engine, car or train in the state of Nebraska shall be liable to any of its employees, who at the time of injury are engaged in construction or repair work." That constitutes one class of employees who are entitled to the benefit of the statute. Then, separated from the former by the disjunctive "or," we have the other class, viz., "or in the use and operation of any engine, car or train for said company." It is clear from this wording of the statute that the legislature intended that the fellow-servant rule (not law) should not apply to any of the employees of any railroad in the state who were either engaged in the operation of engines, cars or trains, or were engaged in construction or repair work. Substantially the same reason sustains the entire classification; that is to say, there are dangers inherent and peculiar to all the vocations described in the statute, which are rarely, if ever, encountered by employees working for a master not engaged in the operation of a railway. The legislature well knew that substantially all railway construction or repair work is dangerous, performed either in the immediate vicinity of tracks upon which trains are passing or by the use of dangerous machinery, as in the case at bar. Classifications should receive a practical construction, and we are of opinion that a reasonable application of the law to the facts in the case before us not only brings the plaintiff within its purview, but forbids a holding that the law itself is obnoxious to the constitution of the United States or to the constitution of the state of Nebraska.

We must not be understood as deciding that all work of construction or repair of any article or structure performed



in the service of a railroad company comes within the purview of the statute. The work of a railroad company is divided into many departments. The duties and hazards of employees in one department may be as dissimilar <sup>208</sup> from those in other departments as are those of a clerk or book-keeper in the uptown headquarters from those of an engineer or brakeman on a train; and questions may hereafter arise as to the scope of the act under consideration, which we do not now decide. But, where the work of construction or repair is as closely connected with the actual operation and use of the railroad as the work of the present plaintiff, it seems clear that it is within the class of hazards covered by the act.

Approving and following the authorities above cited, we hold that the act under consideration is valid, and that plaintiff, at the time of his injury, was engaged in construction or repair work within the meaning of the act. This being true, the court did not err in giving the eighth instruction complained of, nor in refusing to give the fourth instruction requested by the defendant.

The judgment of the district court is therefore affirmed.

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*On the Constitutionality of Statutes Making Railroad* and other corporations liable for injuries to their employees resulting from the negligence of coemployees, see *Pittsburgh etc. Ry. Co. v. Montgomery*, 152 Ind. 1, 71 Am. St. Rep. 301; *Indianapolis etc. Rapid Transit Co. v. Foreman*, 162 Ind. 85, 102 Am. St. Rep. 185; *Ballard v. Mississippi Cotton Oil Co.*, 81 Miss. 507, 95 Am. St. Rep. 476; *Callahan v. St. Louis etc. R. R. Co.*, 170 Mo. 473, 94 Am. St. Rep. 746. A statute or constitutional amendment exempting railroad employees from the application of the fellow-servant rule protects the injured employee, not against what he himself is doing, but against what his coemployees of certain kinds are doing: *Mobile etc. R. R. Co. v. Hicks*, 91 Miss. 273, 124 Am. St. Rep. 679.

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## RUPKE v. MORAN.

[87 Neb. 316, 127 N. W. 127.]

**PUBLIC LAND—Rival Homestead Claimants Before Issuance of Patent.**—In an action by one of two rival homestead claimants to a tract of public land to quiet his title and enjoin the other claimant from interfering with his possession thereof, it is proper for the state courts to decline to pass upon the question of ownership until after the government has parted with its title by duly issuing a patent therefor to one of such claimants. (p. 493.)

**PUBLIC LAND—Rival Homestead Claimants—Injunction.**—In a proper case the district court may grant a restraining order to the one who holds the receiver's final receipt for the land in question in so far as it may be necessary to protect his homestead rights. (pp. 490, 494.)

(Syllabi by the court.)

L. C. Burr, for the appellants.

W. T. Stevens and Claude Wilson, for the appellee.

<sup>316</sup> BARNES, J. This is a suit in equity to restrain the defendants from interfering with the plaintiff in his attempt to comply with his right to perfect his homestead entry under the statutes of the United States upon the northeast quarter of the northeast quarter of section 33, township 11 north, <sup>317</sup> of range 7 east of the sixth P. M., situated in Lancaster county, Nebraska, and to quiet his alleged title thereto. The plaintiff had judgment granting him a restraining order, but the trial court declined to consider the question of title. The defendants have appealed.

The cause was submitted to the district court for Lancaster county upon a stipulation or agreed statement of facts, which we find to be in substance as follows: On the seventh day of September, 1876, one Joseph P. Loosee, who had been a soldier of the Civil War, obtained a receiver's final receipt from the register and receiver of the local land office at Lincoln, Nebraska, to said land as an additional homestead entry. No patent has ever been issued to said land, and the legal title thereto is still held by the government. On the same day that he received his final certificate Loosee and his wife made a warranty deed to said land to one James Moran. On April 9, 1877, the commissioner of the general land office of the United States held Loosee's entry for cancellation, for the reason that the land was within and a part of the grant to the Burlington and Missouri River Railroad Company, and was not subject to homestead entry. On May 1, 1877, Loosee appealed from the decision of the commissioner of the general land office canceling his said entry, and under date of April 20, 1878, the Secretary of the Interior affirmed the decision of the land commissioner. On May 1, 1878, the commissioner of the general land office entered an order formally canceling on the records of his office Loosee's additional homestead entry of the land in controversy. On February 23, 1882, Loosee filed an application for a reinstatement of his entry, and on May 18, 1882, his application was denied. The land in question on the twenty-ninth day of March, 1888, was opened for homestead entry by an order of the commissioner of the general land office. On the twentieth day of May, 1891, one Edward L. Sayer applied to the local land office to enter said tract of land as a homestead, and received the usual register and receiver's receipts therefor. On February <sup>318</sup> 13, 1896, a hearing was had before the register and receiver of the local land office of the United States at Lincoln, Nebraska, between the said Sayer, on the one part, and Joseph P. Loosee and the heirs of James Moran, who

are now the defendants herein, on the other part, which hearing or contest involved the right of homestead entry to the land in question. The register and receiver of the Lincoln land office in a joint opinion found in favor of said Sayer and against Loosee and the defendants herein. Loosee and the defendants appealed to the general land office of the United States, and the commissioner affirmed the decision of the local register and receiver, and ordered that Sayer's homestead application should be allowed. In his decision the commissioner found that James Moran, to whose rights the defendants herein have succeeded, had exhausted his homestead rights prior to September 7, 1876, and was not qualified to take the land under the pre-emption laws, for the reason that he was then the owner of six hundred and forty acres of land to which the tract in question is adjacent. Loosee and the Morans again applied to the Secretary of the Interior, who on the twenty-sixth day of October, 1896, affirmed the decision of the commissioner of the general land office allowing Sayer's entry. Loosee and the defendants herein filed a motion for a review of said decision, which was on February 27, 1897, denied. Sayer abandoned his homestead entry, and on February 7, 1907, it was canceled for that reason. On the eleventh day of February of that year the plaintiff, Henry Rupke, also an honorably discharged soldier of the Civil War, a resident and citizen of the United States, made a homestead entry on the said land and received the register and receiver's receipts therefor. Immediately thereafter he attempted to take possession of the land, at least to the extent of erecting a house or residence thereon, and to comply with the provisions of the homestead laws of the United States in order to perfect his said entry. Thereupon the defendants, who are in possession of said land, refused to permit him to go upon the premises or perform <sup>319</sup> any of the acts necessary to perfect his homestead entry, but at all times have by threats and force of arms prevented him from so doing. The decree of the trial court was in his favor, and enjoined the defendants from interfering with him in any manner, or from in any way preventing him from going upon the land in question and perfecting his homestead entry.

Defendants contend at the outset that they are the owners of the premises in question; that Loosee had a right to make a deed to Moran as soon as he received his final receipt, and that by so doing Moran took absolute title to the premises. On the other hand, it is contended that Moran took no better title to the land than Loosee had; that he took it subject to all rights on the part of the government to cancel Loosee's entry the same as though he had not parted with his interest to Moran. In *Peyton v. Desmond*, 129 Fed. 1, 63 C. C. A.

651; it is said: "One who purchases from an entryman, on the faith of a final receipt or patent certificate, before the issuance of a patent, takes only the equity of his vendor, subject to the authority of the land department to cancel the entry, while the legal title remains in the United States, if it is found that the entry is based upon an error of law or a clear misapprehension of the facts, which, if not corrected, will lead to the transfer of the government's title to one not entitled to it. The land department being a special tribunal to which Congress has confided the administration of the public land laws, the final judgment of that department as to matters of fact properly determinable by it is conclusive, when brought to notice in a collateral proceeding." In *Swigart v. Walker*, 49 Kan. 100, 30 Pac. 162, it was held: "The commissioner of the general land office of the United States has authority to cancel a final homestead receipt and set aside the entry at any time before the patent issues, and a purchaser from the entryman after a final receipt is given and before the issuance of the patent takes the land subject to this supervisory power of the commissioner and of the Secretary of the Interior."

<sup>320</sup> Defendants insist that, when Loosee made his filing on the land in question as an additional soldier's homestead entry, he became the absolute owner thereof; that title passed eo instante from the government to him, and his immediate transfer thereof to James Moran invested his grantee with an indefeasible title thereto. In support of this contention, defendants rely principally upon the two cases of *Webster v. Luther*, 163 U. S. 331, 16 Sup. Ct. Rep. 963, 41 L. ed. 179, and *Ard v. Brandon*, 156 U. S. 537, 15 Sup. Ct. Rep. 406, 39 L. ed. 524. At first blush, it would seem that those cases sustain the defendants' position. A careful examination, however, discloses that in *Webster v. Luther*, 163 U. S. 331, 16 Sup. Ct. Rep. 963, 41 L. ed. 179, the widow of a deceased soldier made application to the local land office to enter the land there in question as an additional soldier's homestead, and received the register and receiver's receipt therefor; that her entry was approved, and in due time she received a patent for the lands which conveyed to her the full legal title; that, when she received the register and receiver's receipts as aforesaid, she executed a power of attorney to one Boggs, by which she empowered him to sell the land upon such terms as he should see fit, receive the money therefor from the purchaser, and deliver to him such a deed or conveyance thereof as to him seemed necessary; that Boggs sold the land and deeded it to Luther, which deed was duly recorded; that thereafter, and when she received the patent from the United States, she deeded the land to Webster, and the con-

trover was between them as to who was the owner of the land and had the legal title thereto. The supreme court of the United States held that, when the widow made her filing, paid the fees and received the receiver's final receipt for the land, which was subject to entry as an additional soldier's homestead, she became the owner thereof; that she could then legally sell and dispose of it even before she received the patent, and that by the sale and conveyance made by her attorney in fact Luther took the legal title thereto.

In the *Ard* case (156 U. S. 537, 15 Sup. Ct. Rep. 406, 39 L. ed. 524), which is nearer in point than any of the other authorities cited, it appears that one who <sup>321</sup> was qualified to make a homestead entry in good faith applied to make such entry upon public land within the indemnity limits of a railroad grant, but not within its place limits, and which had not been withdrawn from homestead entry and settlement, but was at the time he made his application subject to such entry. His application was refused, and afterward the land was withdrawn from entry and was patented to the railroad company. The applicant remained upon the land and cultivated it, and the action was one to oust him of possession. It was held that his application was wrongfully rejected, and that his rights under it were not affected by the fact that he took no appeal.

It will thus be seen that the point of distinction is, in those cases the land was subject to homestead entry when the applications were made, while in the case at bar the land was not subject to such entry, and Loossee's attempted entry was canceled for that reason. That this distinction is fatal to defendants' contention seems clear. Again, in both of those cases the government had parted with its title to the land when the actions were commenced, while in this case the title is still in the United States. We are therefore of opinion that those authorities are of no assistance in the solution of the question now before us, and until such time as the government parts with its title, we should not attempt to determine the question of ownership or title thereto.

It is further contended that they have acquired title by adverse possession, and point to the fact that they have been in possession of the land for more than thirty years. It is conceded that one cannot acquire title by adverse possession as against the government; but it is said that, if the land belonged to the railroad company, then the defendants' possession has ripened into a perfect title, and the court should hold that they are the owners thereof. The trouble with this contention is that it appears from the agreed statement of facts that the railroad company has never complied with the terms of its <sup>322</sup> grant, and has not heretofore, and does

not now, claim any interest therein; that it has never been a party to any of the proceedings, either before the local land office or the department of the interior, and it is not now a party to this suit. Therefore, it cannot be said that defendants have acquired title by adverse possession as against the railroad company, because it has never had any title whatever to the lands in question. It thus seems clear that defendants' contention cannot be upheld.

It appears from the record that the trial court declined to pass upon the question of title, dismissed defendants' cross-petition without prejudice to any future action, and enjoined them from disturbing the plaintiff in his attempt to exercise sufficient dominion over the land in question to protect his homestead rights. In this there was no error, and the judgment of the district court is affirmed.

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*As to the Title of an Entryman on Public Lands Before Issuance of Patent*, see Thompson v. Basler, 148 Cal. 646, 113 Am. St. Rep. 321; Waisner v. Waisner, 15 Wyo. 420, 123 Am. St. Rep. 1081; McLeod v. Spencer, 21 Okl. 165, 129 Am. St. Rep. 774; Herrick & Stevens v. Sargent & Lahr, 140 Iowa, 590, 132 Am. St. Rep. 281. A homestead entryman who makes final proof has a right to convey the land, although the proof is not forwarded to the land office nor the patent issued. And his grantee, in good faith and for value, may protect his title against all the world, including subsequent grantees of the grantor, by recording his deed: Dale v. Griffith, 93 Miss. 573, 136 Am. St. Rep. 546.

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## VILLAGE OF DODGE v. GUIDINGER.

[87 Neb. 349, 127 N. W. 122.]

**WORDS AND PHRASES.**—The Word "Occupation" is a generic term. An occupation is "that to which one's time and attention are habitually devoted; habitual or stated employment; vocation; calling; trade; business." (By the editor.) (p. 495.)

**OCCUPATION TAX.**—A Physician Practicing Medicine as a business is engaged in an occupation within the meaning of a statute authorizing a village "to raise revenue by levying and collecting a license tax on any occupation or business within" its limits. (By the editor.) (p. 495.)

**OCCUPATION TAX—Practicing Medicine.**—Village Trustees may, for the purpose of raising revenue, lawfully enact an ordinance levying a tax upon the occupation of practicing medicine within the village limits. (p. 495.)

(Syllabi by the court except when stated to be by the editor.)

Allen Johnson, for the appellant.

F. W. Button, for the appellee.

**349** ROOT, J. This is an action to recover judgment for an occupation tax. The plaintiff prevailed, and the defendant appeals.

1. The defendant succinctly states the issue: "The question involved in this case is simply whether or not villages in Nebraska may legally lay and collect a tax on the vocation of a physician." The plaintiff is authorized by section 8920, Annotated Statutes of 1909, "to raise revenue by levying and collecting a license tax on any occupation or business <sup>350</sup> within the limits of the city or village, and regulate the same by ordinance." Similar statutes have been approved by this court: *Western Union Tel. Co. v. City of Fremont*, 39 Neb. 692, 58 N. W. 415, 26 L. R. A. 698, and cases there cited.

The defendant contends that practicing medicine is neither a business nor an occupation, but a profession; that, since the statute and the ordinance are silent concerning professions, the tax sought to be collected is void. The word "occupation" is a generic term: *Schuchardt v. People*, 99 Ill. 501, 39 Am. Rep. 34. An occupation is "that to which one's time and attention are habitually devoted; habitual or stated employment; vocation; calling; trade; business": *Century Dictionary*. And a vocation is defined in the same dictionary as "employment; occupation; avocation; calling; business; trade; including professions as well as mechanical occupations." In *Thesaurus (March) Dictionary of the English Language* the word "profession" is defined as "the occupation, if not agricultural, mechanical, or the like, which one follows": See, also, *Webster's Dictionary*. In our opinion a physician practicing medicine as a business is engaged in an occupation within the meaning of the statute, and the plaintiff under the legislative grant of authority had power to levy and collect a tax upon the defendant's occupation or business: *Lent v. Portland*, 42 Or. 488, 71 Pac. 645.

2. The defendant argues that the plaintiff may only license such vocations as it may regulate in the exercise of the police power, and that the practice of medicine is not subject to such regulations. The statute authorizes the imposition of occupation taxes for the purpose of raising revenue. The taxing power, therefore, is the source of the plaintiff's authority to demand from the defendant the tax in question. The power of the legislature to raise revenue by levying a license tax upon occupations is elaborately discussed and definitely determined in *Rosenbloom v. State*, 64 Neb. 342, 89 N. W. 1053, 57 L. R. A. 922. See, also, *State v. Boyd*, 63 Neb. 829, 89 N. W. 417, 58 L. R. A. 108. The question is no longer an open one in this state. The ordinance imposes a uniform tax upon the occupation <sup>351</sup> of practicing medicine in the village of Dodge. There is no suggestion that the amount is excessive, nor would the record support that contention if made.

There is no error in the record, and the judgment of the district court is affirmed.

*The Constitutionality of License Taxes on Physicians and Surgeons* is discussed in the note to *Hager v. Walker*, 129 Am. St. Rep. 293. It is an attribute of sovereignty to tax occupations for the purpose of raising revenue, and a tax may be imposed in the form of a license fee: *Seattle v. Dencker*, 58 Wash. 501, 137 Am. St. Rep. 1076. Under the statutes of Michigan, a city of the fourth class may impose license fees for revenue on transient tradesmen: *People v. Grant*, 157 Mich. 24, 133 Am. St. Rep. 329.

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### OTTO v. CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY.

[87 Neb. 503, 127 N. W. 857.]

**CARRIER—Duty to Stock Shipper on Freight Train.**—A stock shipper, riding on a freight train for the purpose of caring for his shipment of livestock, is entitled to the highest degree of care and protection consistent with the proper and careful operation of the train and with that means or method of transportation. (p. 498.)

**CARRIER—Duty to Passenger Leaving Train in Darkness.**—When such a passenger is compelled, by an attack of illness, to leave the train at his first opportunity, which fact is known to the conductor and those in charge of the train, it is negligence for them to knowingly permit him to leave the way-car while it is standing on an open bridge or trestle at a time when it is so dark that he is unable to see his surroundings or ascertain the danger. (p. 498.)

**CARRIER—Negligence of Passenger Leaving Train in Darkness.**—The question as to whether, under such circumstances, the passenger was guilty of contributory negligence is a proper one for the determination of the jury. (p. 499.)

**INSTRUCTIONS—Refusal of Additional Instructions.**—Where the trial court has, on his own motion, fully and fairly instructed the jury upon all of the issues and the law of the case, it is not error to refuse to give additional instructions requested by the parties. (p. 499.)

(Syllabi by the court.)

James E. Kelby, H. F. Rose and Frank E. Bishop, for the appellant.

Reavis & Reavis, for the appellee.

504 BARNES, J. From a verdict and judgment in favor of the plaintiff in an action for personal injuries, the defendant has appealed.

It appears that on the thirteenth day of December, 1907, the plaintiff shipped two carloads of hogs over the defendant's railroad from Verdon, Nebraska, to Kansas City, Missouri. As is customary in such cases, plaintiff was furnished with transportation to enable him to accompany and care for his stock shipment. It may be stated at the outset that under his contract for transportation he was not entitled to the full measure of care and protection which the law



would afford him had he been traveling on one of defendant's regular passenger trains; but he was, while accompanying his stock on defendant's freight train, entitled to receive the highest degree of care and protection from the defendant's servants and agents consistent with the nature of the train on which he was riding, and its proper and careful operation.

The train left the village of Verdon at 8 o'clock in the evening, and reached a point in the vicinity of the village of Nodaway about 3 o'clock the next morning. Before reaching Nodaway the plaintiff had an attack of sudden illness, and sought for a closet in the way-car, and, finding none, he informed the conductor of his condition and his necessity, and was told that the train would reach Nodaway in about fifteen minutes, where it would stop long enough for him to get off. After the lapse of about fifteen minutes the train whistled and came to a stop. The plaintiff ~~was~~ then asked the conductor if this was Nodaway, and was told that it was. When the train stopped the brakeman took his lantern and left the car, passing out of the rear door and closing it after him. About two or three minutes thereafter the plaintiff followed him. It appears that the train was not at Nodaway station, but had stopped short of that point because another train ahead had not cleared the block signal. The brakeman was aware of that fact, and says he left the train to go back and flag any other train which might have been approaching from the rear, and his knowledge must be imputed to the defendant. When the plaintiff reached the rear platform of the car he took hold of the railing, descended the steps, took one additional step, and alighted upon what he supposed was the roadbed. He says he saw what he took to be the brakeman's lantern; he then advanced an additional step, and landed in the bed of a river some thirty feet below; the way-car having stopped on an open bridge or trestle which there spanned the stream. It further appears that the night was pitch dark; that it was snowing or sleeting, so it was impossible for the plaintiff to see the situation or ascertain the danger there existing. The brakeman testified that, by the light of his lantern, he saw the plaintiff come out of the car and descend the steps onto the bridge; that he called out to warn him of the danger. It seems clear, however, that either the plaintiff did not hear him, or that the warning came too late to be of any avail. The foregoing statement fairly reflects the undisputed facts of this case, and it is the defendant's first contention that they fail to show such negligence on its part as will entitle the plaintiff to recover for the injuries which it must be conceded, he thereby sustained.

For the following reasons, we are of opinion that this contention should not be upheld. The plaintiff was a passenger being transported on the defendant's freight train, and as such was entitled to the highest degree of care and protection from defendant's agents and servants consistent with the proper operation of its train and that <sup>506</sup> method of transportation. En route it became absolutely necessary for him to leave the train. This the conductor of the train well knew. Having such knowledge, he informed the plaintiff that the next stop was Nodaway, and that the train would stop long enough to enable him to alight and attend to the call of nature. As above stated, when the train stopped the conductor knew, or was charged with the knowledge, that they had not reached Nodaway station, and it was his duty to so inform the plaintiff. Knowing that the plaintiff was about to leave the car, the conductor should have notified him of his danger and warned him to look out for a safe place to alight. Not only was this the duty of the conductor, but a due regard for the safety of human life and limb should have impelled him to have exercised at least some reasonable precaution for the welfare of his passenger. This he did not do, but allowed the plaintiff to go forth into the darkness, following the brakeman, without consideration, or warning of any kind. We are therefore of opinion that his conduct constituted such negligence as entitles the plaintiff to recover.

It is strenuously contended, however, that plaintiff was guilty of contributory negligence, and therefore the verdict and judgment in his favor cannot be sustained. Many cases are cited by counsel for defendant in support of this contention. Among them we find Chicago etc. R. Co. v. Martelle, 65 Neb. 540, 91 N. W. 364, and Chicago etc. R. Co. v. Mann, 78 Neb. 541, 111 N. W. 379, decided by this court. In the Martelle case the plaintiff jumped from a rapidly moving train, while in the Mann case the plaintiff, in attempting to board a freight train, under an agreement to do so at his own risk, fell into a properly constructed ash-pit. It was therefore rightly held in both cases that there could be no recovery. We have examined the cases cited from other jurisdictions and are satisfied that they are all distinguishable from the case at bar. In this case it appears, without dispute, that the plaintiff's condition made it imperative for him to leave the train at the first opportunity. <sup>507</sup> His urgent necessity compelled haste, and he had been given permission by the conductor to alight from the way-car at the very time he made the attempt to do so. Again, the brakeman had preceded him, and when he reached the platform of the car he saw what he took to be the brakeman's lantern some little distance away. Therefore, he had the right to assume that the car was standing at a place where it would

be safe for him to alight. It also appears that, notwithstanding his haste, he exercised at least some degree of caution, for he says that when he left the steps he kept hold of the railing of the car until his foot rested upon what seemed to him to be the solid roadbed. Being thus assured of his footing, he let go of the railing, took a second step, and fell from the open bridge or trestle to the bed of the stream below. Under such circumstances we are of opinion that the question of contributory negligence was one for the determination of the jury, and, both of the foregoing questions having been properly submitted to them, we should not disturb their verdict.

Finally, it is contended that the district court erred in giving paragraphs 1 to 5 of his instructions to the jury, and in refusing to give instructions numbered 4, 5 and 6, tendered and requested by the defendant. Without discussing these several assignments separately, it is sufficient to say that we have carefully considered them, and are of opinion that the trial court did not err in giving and refusing instructions.

For the foregoing reasons, the judgment of the district court is affirmed.

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*As to the Liability of a Railway Company to a Passenger Leaving a train at a place other than the regular station, see New York etc. Ry. Co. v. Doane, 115 Ind. 435, 7 Am. St. Rep. 451; Stutz v. Chicago etc. Ry. Co., 73 Wis. 147, 9 Am. St. Rep. 769; Kansas City etc. Ry. Co. v. Parker, 69 Ark. 401, 86 Am. St. Rep. 205; Ouellette v. Grand Trunk Ry. Co., 106 Me. 153, ante, p. 340; St. Louis etc. Ry. Co. v. Bragg, 69 Ark. 402, 86 Am. St. Rep. 206. When the name of a station is called, and soon thereafter the train is brought to a standstill, a passenger may reasonably conclude that it has stopped at the station, and endeavor to alight, and may recover if injured in his attempt to do so, unless the circumstances and indications are such as to render it manifest that the train has not reached the usual and proper landing-place: Smith v. Georgia Pac. Ry. Co., 88 Ala. 538, 16 Am. St. Rep. 63. And when in an action against railroad company for injuries received by one in alighting from a freight train on which he was regularly received and traveling as a passenger, it appears that the train was not stopped at the usual place, where it was safe for passengers to alight, but at an unusual place, where it was unsafe and dangerous, and where the regular station was announced, thereby inviting the party injured, nothing to the contrary appearing, to get off when and where it stopped, and the night was very dark, and passengers in the caboose could not, for that reason, see the danger, and the conductor, on leaving the caboose with the light, could or might have seen it, his failure to warn and inform the passengers of the danger was gross negligence, for which the company is liable: McGee v. Missouri Pac. Ry. Co., 92 Mo. 208, 1 Am. St. Rep. 706.*

*The Liability of a Railway Company to a Person Riding on a Drover's pass for the purpose of taking care of his stock on the train is discussed in the note to Illinois Cent. R. R. Co. v. O'Keefe, 61 Am. St. Rep. 89. According to Illinois Cent. R. R. Co. v. Beebe, 174 Ill. 13, 66 Am. St. 253, one riding on a drover's pass in the charge of live-stock shipped by him is a passenger for hire, and as such entitled to recover if injured through the negligence of the railway corporation or its employees.*

**HENTON v. SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD.**

[87 Neb. 552, 127 N. W. 869.]

**FRATERNAL INSURANCE—Reinstatement by Clerk of Local Camp.**—Where the by-laws of a fraternal beneficiary association authorize the clerk of a local camp to collect arrearages from members who have been suspended for nonpayment of assessments, to restore their names to the membership list, and to report reinstatements to the sovereign camp, he is the agent of the association in performing those duties. (p. 502.)

**FRATERNAL INSURANCE—Reinstatement Without Health Certificate.**—A fraternal beneficiary association may be bound by the action of a local camp clerk who collects arrearages from a member suspended for nonpayment of assessments and restores his name to the membership list without demanding or receiving a health certificate required by the by-laws, where the clerk acts with full knowledge that the member is sick at the time, and where there is no fraud on the latter's part. (p. 503.)

**APPEAL—Request for Direct Verdict—Review.**—Where both parties, at the close of the evidence, request a peremptory instruction, and a verdict is directed in favor of plaintiff, the action of the trial court in declining to submit issues of fact to the jury presents no question for review in the appellate court. (p. 503.)

(Syllabi by the court.)

Arthur H. Burnett, Matthew Gering and A. G. Ellick, for the appellant.

A. L. Tidd, for the appellee.

<sup>552</sup> **ROSE, J.** This is a suit on a fraternal beneficiary certificate issued May 7, 1906, by defendant to W. E. Henton, who died March 7, 1907. Plaintiffs are his widow and orphans. They were named as beneficiaries in his certificate, which, if enforceable, obligates defendant to pay them seven hundred and fifty dollars and to expend one hundred dollars for a monument at assured's grave. Plaintiffs recovered judgment for the full amount of their claim, and defendant has appealed.

<sup>553</sup> The Sovereign Camp of the Woodmen of the World is in Omaha. Assured was a member of the local or subordinate camp at Plattsmouth. To retain his membership and keep his insurance in force he was required to pay monthly assessments of two dollars and fifteen cents each. The assessment for each month was payable on or before the first day of the month following. For failure of a member to make payment within that time, a by-law provides that "he shall stand suspended, and during such suspension his beneficiary certificate shall be void." It is admitted in the answer that the insurance was in force during January, 1907, though the proofs do not show the payment of the assessments for December, 1906, and January, 1907, until the latter part of

February. There is evidence to sustain a finding that those assessments were paid to the clerk of the local camp about ten days before the death of assured, and that on March 7, 1907, before his death, the February assessment was also paid to the clerk. The December and January assessments were paid by a son of assured after the latter had been suspended for nonpayment of the January assessment. Assured's brother in law paid the February assessment by check.

Defendant denies liability on the ground that assured, after he had been suspended, was never reinstated. This defense is based on the following propositions: Assured was presumed to know the laws of the association and the limitations they impose upon officers and members of the local camp. He had been suspended more than ten days when the January assessment was paid. Thereafter he could only be reinstated by paying all arrearages and complying with a by-law which required him to deliver to the clerk a signed statement that he was in good health. Such a certificate was never furnished. When the arrearages were paid defendant was afflicted with the malady which resulted in his death, and for that reason he could not be reinstated. The local officers had no authority to waive the health certificate or other requirements of the by-laws. The points of law involved in the position taken by defendant <sup>554</sup> are ably argued. It is contended that in accepting the payments, after assured had been delinquent more than ten days, the clerk of the local camp was the agent of assured. In addition to its constitution and by-laws defendant relies on the following language, which is copied from the clerk's receipt: "If any part of the above amount is paid for the purpose of reinstating the sovereign so paying, it is received upon the condition and agreement that I receive and hold the same in trust for him pending the necessary action upon his application for reinstatement, and that he has no claim upon the order until such application is accepted in accordance with the constitution and laws. If such application is not accepted, the above sum to be refunded."

The evidence tends to show these facts: Assured's suspension and reinstatement were entered on the records of the local camp and reported to the sovereign camp. Afterward the latter received and audited the payments of the December and January assessments, and no effort was made to return them until April, 1907. The delinquent payments were returned by defendant to the local clerk, but he did not tender them back to plaintiffs, and they were never refunded, though there is in the record an offer by defendant to return them. Nothing was said about the health certificate when the clerk collected the arrearages, and no request for it was ever made. Fraud on the part of assured is not shown. The clerk knew of assured's illness, and had previously reported

the fact to the local camp at a regular meeting. Before the February assessment was paid inquiry was made of the clerk as to assured's standing, and he replied: "He owes one assessment and had better pay it."

Under these circumstances, was the district court justified in holding that the health certificate and forfeiture were waived? Defendant's by-laws require members to pay each assessment and all arrearages, in cases of suspension and reinstatement, to the clerk of the local camp, who is required to forward the funds to the sovereign <sup>555</sup> camp. Transactions essential to the reinstating of a member who has been suspended for nonpayment of assessments must be conducted with the clerk of the local camp. The by-laws provide: "Should a suspended member pay all arrearages and dues to the clerk of his camp within ten days from the date of his suspension, and if in good health and not addicted to the excessive use of intoxicants or narcotics, he shall be restored to membership and his beneficiary certificate again become valid. After the expiration of ten days and within three months from the date of suspension of a suspended member, to reinstate he must pay to the clerk of his camp all arrearages and dues and deliver to him a written statement and warranty signed by himself and witnessed that he is in good health, and not addicted to the excessive use of intoxicants or narcotics, as a condition precedent to reinstatement, and waiving all rights thereto, if such written statement and warranty be untrue." The penalty imposed upon a clerk for reinstating a member whose health is at the time impaired is suspension from office and expulsion from the camp. It seems clear, therefore, that the clerk is the agent of defendant in receiving arrearages and in reinstating members: *Pringle v. Modern Woodmen of America*, 76 Neb. 384, 107 N. W. 756, 113 N. W. 231; *Soehner v. Grand Lodge, Order of Sons of Herman*, 74 Neb. 399, 104 N. W. 871. Under the facts disclosed the clerk did not divest himself of such agency by the form or terms of the receipt quoted. The effect of the clerk's agency is stated in *Pringle v. Modern Woodmen of America*, 76 Neb. 384, 107 N. W. 756, 113 N. W. 231, as follows: "In *Modern Woodmen of America v. Colman*, 68 Neb. 660, 94 N. W. 814, 96 N. W. 154, we held that a forfeiture incurred by the holder of a life insurance policy or contract is waived, if the company, with knowledge of the facts, subsequently collects premiums, dues or assessments on account of the contract, and retains them, without objection, until after the death of the insured; that it is the duty of the agent to make known to his principal all facts concerning the service in which he is engaged that come to his knowledge in the course of his employment, and this <sup>556</sup> duty he is, in a subsequent action between his principal and a third person, conclusively

presumed to have performed. This is the foundation of the rule, necessary to public safety, that notice to an agent in the course of his employment is notice to his principal."

The agency of the clerk of one of defendant's local camps was considered in *Frame v. Sovereign Camp W. O. W.*, 67 Mo. App. 127. The report of the case shows that a member in arrears took sick Sunday, and died Wednesday, following. A relative went to the clerk of the local camp Sunday, reported the sickness, paid the delinquent assessments, and obtained a certificate of reinstatement. The language of the court follows: "The result of our views on this branch of the case is this: That if the clerk of the local camp, with knowledge of the condition of the delinquent and suspended member, receives his dues and reinstates him in the fraternity, it is, in the absence of fraud or collusion, binding on the order; and that such order cannot after such action, if it turns out that the delinquent afterward dies of the sickness with which he was known to be afflicted when reinstated, repudiate the action of its constituted agent. The matter of accepting arrearages and reinstating members was intrusted to the clerk, and his action on such matter, when taken in good faith, binds his principal, as in other cases of principal and agent." This is in harmony with the views expressed in *Pringle v. Modern Woodmen of America*, 76 Neb. 384, 107 N. W. 756, 113 N. W. 231. Adherence to the principle announced in the case last cited requires the approval of the finding in favor of plaintiffs in the present case.

At the close of the evidence both parties requested a peremptory instruction, and a verdict was directed in favor of plaintiffs. It follows that the action of the trial court in declining to submit issues of fact to the jury presents no question to this court for review, though assailed as erroneous: *Dorsey v. Wellman*, 85 Neb. 262, 122 N. W. 989; *Segear v. Westcott*, 83 Neb. 515, 120 N. W. 570.

<sup>557</sup> No error has been found in the record, and the judgment is affirmed.

Root, J., not sitting.

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*On the Right of an Insured Person to Reinstatement after a suspension or forfeiture of his policy, and the effect of such reinstatement, see the note to Lake v. Minnesota etc. Assn., 52 Am. St. Rep. 577; Pacific Mut. Life Ins. Co. v. Galbraith, 115 Tenn. 471, 112 Am. St. Rep. 862. A provision in a policy of life insurance that delinquent members may be reinstated if approved by the medical director and president, by giving reasonable assurance that they are in continued good health, is valid and reasonable, and the required approval is not merely a ministerial act, but involves the exercise of judgment and discretion: Lane v. Fidelity Mut. Life Ins. Co., 142 N. C. 55, 115 Am. St. Rep. 729.*

*The Waiver of Conditions in Insurance Policies by Agents of the insurer is discussed in the note to Johnson v. Aetna Ins. Co., 107 Am. St. Rep. 99.*

## IN RE JURGENS.

[87 Neb. 571, 127 N. W. 885.]

**HOMESTEAD**—Assignment to Widow—Determination of Value.—In assigning a homestead to the widow of an intestate, where the estate owes no debts, the value of their homestead as owned and occupied by them at the time of the death of the husband should be adopted in fixing the extent thereof; and its enhanced value created by the industry and economy of the applicant should not be considered. (pp. 505, 506.)

(Syllabus by the court.)

G. W. Prather, for the appellant.

F. L. Carrico and Hague &amp; Anderbery, for the appellee.

<sup>572</sup> **BARNES, J.** This was an application by Anna C. Jurgens, widow of Heinrich J. Jurgens, to assign to her a homestead out of the lands of her deceased husband. The county court denied her application, and on appeal to the district court for Franklin county there was a finding that at the time of the death of said Heinrich J. Jurgens the said above-described real estate did not exceed in value the sum of two thousand dollars above the liens and encumbrances thereon, and the following judgment was rendered: "It is therefore ordered, adjudged and decreed that said above described real estate, to wit, the northeast quarter of section 10, township 14, range 16 west of the sixth P. M. in Franklin county, Nebraska, be and the same is hereby assigned to the said Anna C. Jurgens for and during the term of her natural life, and that the minor heirs, to wit, George Jurgens, Jurgen Jurgens, Rezena Jurgens, Ona Jurgens and Anna Jurgens share with her in the rents, issues and profits of said homestead during their minority. To which findings, decree and judgment the guardian ad litem excepts." From that order the guardian ad litem has appealed to this court.

It appears that in the month of October, 1899, Heinrich J. Jurgens purchased and took possession of the east half of section 10, township 14 north, of range 16 west of the sixth P. M. in Franklin county, Nebraska, under a contract for a warranty deed, the purchase price being eight thousand dollars, two thousand of which was paid at that time; that the petitioner and her husband selected the north half of the said tract, the same being the land now in question, as their homestead, and resided thereon until her husband's death, which occurred on the twenty-eighth day of June, 1901; that at that time the remainder of the unpaid purchase price of the <sup>573</sup> half section amounted to about six thousand five hundred dollars; that the petitioner, together with her minor children, have resided on the northeast quarter of said section 10 as their homestead continuously until the present time; that they



have cultivated and improved the land, and by their industry and economy have paid the remainder of the purchase price, together with other debts owing by the deceased at the time of his death, amounting to about seven hundred dollars; that on the tenth day of September, 1908, the widow filed her petition in the county court for the assignment of the said northeast quarter of said section as her homestead; a guardian ad litem was appointed for the minor heirs, and upon a hearing before the county judge her petition was denied, and she thereupon prosecuted an appeal to the district court where a trial resulted in the order and judgment above quoted.

It is now contended by the guardian ad litem that the district court erred in holding that, in assigning the petitioner's homestead, its value and extent should be determined as of the date of the death of her husband, and this is the main question presented for our determination. By the terms of section 17 of the homestead act (Laws 1879, p. 57; Comp. Stats. 1909, c. 36), the land in question in this case descended in fee on the death of the intestate to his children, subject to the life estate of the widow. In construing the provisions of the homestead law it was said in *Re Hadsall*, 82 Neb. 587, 118 N. W. 331: "The title to the lots in question was in Henry B. Hadsall at the time of his decease. It was his homestead. On his death a life estate therein vested in his widow, the applicant herein, and the fee vested in his heirs subject to the widow's life estate. This homestead was not an asset of the decedent's estate or subject to administration, and we are unanimous in the opinion that all claims against the estate of whatever kind or nature must be paid out of the assets belonging to the estate." It seems clear, therefore, that the homestead which vests at the death of an intestate in the survivor for life is the identical homestead in quantity and value defined in section 1 of the act of 1879, and the statute recognizes none other.

It is claimed, however, that the applicant having by her industry and economy paid the remainder of the purchase price of the half section of land of which her husband died seised, together with the other debts owing by his estate, and having placed valuable improvements on that portion of it occupied as a homestead, thereby materially increasing its value, she is not entitled to have the whole homestead of one hundred and sixty acres assigned to her, and that she is only entitled to so much of it as is now at this time worth two thousand dollars. We do not think this view should be adopted. The law is well settled that, if a creditor of the deceased debtor claims that the homestead exceeds in value the statutory amount, its worth at the time of the decedent's death will govern: 21 Cyc. 576; *Parisot v. Tucker*, 65 Miss. 439, 4 South. 113; *McLane v. Paschal*, 74 Tex. 20, 11 S. W. 837. We are of opinion that the same rule should govern in

the matter of the assignment of a homestead when petitioned for by the widow of an intestate.

It is further contended that the court erred in refusing to receive evidence of the amount and value of the improvements placed upon the land by the petitioner, but in view of the rule above announced, such evidence was clearly immaterial, and the court did not err in excluding it.

For the foregoing reasons, the judgment of the district court is affirmed.

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*In the Case of a Probate Homestead* the law of some states places no limitation on the value: *Estate of Levy*, 141 Cal. 646, 99 Am. St. Rep. 92.

*The Value of a Homestead, so Far as Concerns an Alleged Release* thereof by leasing the premises for the purpose of prospecting for oil and gas, is determinable as of the date of the lease, and not as of the time when gas or oil is discovered by the lessees: *Bruner v. Hicks*, 230 Ill. 536, 120 Am. St. Rep. 332.

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## WADE v. BELMONT IRRIGATING CANAL AND WATER-POWER COMPANY.

[87 Neb. 732, 128 N. W. 514.]

**IRRIGATION — Breach of Contract to Furnish Water — Damages.**—In an action for damages for the breach of a contract to supply water for irrigating the plaintiff's lands, where it appears that the land is unbroken and practically unproductive prairie, if the plaintiff prevails, he can only recover the difference between the rental value of said land with water according to the terms of the contract and the rental value without such water. The supposed value of what the land might have produced had the water been furnished is too remote, speculative and conjectural. (p. 508.)

(Syllabus by the court.)

G. J. Hunt, for the appellant.

Williams & Williams and Wright, Duffie & Wright for the appellee.

**733 REESE, C. J.** Plaintiff filed his petition in the district court alleging that the defendant is a corporation organized under the laws of this state for the purpose of operating an irrigating canal and selling the water for irrigation; that he is the owner of the southeast quarter of the northeast quarter and the northeast quarter of the southeast quarter of section 19, township 18, range 47, in Cheyenne county, "said land being located under and susceptible of irrigation from the defendant's canal"; that on the thirtieth day of December, 1897, he purchased the land of defendant, with the express understanding that the consideration paid for the

land "included payment for two forty-acre tract water rights, the water under said contract to be delivered to plaintiff from said canal, for which water rights plaintiff paid defendant for said lands and said water rights the sum of eighteen hundred dollars," and in consideration of the further sum of two dollars defendant executed and delivered to plaintiff a "water deed," a copy of which is attached to the petition, and by which defendant agreed to furnish the necessary water for irrigating said land during each and every irrigating season thereafter; that defendant has failed and neglected to furnish any water to irrigate said land for the year 1907, to plaintiff's damage in the sum of eight hundred dollars, for which judgment is demanded. The defendant answered the petition, denying "that, by reason of defendant's failure to furnish water to the plaintiff in the year 1907, said plaintiff has been damaged in the sum of eight hundred dollars or in any sum whatever." The cause was tried to the court without the intervention of a jury, the finding of the court being in favor of the plaintiff, and the assessment of his damages in the sum of four hundred dollars, for which judgment was rendered. Defendant appeals.

A number of questions are presented for decision, but it is thought they may not arise again in another trial, and one only will be here noticed, and that one is as to the proper measure of damages. The proof showed that, prior <sup>734</sup> to the year 1907, the land had not been irrigated for some time and no crops had been raised upon it; that plaintiff desired it to be irrigated that year so that the native grasses would grow where practically none had grown before. The land was to all intents and purposes wild and substantially a desert waste. The theory of plaintiff's case was that if the soil could be irrigated, beginning early in the season, the moisture would cause the spontaneous growth of grama grass which would within a short time develop into what is called "wheat grass," and from which a cutting could be had. Neither one of the grasses named was growing on the land, except on one or two small spots. At the beginning of the trial plaintiff was called as a witness in his own behalf, and the question arose as to what was the proper measure of damages, when the court announced that "the damage is the difference between the crop actually raised and what would have been raised if water had been supplied." While no exception was taken to the ruling, the decision caused the case to be tried upon that issue, and the question is presented here. As we view the case, there can be no doubt but that the learned district judge was in error in so holding. There were no special damages alleged or declared upon the petition. As we have seen, the averments reach only to the fact that defendant undertook to furnish water sufficient to irrigate the land, and failed to

do so, to plaintiff's damage. Indeed, it is quite doubtful if under the facts of the case any allegations could be made which would admit of the application of the rule stated by the court.

In *Crow v. San Joaquin & Kings River C. & I. Co.*, 130 Cal. 309, 62 Pac. 562, 1058, the question of the measure of damages for failure to furnish water in compliance with the contract therefor was under consideration. The trial court admitted evidence to the effect that if plaintiff had obtained the water to which he was entitled, he would have planted a crop of alfalfa from which he would have realized certain profits, but owing to his failure to get the water, he did not plant the alfalfa, and instructed the jury that the <sup>735</sup> plaintiff was entitled to recover as damages the profits he would have realized from the crops of alfalfa that he would have raised on the land had water been furnished by defendant as demanded by the plaintiff, less the cost of raising and caring for the crops, and less what the land actually produced during the time of the failure to supply the water. The court say: "The rule embodied in the instruction of the court and under which the testimony on behalf of the plaintiff was admitted is too remote and speculative. The proper measure of damages in a case like this is the difference between the rental value of the land with water and its rental value without it. . . . Conjecture as to profits of the kind sought here cannot be recovered as damages in such cases; they must be damages capable of ascertainment by proof to a reasonable certainty; uncertain and speculative profits, which might or might not have been realized, are not recoverable in such action." This rule is announced in *Pallett v. Murphy*, 131 Cal. 192, 63 Pac. 366, *Northern Colorado Irr. Co. v. Richards*, 22 Colo. 450, 45 Pac. 423, *Giles v. O'Toole*, 4 Barb. 261, *City of Chicago v. Huenerbein*, 85 Ill. 594, 28 Am. Rep. 626, *Pollitt v. Long*, 58 Barb. 20, *Horres v. Berkeley Chemical Co.*, 57 S. C. 189, 35 S. E. 500, 52 L. R. A. 36; and is doubtless well settled. There are cases holding, and perhaps correctly, that if a crop is planted and has been well advanced in growth so that by its inspection a well-founded opinion can be formed as to what the crop will produce if permitted to mature according to the usual course of the season, such evidence might be completed, but we have found no well-considered case where the rule has been applied to a case like this. The difference between the rental value of the land with water supply and its rental value as it was must be the test.

It follows that the judgment of the district court must be reversed and the cause remanded for further proceedings, which is done.

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*That Damages may be Recovered for the Breach of a Contract to Furnish Water for irrigation purposes, see Clague v. Tri-State Land Co.,*

84 Neb. 499, 133 Am. St. Rep. 637; Mathieu v. North American etc. Co., 119 La. 896, 121 Am. St. Rep. 548.

*Where Land is Wrongfully Overflowed so as to Deprive the Owner of its use, the true measure of damages is its fair rental value, and not the contingent profits of crops which might have been raised on it had it not been overflowed: City of Chicago v. Huenerbein, 85 Ill. 594, 28 Am. Rep. 626.*

**CASES**  
**IN THE**  
**COURT OF ERRORS AND APPEALS**  
**OF**  
**NEW JERSEY.**

**REILLEY v. CURLEY.**

[75 N. J. Eq. 57, 71 Atl. 700.]

**ADJOINING OWNERS—Regard for Rights of Each Other.**—While one is entitled to enjoy his property in the pursuit of a lawful business, still he must conduct it with due regard to the rights of surrounding property owners. When it creates conditions which render the enjoyment of surrounding properties impossible, equity will restrain the persistent pursuit of the injury. (p. 511.)

**NUISANCE.—A Noise may Constitute a Nuisance which equity will restrain.** (p. 511.)

**NUISANCE.—In Determining Whether a Noise is a Nuisance,** the character and volume of the noise, the time and duration of its occurrence, the place where it occurs, and the surroundings thereof, are the important and determinative features. (p. 512.)

**NUISANCE.—Where the Noise from Machinery used in depositing stone on a lot in a residential district in a city renders it impossible for people in neighboring houses to converse or use their premises for customary purposes, such operations will be enjoined.** (p. 513.)

Ziegner & Lane, for the complainants.

Tumulty & Cutley, for the defendants.

<sup>58</sup> **GARRISON, V. C.** This is an application on behalf of Reilley and three other complainants against Curley and another to obtain a preliminary injunction.

The bill alleges that the complainants are owners or occupants, or both, of houses in Jersey City, in the neighborhood of Baldwin, Magnolia and Pavonia avenues and West and East streets; that this is a strictly residential neighborhood; that on East street, Curley, one of the defendants, has leased from Byron, the other defendant, two lots of land on opposite sides of that street; that he is engaged in hauling to those lots loads of broken stone; that these stones are in what are termed "boats"; that on the lots he has an engine and a derrick and a cable; that the cable is hitched to the "boats" and they are drawn up, by means of the steam en-

gine, to the top of the pile and there dumped; that then the cable is allowed to run free and the "boats" are lowered onto the wagons.

It is charged that the noise attendant upon the operation of the engine and cable is so great as to seriously interfere with the dwellers in that neighborhood, and is a nuisance.

It is also charged that the engine is a second-hand one, and in an unfit condition to be used. It is suggested that a muffler could be used upon the engine so as to minimize the noise, and that repairs could be made to it to do away with some of its present defects, which defects are alleged to be one of the causes of the noise complained of.

The answering affidavits are mainly directed to proving that the engine was the one ordinarily used for such operations, and that no more noise is attendant upon its operation than is usual in such operations, and that mufflers are not put upon such engines, and that no repairs are necessary to make the engine a proper one to be used with no unnecessary noise in this business. There is some slight attempt to show that it does not make much noise, but there is no direct denial of the allegations of the witnesses for the complainants that much noise does result from the operation.

An opportunity was afforded the defendant Curley to experiment <sup>59</sup> with a muffler, and in such other way as he might think fit to adopt, but the proofs show that he did not succeed in minimizing the volume of noise, which was as great as theretofore.

It will be useful to consider several questions of law before dealing directly with the case at bar.

Since the defendant Curley is not engaged in improving the land on which he is piling the stone, but is merely using the land as a storage place for the stone, there is no occasion for the application of the principle that neighbors must endure the usual and customary discomforts arising out of the improvement by one of his property.

The first question relates to the principle to be applied to the rights of the respective parties, and this has been well summed up in a recent case in this court, as follows: "While defendant is entitled to the enjoyment of its property in the pursuit of a lawful business, that business must be conducted with due regard to the well-recognized rights of surrounding property owners. When such business becomes creative of conditions which clearly render the appropriate enjoyment of surrounding properties impossible, the rights of others are invaded, and equity will restrain the persistent pursuit of such injury": *First M. E. Church of Cape May v. Cape May Grain etc. Co.*, 73 N. J. Eq. 257, 67 Atl. 613.

The next question is whether noise alone may constitute such a nuisance as to subject the one creating the same to

restraint in equity. That such is the case I am convinced from the authorities, not only in our state, but in many other jurisdictions.

Of course, the character and volume of the noise, and the time and duration of its occurrence, and the place where it occurs, and the surroundings thereof, are the important and determinative features: *Davidson v. Isham*, <sup>60</sup> 9 N. J. Eq. 186; *Wolcott v. Melick*, 11 N. J. Eq. 204, 66 Am. Dec. 790; *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654; *Cleveland v. Citizens' Gaslight Co.*, 20 N. J. Eq. 201; *Demarest v. Hardham*, 34 N. J. Eq. 469; *Cronin v. Bloemesteek*, 58 N. J. Eq. 313, 43 Atl. 605; *Gilbough v. West Side Amusement Co.*, 64 N. J. Eq. 27, 53 Atl. 289; *Laird v. Atlantic Coast Sanitary Co.*, 73 N. J. Eq. 49, 67 Atl. 387; *First M. E. Church v. Cape May Grain etc. Co.*, 73 N. J. Eq. 257, 67 Atl. 613; *Powell v. Bentley & Gerwig Furniture Co.*, 12 L. R. A. 53 (with numerous cases in the notes); *Hill v. McBurney Oil etc. Co.*, 112 Ga. 788, 38 S. E. 42, 52 L. R. A. 398; *Froelicher v. Oswald Iron Works*, 111 La. 705, 35 South. 821, 64 L. R. A. 228, and note; *Herring v. Wilton*, 106 Va. 171, 117 Am. St. Rep. 997, 55 S. E. 546, 7 L. R. A., N. S., 349, 10 Ann. Cas. 66; 2 Wood on Nuisances, 3d ed., sec. 611.

The defendant Curley placed the stress on his argument, so far as the law applicable to the case is concerned, upon the distinction suggested by the vice-chancellor in the case of *Hennessy v. Carmony*, 50 N. J. Eq. 616, 25 Atl. 374. The court in that case drew a distinction between that class of nuisances which affected air and light merely by way of noise and disagreeable gases and obstruction of light and those which directly affected the land itself or structures upon it. The only pertinence of the distinction relates to the degree of the alleged nuisance, the vice-chancellor suggesting that in the former class of cases a much greater degree is required to entitle the party to relief than in the latter; but the whole matter is, in my view, set at rest by the most recent decision of the court of errors and appeals upon this subject. The case of *Roessler & Hasslacher Chemical Co. v. Doyle*, 73 N. J. L. 521, 64 Atl. 156, was affirmed in the court of errors and appeals (74 N. J. L. 850, 67 Atl. 1102), by the unanimous vote of that court, for the reasons set forth in the supreme court. In the supreme court, attention is called to the distinction above referred to, which apparently was first suggested by <sup>61</sup> Lord Westbury in *St. Helens Smelting Co. v. Tipping*, 11 H. L. C. 642; and Judge Reed, in writing the opinion, said (at page 528): "These observations of Lord Westbury seem to have suggested the form of the requests on the trial of the present case. The court was asked to charge that the undisputed evidence was that the odors and noise merely affected the air and plaintiff's personal com-



fort; that the plaintiff's residence is not (sic) in a manufacturing locality, and that the odors were incident to the proper conduct of defendant's business; therefore, the plaintiff could not recover.

"But it is apparent that if the odors and noises existed as testified to by the plaintiff and his witnesses, they diminished the enjoyment, habitableness and value of his dwelling, and so injured his property.- The request was properly refused.

"All the requests to charge which are grounded upon a distinction between personal discomfort and injury to plaintiff's habitation were based upon a difference which in this case did not exist.

"Indeed, no judge has ever suggested that personal discomfort received by an owner of property while residing therein would not afford a ground of action."

This case also reiterates the well-settled principle which lies at the foundation of all of this branch of the law, and which has been heretofore stated, namely, that the degree of personal discomfort is the determinative feature, and "in measuring the degree . . . all the surrounding circumstances must be taken into account in judging whether the degree is of sufficient importance to confer a right of action."

This brings me to a consideration of the facts of the case in hand.

The only dispute which it may fairly be said the proofs disclose concerns the condition of the machinery in use, the complainants alleging that it is second-hand and defective, and the defendants denying this.

There is practically no dispute of the complainant's testimony concerning the nature, extent and effect of the noise created by the defendant Curley's operation of the engine and cable and the "boats." The testimony of numerous witnesses on behalf of the <sup>62</sup> complainants, who all dwell in the neighborhood, is that from an early hour in the morning until 6 o'clock at night the noise of the engine and its operation practically precludes the possibility of conversing in the houses in the neighborhood when the windows of such houses are closed, and that the noise is such that the windows of the houses cannot be kept open.

It seems to me clear, beyond possibility of successful refutation, that an occupant of a dwelling-house in a strictly residential neighborhood, as this is, may be said to be deprived of the legitimate use of his property, or to have his property rights seriously invaded, if, during all of the day so much noise penetrates his dwelling from the operation, by a neighbor, of machinery as to render it impossible for him to converse in or to use his premises for their customary purposes.

I do not decide, because it is not necessary, that the defendant may not use these lots for the deposit of stone. I do not decide that a residential neighborhood is an improper place to store broken stone taken from excavations in other places. But it is important in the consideration to bear in mind that there are undoubtedly numerous places (where broken stone could be stored with the noise necessarily attendant on handling the same) which are so far removed from residences as not to seriously interfere with their use by their occupants.

The fact that the use of these lots for this purpose is temporary does not aid the defendants at all, but rather makes in favor of the complainants. If the defendants' purpose is, as they stated, merely to use these lots temporarily for this purpose, it would seem as if their duty, under the circumstances, was to seek some other place for such temporary use than a thickly settled residential portion of the city.

Under all of the circumstances of this case I think that the complainants have proven a right requiring protection, and that the defendants have invaded that right so as to be restrained.

I will advise the issuance of a temporary injunction restraining the defendants from so operating the engine or any engine upon the premises in question as to cause noise of sufficient volume to penetrate the houses of the neighbors and destroy the peace and comfort of those dwelling therein.

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*The Duty and Liability of Land Owners to Adjoining Proprietors* are discussed in the note to *Weitzmann v. Barber Asphalt Co.*, 123 Am. St. Rep. 565.

*As to Whether Noises may Constitute a Nuisance*, see the note to *Acme Fertilizer Co. v. State*, 107 Am. St. Rep. 211, 231.

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## GALLAGHER v. TRUE AMERICAN PUBLISHING COMPANY.

[75 N. J. Eq. 171, 71 Atl. 741.]

**TIME—Fractions of Day.—The Law will Take Account of the fraction of a day when justice so requires.** (p. 517.)

**TIME—Fractions of Day—Adjudications on Same Day.—If, on a day when this court adjudicates that a corporation is insolvent and appoints a receiver thereof in whom title to the company's real and personal property thereupon vests, a judgment is recovered and entered against the corporation at an earlier hour, the judgment is to be paid out of the proceeds of the sale of the company's land as a preferred claim, because the judgment was a lien upon the land at**

the time of the appointment of the receiver. *Doane v. Millville Mutual Ins. Co.*, 43 N. J. Eq. 522, 11 Atl. 739, distinguished. (p. 517.)  
(Syllabi by the court.)

Charles E. Gummere, for the appellant.

James & Malcolm G. Buchanan, for the receiver.

<sup>171</sup> WALKER, V. C. On April 28, 1908, at ten minutes after 4 o'clock in the afternoon, a judgment was recovered in the supreme court of this state against the defendant company, impleaded with others. The suit was on a promissory note of which the defendant company was the maker, and, consequently, the party primarily liable. The other defendants were indorsers. At 8 o'clock in the evening of the same day the bill of complaint in this cause was presented to this court, and an order was thereupon made appointing Edward L. Katzenbach, Esq., receiver of the defendant company. The bill and order were, according to the <sup>172</sup> practice, marked filed as of April 28, 1908, the date of their presentation and consideration, and were actually filed in the clerk's office the next day. Mr. Katzenbach qualified as receiver on the 29th, the day the papers were lodged in the clerk's office.

A claim by the plaintiff as a preferred creditor against the defendant corporation in respect to the lands of the defendant was duly made and presented to the receiver, who disallowed it as a preference. Hence this appeal.

The solution of the question here presented depends upon whether the law will take account of the fraction of a day.

Our act concerning judgments (Gen. Stats., p. 1841, sec. 2) provides that a judgment shall bind lands from the time of the actual entry thereof on the records of the court.

Section 68 of our present corporation act (Rev. 1896; Pub. Laws, pp. 277, 299) provides that upon the appointment of a receiver the property of an insolvent corporation forthwith vests in him; and, therefore, the property of the defendant company vested in the receiver on the day the appellant's judgment was recovered. Qualification by giving bond and taking the statutory oath is only necessary to enable the receiver to act; it is not a prerequisite to the vesting of title in him. Further, the corporation act (Pub. Laws 1896, pp. 277, 304, sec. 86) provides that upon distribution by the receiver judgment creditors shall be preferred when the judgment has not been by confession for the purpose of preference.

In *Doane v. Millville Mutual Ins. Co.*, 43 N. J. Eq. 522, 11 Atl. 739, it was held in this court that a bona fide judgment creditor is entitled to preference in payment of general creditors of an insolvent corporation, but that such preference

does not include a judgment obtained against the company on the day when the court took control thereof by issuing an order restraining the company from transacting business. This proceeded upon the principle that the law knows no parts of days. This case was reviewed in the court of errors and appeals and reversed, but not upon the question to which reference has just been made.

In this case (*Doane v. Millville Mutual Ins. Co.*) the court of errors and appeals remarked (45 N. J. Eq. <sup>173</sup> 274, 17 Atl. 625) that it was in accord with prevalent judicial views to hold that judgment creditors should be preferred so far as they had acquired liens, and if real estate had become subject to judgment, or if personal property had been bound by delivery of an execution to the sheriff, the rights thus created should not be disturbed. This observation appears to modify what was held by this court in the same case regarding the lien of judgment creditors whose judgments are recovered on the same day a bill in insolvency is filed against a corporation and the court takes control of it by the issuance of a restraining order; but does not, as I understand it, modify the views of this court in that case on the facts of that case which were before the court; for in that case there does not appear to have been any proof as to the time in which the judgment was entered with reference to the time when the order to show cause and restraining order was made. Had these facts been made to appear, the decision of the court of chancery in that case might have been otherwise than it was; and, in the absence of such proof, the decision, to my mind, is unassailable. Certainly the court cannot take cognizance of a fraction of a day unless the particular time is brought to its attention. Regarding, then, the case of *Doane v. Millville Mutual Ins. Co.*, in this court, to have been decided with reference to the particular facts of that case, and having regard to the observation of the court of errors and appeals in the same case, effect can be given to the ruling in the latter court without holding that it overrules the decision of this court.

After all, the rule that the law does not take account of the fraction of a day is, like almost every other rule, subject to exceptions, and one exception is that which is recognized in the contest between judgment creditors as to who has the prior lien by virtue of a levy made on the same day with another or with other levies. Now, as it is incumbent upon courts to decide who is first in point of time with reference to the delivery of a writ to a sheriff or other officer, and of the priority of a levy upon property as between several executions, it would be quite an anomaly, if not absurd, for this court to refuse to take account of time as between a judgment creditor and a receiver, each claiming

priority of right in the real estate of an insolvent corporation, <sup>174</sup> the judgment creditor by reason of the entry of a judgment, which, by the terms of the statute, is a lien upon the land of the defendant upon its entry, and the receiver in behalf of unsecured creditors, asserting that the judgment merely ascertains the amount of the debt due to the creditor, and that no lien thereunder exists upon the land in his possession and to which he holds title by virtue of the statute and order of his appointment.

The law does take account of parts of days in cases where it is essential so to do in order that justice may be done: *Johnson v. Pennington*, 15 N. J. L. 188. And the exact time of the entry of a judgment may be proved as matter dehors the record: *Hunt v. Swayze*, 55 N. J. L. 33, 25 Atl. 850.

The doctrine that the law will take cognizance of the fractions of a day is a legal fiction, and it will not be permitted to work injustice: *Clark v. Bradlaugh*, L. R. 7 Q. B. D. 151; affirmed, on appeal, 8 Q. B. D. 63.

In *Hoppock's Exrs. v. Ramsey*, 28 N. J. Eq. 413, it was held that where a conveyance of land was made on the same day that a judgment was recovered against the grantor, and there was no allegation or proof to show which preceded the other in point of time, the master's report that the judgment was entitled to priority should be sent back for further proofs. This is a decision to the effect that as between a judgment and a conveyance made on the same day, it is proper and lawful to show which preceded the other in point of time. And that is practically the question which is before me on this appeal. The petitioner is a judgment creditor, whose judgment was entered against the defendant at ten minutes past 4 o'clock on a certain day, and the receiver occupies the position of a grantee, upon whom title devolved, not by a deed, it is true, but by act of the law operating through the order of his appointment, made at 8 o'clock in the evening of the same day.

The fact is that the appellant's judgment was entered three hours and fifty minutes (practically four hours) before the appointment of the receiver, and the consequent divesting of title to its lands out of the defendant and into the receiver by virtue <sup>175</sup> of the order of his appointment. To hold that the appellant's judgment was not a lien upon the lands of the defendant at the time of the appointment of the receiver would be to refuse to give effect to two statutes, namely, that which makes a judgment a lien upon lands from the time of its entry and that which provides that bona fide judgment creditors shall be paid by way of preference out of the assets of an insolvent corporation.

These views lead to a reversal of the decision of the receiver. I will advise an order that the appellant's judgment

be paid by way of preference out of the proceeds of the sale of the defendant corporation's real estate in the hands of the receiver.

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*While Fractions of a Day are Usually not Regarded* (Ex parte Masie, 131 Ala. 62, 90 Am. St. Rep. 20), they may be considered when justice demands it: See the note to *State v. Michael*, 78 Am. St. Rep. 382, 383. The legal fiction that there are no fractions of a day has no application to a case when the statute, to avoid confusion, expressly requires that notice shall be taken of the precise time an official act is done and that a record thereof be made: *Brady v. Gilman*, 96 Minn. 234, 113 Am. St. Rep. 622. And the legal fiction that there are no divisions or fractions of a day has no application to transactions between persons, where priority of rights becomes a question of fact: *New England Mortgage etc. Co. v. Fry*, 143 Ala. 637, 111 Am. St. Rep. 62.

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### PFEFFERLE v. HERR.

[75 N. J. Eq. 219, 71 Atl. 689.]

**GUARDIAN—Sale of Ward's Land for Maintenance.**—The rule of the statute that the orphans court may order a guardian to sell so much of the ward's land as may be adequate for his maintenance and education applies to testamentary as well as statutory guardians. (p. 521.)

**TRUSTEE—Encroachment on Corpus of Estate.**—In a proper case a testamentary trustee may obtain the protection of an order of court to make an encroachment in behalf of his ward on the corpus of the estate, and what may be done in advance may be ratified afterward. (p. 522.)

**EXECUTOR—Grounds for Removal.—The Encroachment** by an executor and trustee upon the principal of the estate of infant legatees in advance of the period of distribution, for their maintenance and education, is not ground for his removal, in the absence of bad faith or wanton and wasteful invasion of the corpus of the estate. (p. 522.)

**EXECUTOR—Grounds for Removal.—An Executor and Trustee** will not be removed on the ground that when he sold real estate, he made excessive payments to the widow on account of her dower without having it ascertained according to law, and on the ground that a suit filed by the widow, pending proceedings for the removal of the executor, has not been prosecuted with due diligence; at least until it has been definitely ascertained what is the fact in such matters. (p. 522.)

**WILL — Encumbrance on Land—Dower. — The Direction** in a will for the payment of all encumbrances on the testator's real estate out of his personal property is the expression of an intention to pass the real estate to the devisees unencumbered and to endow the widow in the same value therein as that value is in the hands of the devisees. (pp. 522, 523.)

**EXECUTOR—Removal for Failure to Pay Taxes.**—An executor will not be removed for dereliction in not paying taxes whereby penalties and interest were incurred and some of the estate sold, if the lands

have been redeemed and he has been surcharged in his account with the penalties and interest incurred. (p. 523.)

**EXECUTOR—Grounds for Removal.—The Statute Providing** that when property in the hands of an executor or trustee is unsecured or in danger of being wasted, he shall give bond conditioned for the faithful performance of his duty, is a declaration of legislative policy that it is not for every unwarranted act of omission or commission that an executor is to be removed, but that if he has strayed from the path of fiduciary duty, he may be compelled to secure those who might suffer by reason of his dereliction, the stigma of removal to be placed upon him only in a flagrant case. (p. 523.)

**EXECUTOR—Grounds for Removal.—Where an Executor and trustee, who has made excessive payments to the widow on account of her dower, gives a bond required by court and conditioned on the faithful performance of duty, and thus secures the estate, his misconduct is not ground for removal. (pp. 523, 525.)**

Samuel A. Besson and Joseph M. Roseberry, for the appellants.

Pitney, Hardin & Skinner, for the respondent.

<sup>220</sup> **WALKER, V. O.** John F. Pfefferle died January 1, 1892, leaving him surviving his widow, Margaret E. Pfefferle, who was his second wife and who has since married, and whose name is now Margaret E. McClellan, and his three children, Florence, Gertrude and Frederick, by his first wife, and two children, Ida and Oscar, by his second wife. At the time of his death Florence was twelve years old; Gertrude, nine; Frederick, seven; Oscar, two, and Ida, three months. Mr. Pfefferle left a last will and testament dated November 11, 1891, which was proved before the surrogate of Essex county, January 25, 1892. Mr. Herr was made executor, and he and the testator's wife were appointed guardians of his children during their minority. Mr. Herr qualified as executor and took upon himself the burden of the administration of the estate upon letters testamentary being issued to him <sup>221</sup> on the date of the probate of the will. Neither he nor Mrs. McClellan qualified as testamentary guardians of the infant children of the deceased, but Mrs. McClellan in 1903 was appointed guardian of her two infant children by the Essex county orphans court.

The testator in his will devised and bequeathed all his real and personal estate unto such of his children as should be living at the time of his death, in equal shares, subject to the right of dower of his wife in the real estate, and directed his executor to sell so much and such parts of his personal estate as might seem necessary to pay and discharge all encumbrances on his real estate, it being his will and he did order that none of his real or personal estate should be conveyed or paid over to his children before they attained the age of thirty years, respectively, they, however, to have so much of the income and profit thereof as might be necessary for

their maintenance and education during their minority and for their support until they attain said age.

The appellants in their petition to the orphans court alleged that the executor and trustee had wasted and misapplied the estate committed to his custody, and had abused the trust and confidence reposed in him by the testator; that up to September, 1901, he had paid to the widow \$9,215.42 of the principal of the estate in violation of the provisions of the will; that he had so paid out of the principal to Florence the sum of \$5,199.49; to Gertrude, \$3,732.41; to Frederick, \$1,661.33; to Ida, \$1,012.84, and to Oscar, \$829.97—in all, \$21,650.56.

It will be noticed that the petitioners are Florence, Gertrude and Frederick, who were recipients of the respondent's disbursements out of their father's estate. The fact is that the respondent, from the death of the testator until the filing of his second account as executor, provided the petitioners and other children of the decedent with means for their support and education as seemed to him justified; but because of exceptions filed to that account, questioning among other expenditures those made for the support and education of the petitioners, and complaining that the respondent should not have allowed more moneys from the estate to be expended for the petitioners than the share of the <sup>222</sup> net income belonging to them, the respondent, for his own protection, ceased making allowances to the petitioners.

In this posture of affairs the appellants filed a bill of complaint in the court of chancery, praying in the alternative, among other things, that the respondent as executor be decreed to pay to each of the complainants out of the income to which they are entitled under the will of their father the sum of forty dollars per month for their maintenance and support, or that he be ordered and decreed to provide in some other way for the necessary education, support and maintenance of the complainants. The defendants to this bill were Mr. Herr, the executor, Mrs. McClellan, the widow, and her infant children, Ida and Oscar Pfefferle.

The executor answered and a decree pro confesso was passed against Mrs. McClellan. The clerk in chancery was appointed guardian of her infant children, and filed answers on their behalf through counsel appointed for that purpose. After hearing, and on February 26, 1906, a final decree was made in the cause (no opinion being filed), which ordered and adjudged that the real estate whereof the testator died seised, together with the personal estate remaining in the hands of the respondent as executor, after administering upon said estate, are held by him in trust for the complainants and the defendants, Ida and Oscar Pfefferle, to keep the same and to apply the equal undivided one-fifth part of the



net income and profit, or so much thereof as in his judgment may be necessary for the maintenance and education of each of said children who have not reached the age of twenty-one years, and for the maintenance of each who have reached that age until they shall attain the age of thirty years, and to pay to each his or her equal undivided one-fifth part of the principal of said estate, together with any accumulated income, as and when he or she shall attain said age, and upon the further trusts declared in said will, subject, however, to the right of dower of the widow; and that the trustee apply an equal one-fifth part of the net income and profits of the estate, or so much thereof as in his judgment may be necessary, for the maintenance and education of each of the children who have not reached the age of twenty-one years, and for the maintenance of each of them <sup>223</sup> who has reached that age until he or she shall reach the age of thirty years respectively.

The question of the amount of allowance out of the estate to the children of the decedent was a question of doubt and difficulty at least, for, on a prior bill filed which was demurred to for want of parties, Vice-Chancellor Stevenson, in his opinion (*Pfefferle v. Herr*, 65 N. J. Eq. 325, 55 Atl. 1103), said: "Whether the right of each child to maintenance, etc., applies only to the income of his share or to the income of the entire estate, is the question of construction to be determined at the start. The will says 'that so much of the income and profit thereof'—i. e., of the entire real and personal estate—'as may be necessary' shall be applied to the maintenance and education of the children. The will does not say that so much of the income of each share as may be necessary shall be applied to the maintenance and education of the child entitled to the share."

The objection, as I understand it, is that the executor and trustee paid to the children of the testator sums of money in excess of the income of the estate; but there is no allegation that any of these sums was paid for anything other than maintenance and education.

Assuming that portions of the allowances made for the support and education of the infants were advanced out of the principal of the estate upon the sale of certain portions of the realty, the executor may settle that score with the infants when they are entitled to their shares in severalty upon attaining the prescribed age, especially in view of the fact that the trustee has given security.

By statute (Gen. Stats., p. 1616, sec. 3) the orphans court may order a guardian to sell so much of the ward's lands as may be adequate for his maintenance and education. And this, as I understand it, applies to testamentary as well as statutory guardians. It was held (*In re Barry*, 61 N. J. Eq.

135, 47 Atl. 1052) that this court will leave the question of the necessity of expenditure out of the principal of an infant's estate for his maintenance to the judgment of the guardian, subject to the supervision of the orphans court on the settlement of the accounts. In *Stephens v. Howard's Exr.*, 32 N. J. Eq. <sup>224</sup> 244, Vice-Chancellor Van Fleet held that where a legacy vests in an infant, but is payable when it attains a certain age, and its father is unable to support it, and the interest arising from the legacies is not sufficient for that purpose, a court of equity may, in advance of the time fixed for payment by the will, order the principal of the legacy applied to the support of the legatee. These citations are made for the purpose of showing that encroachment upon the principal of the estate of a legatee in advance of the period of distribution is not absolutely and under all circumstances forbidden. A trustee may, in a proper case, apply for and obtain the protection of an order to make such encroachment in behalf of his ward. And it appears, too, that what may be done in advance may be ratified afterward. In the absence of bad faith, and unless there be wanton, excessive and wasteful invasion of the corpus of an estate for the maintenance and education of its beneficiary, it would appear that a foundation does not exist for the removal of a trustee upon that score. It may be that the trustee will have to submit to a surcharge in this matter in the end, but for present purposes a showing is not made which calls for the removal of the trustee because of these advances.

When the executor sold real estate he made payments to the widow on account of her dower, without having her dower interest ascertained according to law, and it is claimed that he has paid her excessive amounts.

The testator directed that all the encumbrances on his real estate should be paid out of his personal estate. It would seem from this that the testator intended that his wife should be endowed in the gross value of his real estate, not deducting any encumbrances thereon. In *McLenahan v. McLenahan*, 18 N. J. Eq. 101, it was held that if lands are devised subject to a mortgage not made by the decedent, the heir or devisee takes cum onere, unless the decedent shall have assumed the debt in such manner to show his intention to charge his personal estate. And in *Campbell v. Campbell*, 30 N. J. Eq. 415, on a bill for dower in lands of an intestate, it was held the personal estate must exonerate the land from a mortgage put thereon by the intestate, and dower be assigned therefrom <sup>225</sup> as if unencumbered, and as to a mortgage upon the land assumed by the decedent, dower must be assigned therefrom, subject to the mortgage. The direction in the will for the payment of all encumbrances on the testator's real estate out of his personal property is, to my

mind, the expression of a clear intention to pass the real estate to the devisees unencumbered, and to endow the widow in the same value therein as that value has in the hands of the devisees: *Hetzel v. Hetzel*, 74 N. J. Eq. 770, 71 Atl. 755.

Since this controversy has arisen between certain of the beneficiaries and the executor, the widow has filed a bill for dower in the court of chancery. It is asserted by the appellants that the bill for dower has not been prosecuted with due diligence. Whether this be so or not, in a collateral proceeding like this, the want of diligent prosecution of a suit for dower should not be made the basis of the removal of an executor who is said to have made overpayments on account of dower to the widow; at least until it has been definitely ascertained what is the fact in this regard, the matter should be allowed to remain in statu quo. I fail to see that bad faith or gross incompetence is chargeable against the executor in reference to this matter.

It is charged also against the executor that he allowed taxes upon the testator's real estate to become defaulted in and that penalties and interest were added to the amount of the taxes, and that some, at least, of the real estate was sold to the city of Newark. As a matter of fact, the lands have been redeemed, and the executor in his account in the orphans court was surcharged with all penalties and interest that were paid to effect such redemption. In this respect the estate has not suffered at all. Of course, the executor was very derelict in permitting this thing, but he has atoned for his default.

Because it appeared to the judge of the orphans court, who heard this matter below, that by reason of advances made by the trustee on account of the widow's dower the assets of the estate were to some extent insecure, it was ordered that the executor give a bond to the ordinary in the sum of \$10,000, conditioned for the faithful performance of his duty under the will, which bond, I understand, has been given, and the estate thus secured.

<sup>226</sup> By section 140 of the orphans court act (Pub. Laws 1898, pp. 715, 767), it is provided that when property in the hands of any executor or trustee is unsafe or insecure, or in danger of being wasted, such executor or trustee may be required to give bond to the ordinary conditioned for the faithful performance of his duty under the will of the testator. This declaration of legislative policy clearly enough indicates that it is not for every unwarranted act of omission or commission that an executor is to be removed; only that if he has strayed from the path of fiduciary duty, he may be compelled to secure those who might suffer loss by reason of his dereliction, the stigma of removal to be placed upon him only in a flagrant case.

In *Carpenter v. Gray*, 32 N. J. Eq. 692, Chancellor Runyon, as ordinary, refused to remove an executor or require him to give security on a petition asking for an accounting as to the investment of a trust fund of \$3,000, no bad faith appearing.

The court of errors and appeals held, in *Holcomb v. Coryell*, 12 N. J. Eq. 289, that a testator has a right to impose confidence in whom he pleases, and if he selects as his representative an irresponsible or insolvent person, in the absence of fraud or misconduct or breach of trust, security cannot be required of such executor, but if the acts or omissions of the trustee be such as to endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties or a want of reasonable fidelity, equity will remove such trustee. In that case (*Holcomb v. Coryell*) it appeared that executors filed an inventory containing five items of assets, one of which was "bonds, notes and books of account, \$84,004.15." Upon a bill filed complaining of the inventory and calling upon the executors to account and state the particulars which constituted the assets, instead of availing themselves of the opportunity thus afforded of placing themselves right upon the record, they put in an answer insisting that the inventory and appraisement was all that the law required. It appeared, however, as a fact, that a true inventory and appraisement exhibited one of the executors as a debtor to the estate in the sum of \$32,000 and upward, and the other in the sum of \$3,600 and upward. The executor who owed the larger amount brought in a bill for his services as agent <sup>227</sup> of the testator amounting to \$11,800, and for purchase money for property of his own which he had conveyed to the executors amounting to \$21,500. After full examination it was determined that he was entitled to \$1,200 for services, and that he had conveyed property to the estate for the purpose of exhausting the assets in hand, but not of liquidating his indebtedness, and charged exorbitant prices, and in a manner not authorized by law. The chancellor in the court below, upon this state of facts, remarked that he was not disposed to impute moral turpitude to either of the defendants in the discharge of their duties, but there had been such a palpable mistake on their part as to the obligations and duties imposed upon them, such a disregard of the rights of the infant complainant, in the manner in which the suit had been defended, and such ignorance and negligence in the management of the large fund at their disposal, as imperatively demanded of the court to extend to the complainant the protection which was invoked, and to which she was entitled when her property was in jeopardy. Security was required, but the executors were not removed, and the court of errors and appeals affirmed the chancellor.

By section 149 of the orphans court act (Pub. Laws 1898, pp. 715, 770) it is provided that upon refusal or neglect to do and perform certain enumerated acts, or for embezzlement, waste or misapplication of the estate committed to his custody, or for abuse of the trust and confidence reposed in him, an executor or trustee may be removed by the orphans court.

Chancellor Runyon, as ordinary, in *Lett v. Emmett*, 37 N. J. Eq. 535, held that an executor should be removed because he sought by false representations and by taking advantage of her poverty to induce the residuary legatee to sell her interest in the estate to him for a small price and about one-fourth of its value. Here was no case of mistake or ignorance or carelessness, but a fraudulent act of commission of the most palpable sort, which fully merited the judgment pronounced against the executor.

In *Flinn's Case*, 31 N. J. Eq. 640, Chancellor Runyon, as ordinary, held that it was not proof of waste, in a proceeding to remove a guardian who was personally responsible, <sup>228</sup> that he had incurred liability to pay counsel fees in a controversy over his management of the ward's property, since such fees, if unlawful or unnecessary, might be disallowed in his account.

In *Heisler v. Sharp's Exrs.*, 44 N. J. Eq. 167, 14 Atl. 624, it was held in this court that no man is infallible; the wisest make mistakes, but the law holds no man responsible for the consequences of his mistakes which are the result of the imperfection of human judgment, and do not proceed from fraud, gross carelessness or indifference to duty. Affirmed for the reasons given by the vice-ordinary: *Heisler v. Puckett*, 45 N. J. Eq. 367, 19 Atl. 621.

There is much to criticise in the conduct of this executor and trustee, but I do not think that a case has been made which requires his removal and the revocation of his letters. The giving of security which was ordered in the court below was, I think, all that was required.

The order appealed from will be affirmed.

#### GROUND8 FOR THE REMOVAL OF EXECUTORS AND ADMINISTRATORS.

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#### I. Preliminary Observations.

The power to remove an executor or administrator is generally given by statute; but it has been held that a court of probate has power, independent of statute, to revoke letters testamentary or of administration, where they have been issued without jurisdiction, irregularly or illegally, or for a special cause which has ceased to exist: *Morgan v. Dodge*, 44 N. H. 255, 82 Am. Dec. 213. Such power is given for the protection of the estates of deceased persons. The court having jurisdiction of a petition for the removal of an executor or administrator has a very large discretion in determining whether, upon the facts presented to it, the representative appointed by it shall be removed: *In re Bell's Estate*, 135 Cal. 194, 67 Pac. 123; *Cosby v. Weaver*, 107 Ga. 761, 33 S. E. 656; *Clancy v. McElroy*, 30 Wash. 567, 70 Pac. 1095; *Cutler v. Howard*, 9 Wis. 309. Statutory authority that a court "may" remove an executor for certain specified causes is to be construed as giving a discretionary power of removal, and is not compulsory though one of the causes may exist: *Cutler v. Howard*, 9 Wis. 309.

The representative is not to be removed for a slight departure from duty, but only for some devastavit or other dishonest, corrupt, or improper neglect or maladministration of the estate. An executor or administrator is not the agent, officer or assistant of the court having jurisdiction of probate matters. He is a trustee, and has such an interest in the execution of his trust as entitles him to the protection of the law. The court, it is true, has supervisory power over him, but his duties are prescribed by law and not by the court, and so long as he observes the requirements of the law and faithfully executes his trust, he cannot be compelled to surrender it. He is, therefore, entitled to protection from removal without just and legal cause, and that cause must, as we understand the de-

cisions, be some defined statutory cause: In *re Healy's Estate*, 137 Cal. 474, 70 Pac. 455; *Miller v. Hider*, 9 Colo. App. 50, 47 Pac. 406; *Walker v. Torrance*, 12 Ga. 604; *Young's Admr. v. Louisville etc. R. R. Co.*, 121 Ky. 483, 89 S. W. 475; *Gill v. Riley*, 28 Ky. Law Rep. 639, 90 S. W. 2; *Levering v. Levering*, 64 Md. 399, 2 Atl. 1; *Muirhead v. Muirhead*, 14 Miss. (6 Smedes & M.) 451; *Morgan v. Dodge*, 44 N. H. 255, 82 Am. Dec. 213; *McFadgen v. Council*, 81 N. C. 195; *In re Mussault's Exr.*, T. U. P. Charlt. 259; *Cutler v. Howard*, 9 Wis. 309.

But it is shown further on, in other subdivisions of this note, that an executor or administrator may be removed from his office for the following causes, among others, namely: That he is a habitual drunkard; that he is improvident, or lacks the understanding necessary to enable him to discharge his trust; that he has failed to obey an order of the court to give further bond or security; that he has failed to file a proper inventory, or to render accounts or returns within the required time, particularly after due citation and order; that he has failed to prosecute or defend actions; that he is unfaithful or neglectful of his trust; that he has been guilty of waste, misconduct, mismanagement or misappropriation of assets of the estate; that he has been guilty of improprieties in regard to the collection of the assets of the estate; that he has fraudulently or unjustly allowed the payment of claims against the estate; that there is a hostile feeling between him and the heirs; that he has become a nonresident; that he has been guilty of misconduct respecting sales of property of the estate; that he has made unauthorized investments or loans; that he is squandering or embezzling the estate, or making improper use of its property; that he has committed or is about to commit a fraud on the estate; or that his removal is advisable for the best interests of the estate.

It has been affirmed that the power to remove an executor or administrator extends only to statutory causes, and the court has no discretionary power to remove him for other causes. Until some one of the causes mentioned in the statute is placed before the court for action, the court has no power or jurisdiction to act: *Miller v. Hider*, 9 Colo. App. 50, 47 Pac. 406; *Munroe v. People*, 102 Ill. 406.

A court is reluctant to remove a representative unless it clearly appears that retaining him in office will jeopardize the interests of the estate: *Succession of Willis*, 109 La. 281, 33 South. 314; *In re Kason's Estate*, 46 App. Div. 348, 61 N. Y. Supp. 569; *In re Estate of Johnson*, 15 N. Y. St. Rep. 752. He is not to be dismissed for errors of judgment: *Succession of Sparrow*, 39 La. Ann. 696, 2 South. 501.

The power of removal should not be exercised when the purpose of the petitioner is clearly not to protect the estate, but to punish the representative: *In re Burr*, 118 App. Div. 482, 104 N. Y. Supp. 29; nor should there be any removal if no necessity exists therefor: *Succession of Gerard*, 116 La. 912, 41 South. 206; *McFarlan v. McFarlan*, 155 Mich. 652, 119 N. W. 1108. As statutes have committed the power to remove executors or administrators to the courts of probate granting the letters, and have carefully defined the causes of removal, a court of chancery, conceding that it has such power of removal, can exercise it only in an extreme case; as where actual fraud or some of the distinct grounds of removal in the court of probate are shown to exist: *Randle v. Carter*, 62 Ala. 95. And the general rule is that a probate court will not remove the representative except where he has been guilty of willful misconduct, waste,

or improper disposition of the assets of the estate: *Witherspoon v. Watts*, 18 S. C. 396.

## II. What, in General, Authorizes Removal.

An executor or administrator may be removed for maladministration: *Bozeman v. May*, 132 Ala. 233, 31 South. 491; or where the continuation of his trust would be dangerous to the rights of creditors or heirs: *In re Mussault's Exr.*, T. U. P. Charl't. 259; *Lucich v. Medin*, 3 Nev. 93, 93 Am. Dec. 376. In case of the neglect or refusal of executors to execute a power of sale, the remedy of legatees having an interest in the proceeds only is to have the executors removed and other trustees appointed in their place: *Silverthorn v. McKinstor*, 12 Pa. (2 Jones) 67. The failure of an administrator to collect the debts of the estate represented by him as they become due, or to collect the same in illegal and worthless funds, is cause for his removal, unless a valid excuse is shown for such failure: *Oglesby v. Howard*, 43 Ala. 144; and see *Hightower v. Moore*, 46 Ala. 466, cited in subdivision III, post. An executor or administrator may be removed for his failure to obey an order of court: *Fuhrer v. State*, 55 Ind. 150; *Van Dusen's Appeal*, 102 Pa. 224; *Wright v. McNatt*, 49 Tex. 425. The failure of an executrix to comply with a decree of court directing her to convert shares of stock into a legal investment, and to assign mortgages of the estate, held by her in her own name, to herself as executrix, warrants her removal, even without citation: *Van Dusen's Appeal*, 102 Pa. 224. An administrator may be removed where there was error in the appointment: *Heimberger v. Chamberlin*, 135 Ill. App. 615. Although a son has obtained letters of administration upon his father's estate, the probate court may, upon the timely application of the widow, remove the son and confer the appointment upon the widow: *Muirhead v. Muirhead*, 14 Miss. (6 Smedes & M.) 451.

An administrator may be removed by operation of law. Thus, the appointment of another person with the will annexed supersedes, per se, all former administrations of the estate, and the acts of the administrator with the will annexed are valid: *McCauley v. Harvey*, 49 Cal. 497.

Where a court has once granted administration, it unquestionably has power to take further proceedings to settle and close the estate, and, if it becomes necessary to this end, to remove one administrator and to appoint another. Under the Texas statute this can be done upon the court's own motion: *Kuck v. Dixon* (Tex. Civ. App.), 127 S. W. 910.

A petition for the removal of an executor or administrator which fails to show the interest of the petitioner in the administration, is fatally defective: *White v. Spaulding*, 50 Mich. 22, 14 N. W. 694. No cognizance can be taken of matters not alleged in the petition: *Carpenter v. Gray*, 32 N. J. Eq. 692. And where the statute designates the steps necessary to be taken by a court to remove an executor or administrator, an order of removal without a compliance with the statute is unauthorized and ineffectual: *Horn v. White*, 127 Ill. App. 222.

An executor who fails to do what is necessary to protect the estate of his testator should be removed, although he may have abstained from doing anything actually wrong: *Lucich v. Medin*, 3 Nev. 93, 93 Am. Dec. 376. He should also be removed where he has administered the estate with a total disregard of the interests of the creditors and



heirs. Extravagance, waste and mismanagement of an estate afford the same ground for the removal of an executor as absolute fraud: *Rogers v. Morrison*, 21 La. Ann. 455; *Lucich v. Medin*, 3 Nev. 93, 93 Am. Dec. 376.

### III. What, in General, Does not Authorize Removal.

An executor will not be removed after the final account of a succession has been filed and homologated, and nothing remains to be settled except such matters as may be more properly settled among the heirs in a partition proceeding, and it is evidently to the interest of all parties concerned that the executor should not be removed, and there is presented no peremptory ground for removal: Succession of Gerard, 116 La. 912, 41 South. 206. Nor will an administrator be dismissed after his final account has been filed, when the dismissal cannot be of any possible benefit to heirs or creditors: Succession of Conery, 111 La. 113, 35 South. 479. Nor will an administrator be discharged when it is evident that his dismissal would be detrimental to the interests of the succession he represents; that it would only result in other costs and further delays: Succession of Willis, 109 La. 281, 33 South. 314.

In Alabama, it was no ground for the removal of an administrator in 1869 that, in 1864, he received Confederate currency in payment for property of the estate sold by him: *Hightower v. Moore*, 46 Ala. 466. If an estate has no debts, and the next of kin divide it according to the statute of distributions, an administrator subsequently appointed is not to be removed for failing to make returns, because there is nothing to do and nothing to return: *Harris v. Seals*, 29 Ga. 585. The circumstances of an executor are "precarious" only, within the meaning of the New York statute, authorizing a removal where the circumstances of the executor are so precarious as not to afford adequate security for the administration of said estate, when his conduct and character present such evidence of improvidence or recklessness in the management of the trust estate, or of his own, as in the opinion of prudent and discreet men endangers its security: *Shields v. Shields*, 60 Barb. 56.

Although the statute prescribes a limitation, as to time, on the granting of administration in cases of intestacy, it is error to remove an administrator appointed within three days after the death of an intestate, on the ground that the administration was improvidently granted, as the limitation does not apply where the intestacy of the deceased is "notorious or satisfactorily proved," for the presumption is that such dying intestate was notorious, or was proved as required: *Jones v. Harbaugh*, 93 Md. 269, 48 Atl. 827. The appointment of a stranger as administrator, before the application of one entitled to letters, as a brother of decedent, will not be revoked on the application of the person entitled as having been improvidently granted, where there was no fraud in the original appointment: *Jones v. Harbaugh*, 93 Md. 269, 48 Atl. 827. A peremptory order committing an administrator for contempt in refusing the demand of referees to produce all books and papers in her possession containing entries or memoranda of transactions, or accounts of expenditures, in reference to the estate will be reversed where her report, covering a period of several years, had been filed and approved by the heirs, all of whom were of age; where the case was not a proper one for refer-

ence; and where no ground appeared, in reference to said report, for the suspension or removal of the executrix: *In re Ming*, 15 Mont. 79, 38 Pac. 228.

#### IV. Marriage of Administratrix or Executrix.

The Indiana statute makes the marriage of a feme sole administratrix or executrix a cause for her removal, unless her husband files his written consent to her continuing as such: *Jenkins v. Jenkins*, Admr., 23 Ind. 79. Under the California statute, the marriage of an executrix does not eo instanti deprive her of the power to act; it merely renders her incompetent and she may be removed in the manner provided by law: *Schroeder v. Superior Court*, 70 Cal. 343, 11 Pac. 651.

#### V. Habitual Drunkenness.

An executor or administrator who is a habitual drunkard may be removed from his trust without an affirmative showing that he had thereby become incapable of discharging his trust to the interest of the estate. The court will take judicial cognizance of the fact that habitual intoxication does incapacitate a man for the discharge of such a trust: *Gurley v. Butler*, 83 Ind. 501.

#### VI. Illiteracy, Improvidence or Want of Understanding.

An administrator cannot be removed on the mere ground that he can neither read nor write. These qualifications, while very useful, are not deemed to be absolutely essential, because persons without them often have good business capacity: *Gregg v. Wilson*, 24 Ind. 227. But illiteracy, coupled with improvidence and a want of understanding, renders the representative incapable, and is a good cause for removal: *In re Courtney's Estate*, 31 Mont. 625, 79 Pac. 317.

The term "improvidence" refers to habits of mind and conduct which become a part of the man, and render him generally and under all ordinary circumstances unfit for the trust or employment in question: *Freeman v. Kellogg*, 4 Redf. Sur. (N. Y.) 218. If an executor is palpably deficient in the understanding necessary to enable one to transact business, he is for that reason incompetent, because he is incapable; and, where it appears from the evidence that he made no sufficient effort to collect debts due the estate, and from his own statements and testimony, that he was ignorant of his own personal business relations with the decedent, and that he never read and did not know the contents of the affidavits attached to his report, he may properly be removed from his trust on the ground of improvidence and want of understanding: *In re Courtney's Estate*, 31 Mont. 625, 79 Pac. 317. But if the legislature has not authorized the removal of an executor from his office on account of misconduct or mismanagement of the trust, nor because he is insolvent, his letters cannot be revoked on the ground that he is legally incompetent to serve "by reason of improvidence," although he is illiterate and a person of small pecuniary means, and has even been guilty of misconduct or mismanagement in administering the trust estate: *Emerson v. Bowers*, 14 N. Y. (4 Kern) 449.

If the executor is a confidential agent solemnly chosen by the testator to execute his wishes as they may be expressed in his will, the testator's authority will not be taken away except upon undoubted proof of his utter improvidence and unfitness for the duties of his

trust. The principle applicable is, "whom the testator will trust, so will the law": In re Johnson's Estate, 15 N. Y. St. Rep. 752.

The fact that a trust in real estate has, while in the hands of an administrator, greatly diminished in value and income, is no ground for his removal as "improvident": In re Treadwell's Estate, 37 Misc. Rep. 584, 75 N. Y. Supp. 1058.

#### VII. Failure to Give Bond or Security.

An administrator's failure to file a bond has been held a good ground for his removal: Toledo etc. R. R. Co. v. Reeves, 8 Ind. App. 667, 35 N. E. 199. He may be removed on the petition of anyone interested where he fails to give the security required by law: Succession of De Flechier, 1 La. Ann. 20; or by the court: McFadgen v. Council, 81 N. C. 195; and he may be removed for failure to give "counter security": Davenport v. Irvine, 27 Ky. (4 J. J. Marsh.) 60. But if cause exists, the fact that a representative has given the additional security required does not oust the court of its jurisdiction to remove him: Shreve v. Wampole, 38 N. J. Eq. 490.

Some courts, however, hold that the mere failure to have a valid bond up is no ground for the removal, on petition, of an executor or administrator, and that the most that can be asked is the giving of a new bond: Barricklow v. Stewart, 31 Ind. App. 446, 68 N. E. 316. An executrix, nominated without bond, who has qualified, and is acting, will not be removed for mismanagement, nor even be required to give a bond, where there is no evidence of mismanagement: In re Fisher's Estate, 128 Iowa, 626, 104 N. W. 1023. Under a statute providing that the executors named in a will are entitled to letters testamentary, immediately after its probate, unless some person interested interposes objection, letters granted to nonresidents will not be revoked on the ground that they have not given any bond, where the testator directed that they should not be required to give any bond, and where they are entitled, under the laws of the state, to letters without giving bond: Postley v. Cheyne, 4 Dem. Sur. (N. Y.) 492.

The failure of a husband, who marries an executrix, to give a bond, as required by statute, does not revoke or suspend her power as executrix. It is merely a cause for removal, and, until the proper exercise of the power of removal for this cause, her power as executrix remains in full force: Yates v. Clark, 56 Miss. 212.

A statute providing a mode which enables creditors of an estate to enforce the execution of a bond by an independent executor does not contemplate the removal of such executor, unless, after being required to do so, he fails to execute a bond in accordance with the order of the court: Perkins v. Wood, 63 Tex. 396. Under the law of Louisiana, if an executor, who has been ordered to furnish security, fails to do so within the delay allowed, such failure, ipso facto, works an immediate removal, and it is the duty of the judge to appoint a dative executor: Succession of Guidry, 40 La. Ann. 671, 4 South. 893. While letters testamentary may be revoked where the "circumstances of the executors are such that they do not afford adequate security for the due administration of the estate," such circumstances are not shown, in a petition for the removal of the executors, by the fact that they are men of inconsiderable means, not transacting any business or having any place of business: Postley v. Cheyne, 4 Dem. Sur. (N. Y.) 492.

A residuary legatee who has qualified as executrix and given a bond that she will pay all the debts and legacies of the testator, and perform all orders and decrees of the probate court by her to be performed in the premises, may be removed by the probate court for failing to file a new bond, or for failure to comply with any lawful order or decree of that court: *Lafferty v. People's Sav. Bank*, 76 Mich. 35, 43 N. W. 34. But if the statute provides an ample remedy in a case where the surety on the bond of an executor or administrator "is insufficient," or where the bond is "inadequate in amount," and the representative is given a reasonable time, not to exceed five days, in which to procure a new bond, after such inadequacy or insufficiency shall have been determined in a proceeding instituted before the surrogate, the letters of the representative cannot be revoked until such time has expired. Persons interested in the estate cannot insist on a summary removal for such cause: *In re Moulton's Estate*, 57 Hun, 589, 10 N. Y. Supp. 717.

Where the assets of the estate in the hands of the executor or administrator are in danger of being lost, wasted, or misappropriated, and the representative is ordered to give new security by a certain day, he may be removed in case of his failure to file a substantial bond: *Carey v. Reed*, 82 Md. 383, 33 Atl. 633. He may also be removed for his failure to comply with an order of court requiring him to give an additional bond; and, conceding that such order is appealable, the removal may be made during the pendency of an appeal therefrom by the executor or administrator, if no supersedeas bond has been given: *Betts v. Cobb*, 121 Ala. 154, 25 South. 692. But a public administrator cannot be removed for a mere failure to renew his bond, where he is not in default in any other particular, and offers to make such renewal in response to the notice served upon him: *In re Trotter*, 115 N. C. 193, 20 S. E. 443.

#### VIII. Failure to File Inventory.

The failure of an executor or administrator to make and return an inventory of the estate represented by him, as required by law, is a violation of his duty, for which he is liable to be removed: *Oglesby v. Howard*, 43 Ala. 144; *Pace v. Oppenheim*, 12 Ind. 544; *Toledo etc. R. R. Co. v. Reeves*, 8 Ind. App. 667, 35 N. E. 199; *In re Holladay's Estate*, 18 Or. 168, 22 Pac. 750; *In re Barnes' Estate*, 36 Or. 279, 59 Pac. 464. It is sometimes made the duty of the court, by the law in force, to make the removal upon the representative's failure to return an inventory within a specified time from the grant of letters: *Willis v. Ferguson*, 46 Tex. 496. The filing of the inventory is required, doubtless, to enable the court to determine the extent of the assets of the estate, but if no such assets exist when the inventory is to be filed, that fact should be stated in a writing filed in lieu of the inventory: *Toledo etc. R. R. Co. v. Reeves*, 8 Ind. App. 667, 35 N. E. 199.

The practice seems to be that the court having jurisdiction of the estate is vested with some discretion as to whether it will remove the representative of the estate for failing to file an inventory within time. Thus, where the executor had made and verified a proper inventory, but through inadvertence and forgetfulness failed to file it until after the time had expired, an application for his removal was refused, as it would manifestly have been unjust to him to

have granted it: *Clancy v. McElroy*, 30 Wash. 567, 70 Pac. 1095. If there has been no negligent or willful default on the part of the executor or administrator, and no detriment to the estate, the representative ought not to be removed for his omission to file an inventory, or to make an annual settlement, until he has been cited to do so, and has failed to comply with the citation: *Hubbard v. Smith*, 45 Ala. 516.

In some jurisdictions an administrator or executor can be removed only for legal and specific causes, and after citation and an opportunity to be heard in opposition to the motion. Justice requires that he should always be permitted to urge in his defense any matters of exculpation which may exist: *In re Patten's Estate*, 7 Mackey (D. C.), 392. Thus, the failure of the administrator or executor to return, within the time prescribed, a special inventory ordered by the court, is no ground for his removal where a sufficient excuse is shown for such failure. The court may extend the time for returning such inventory, and should do so if no damage results from the delay, and satisfactory reasons are given therefor: *In re Patten's Estate*, 7 Mackey (D. C.), 392. If the statute provides for the removal of the representative of an estate, who has willfully or without a cause neglected to obey an order made by the surrogate, but also provides that the surrogate may by order compel him to file an inventory, his failure to file the inventory, in the absence of an order by the surrogate directing him so to do, is not a ground for removal: *In re Moulton's Estate*, 57 Hun, 589, 10 N. Y. Supp. 717.

Where the creditors represent that certain real estate of the estate of a decedent was fraudulently conveyed by the intestate for the purpose of defrauding his creditors, and they request the administratrix to inventory the same as real estate of the intestate, and offer to indemnify her for so doing, the administratrix may be removed from her trust if she refuses to do so: *Andrews v. Tucker*, 24 Mass. (7 Pick.) 250. In *Hansell v. Hickox*, 121 La. 721, 46 South. 784, the court declined to remove administrators on the ground of having prejudicially withheld property from the inventory, that contention not being sustained.

The failure of one coexecutor to return, in his inventory of debts, a note due from himself to the estate, does not constitute a ground for his removal, where such note was returned by the other executors in their inventory, and is in their possession: *Dowdy v. Graham*, 42 Miss. 451.

#### IX. Failure to Account.

One of the first and most important duties of an executor or administrator is to keep and render full and accurate accounts and reports concerning the estate in his hands; and if he fails to do so, especially after citation and notice, he may be removed: *Succession of Benton*, 106 La. 494, 31 South. 123, 59 L. R. A. 135; *Gray v. Gray*, 39 N. J. Eq. 332; *In re Hickey*, 34 Misc. Rep. 860, 69 N. Y. Supp. 844. If he fails, for a period of twenty years, to make any statement of account for the decedent's estate, he ought to be removed: *Armstrong v. Stowe*, 77 N. C. 360. And his neglect to file an account within the time prescribed by law will subject him to destitution from office: *Collins v. Hollier*, 13 La. Ann. 585. But while a failure to make returns may often be a cause for removal, there is no compulsory mandate of the law that in every case such failure shall of

itself be regarded as imperatively demanding the removal from office of an administrator or executor. Whether or not his letters shall be revoked for this reason alone is a matter which rests in the sound discretion of the court: *Cosby v. Weaver*, 107 Ga. 761, 33 S. E. 656. A failure to account may, in the absence of any explanation, be a sufficient cause of removal; but where an executrix was honestly of the opinion that, under the broad powers conferred upon her by the will, it was not incumbent upon her to make returns, and she was confirmed in this opinion by the ordinary, it is proper to refuse to remove her for such failure, particularly where she expresses a willingness to make full returns of all her receipts and disbursements in the event that it should be adjudicated that she was not, by the will, exempted from so doing: *Cosby v. Weaver*, 107 Ga. 761, 33 S. E. 656.

In practice, the law comes to this: If the administrator or executor is derelict in his duty in filing an account, he may be ordered to do so by the court; and if he disobeys the order of the court, he may be removed upon the demand of creditors, or others interested, or upon the court's own motion: *Evans v. Buchanan*, 15 Ind. 438; *Succession of Head*, 28 La. Ann. 800. He ought not to be summarily removed for his failure to make regular settlements, where he has not been required to do so by the court, or those interested, particularly where no injury has resulted to the estate: *Hightower v. Moore*, 46 Ala. 466. To warrant his dismissal for a mere failure to render annual accounts, it must be alleged and proved that he has disobeyed an order of court to render his account: *Succession of Bertrand*, 127 La. 000, 54 South. 127. If, however, the representative is ordered to account, and neglects for a year to comply with the order, that is sufficient of itself to authorize his removal: *Evans v. Buchanan*, 15 Ind. 438; *Brown v. Ventress*, 24 La. Ann. 187; especially if he has in his hand, in the meantime, a considerable sum of money belonging to the estate: *Evans v. Buchanan*, 15 Ind. 438.

#### X. Unsuitableness to Discharge Trust.

In some of the states an executor or administrator may be removed as being "evidently unsuitable" to discharge his trust. The word "unsuitableness" implies not want of capacity or mental infirmity, but an unfitness arising out of the situation of the person in connection with the estate of which he is administrator, either by reason of his being indebted to it, or having claims upon it, or in the interest he has under a will, or his situation as an heir at law. The statute does not attempt to enumerate the causes, but gives the judge of probate a broad discretion to include the various cases that may arise, where the exercise of such a power would be judicious: *Thayer v. Homer*, 52 Mass. (11 Met.) 104. As said in *Winship v. Bass*, 12 Mass. 199, "the statute gives a very broad discretion to the judge, evidently intending not to define or limit the disabilities which should be causes of removal; but to leave room for the application of the power to all cases which may occur to render the execution of a will, or the administration of an estate, perplexed or difficult."

The decisions as to unsuitableness are, therefore, generally of a negative character, and show when the representative is not unsuitable, rather than when he is unsuitable. Thus, the fact that the executor is indebted to the estate of the testator in a large sum of

money, which he refuses to consider as assets, is not a ground for removing him as being an unsuitable person to remain executor. The fact that he is executor does not discharge him from his debt to the testator. He shall be considered as having paid the debt, and as holding the amount in his hands for the benefit of the estate: *Winship v. Bass*, 12 Mass. 199. The fact that executors are indebted to the estate of the testator is no cause for their removal on the ground of unsuitableness, though nearly the whole estate consists of debts due from the executors. For any debt due from them to the testator, they may be required to account in the settlement of the estate, in the ordinary course of administration; and they, and the sureties on their bond, will be liable to make it good: *Hussey v. Coffin*, 83 Mass. (1 Allen) 354. Nor should an administrator be removed as "being evidently unsuitable to discharge the trust reposed in him" because of the fact that he presents claims of his own against the estate represented by him: *Murray v. Angell*, 16 R. I. 692, 19 Atl. 246. If one of his claims has been allowed, and the allowance appealed from, at the time the court orders his removal, the validity of his claim is to be established in the appellate court, and the removal does not affect the matter one way or the other: *Murray v. Angell*, 16 R. I. 692, 19 Atl. 246.

The question of the representative's unsuitableness is to be determined as of the date of the petition for his removal: *Drake v. Green*, 92 Mass. (10 Allen) 124; *McGuinness v. Hughes*, 188 Mass. 201, 74 N. E. 317; *Murray v. Angell*, 16 R. I. 692, 19 Atl. 246. He will not be removed, as evidently unsuitable for the discharge of his trust, simply on proof that he was unsuitable at the time of his appointment. There must be proof that he continues to be so: *Drake v. Green*, 92 Mass. (10 Allen) 124.

#### XI. Antagonism of Interest.

An executor or administrator whose personal interests are in conflict with his duty as a representative of the estate is not a proper person to hold the office, and he should be removed: *Putney v. Fletcher*, 148 Mass. 247, 19 N. E. 370; *In re Mills' Estate*, 22 Or. 210, 29 Pac. 443; *Marks v. Coats*, 37 Or. 609, 62 Pac. 488; *Kellberg's Appeal*, 86 Pa. 129. He should be removed where he has failed to include in his inventory certain personal property which he claims to have purchased from an heir: *In re Mills' Estate*, 22 Or. 210, 29 Pac. 443. So, where a decedent, whose estate is insolvent, had, in his lifetime, conveyed lands to his children, one of whom is the administrator, by conveyances which, there is reasonable ground to believe, were voidable as against creditors, it is the statutory duty of the administrator to petition for leave to sue to set such conveyances aside; and if he fails to perform this duty, the court will remove him without passing on the question of the validity of the conveyances: *Marks v. Coats*, 37 Or. 609, 62 Pac. 488.

While letters testamentary cannot be refused to the executor named in a will on the ground that he claims, as his own, property which legatees under the will insist belongs to the estate, the case is different where, after appointment, the executor, without sufficient reason, asserts title to the property of the estate, and refuses to inventory it as the property of the estate. Such clear neglect of his duty is a fraud upon the estate, and is a statutory ground for his

removal: *In re Rathgeb's Estate*, 125 Cal. 302, 57 Pac. 1010. An administrator who has acted improperly, who claims that substantially the whole estate belongs to himself, and that the decedent had no property when he died, although there was standing in his name, in different banks, a large amount of money, is an unfit and improper person to remain administrator. His whole interest is against the estate, and he should be removed: *In re Wallace*, 68 App. Div. 649, 74 N. Y. Supp. 33.

A decree removing an executor on the ground that the prosecution of his individual claims on the estate would conflict with his duties as executor, if not appealed from, is conclusive in a collateral suit: *Thayer v. Homer*, 52 Mass. (11 Met.) 104. And it is no abuse of discretion to remove a collector, appointed in a will contest, on the ground that he is interested in the litigation: *Guthrie v. Welch*, 24 App. D. C. 562.

It must be observed, however, that an executor holds his office by virtue of the testator's selection, and has a right to continue in the office if competent to perform its duties. When his competency is challenged on the score of interest, the question is to be considered with reference to the situation of the estate at the time. If his interest will not conflict with the duties still to be performed, there is no occasion for removal: *Odlin v. Nichols*, 81 Vt. 219, 69 Atl. 644. If three temporary administrators are appointed, in a proper case, they will not be removed on the ground that they are interested in the estate, two of them being legatees named in the will, and the other, the executor named therein: *In re Ashmore's Estate*, 48 Misc. Rep. 312, 96 N. Y. Supp. 772, 35 Civ. Proc. R. 268. So it will often occur that the interest of distributees will conflict, and that the principal, or residuary legatee, will stand in the attitude of adversary to pecuniary, or specific or demonstrative legatees, or to specific devisees. But such conflicts cannot deprive the next of kin, or the principal, or residuary legatee, of the priority of right to the administration; and as they do not, in the first instance, deprive of priority, they cannot, when they arise subsequently, justify removal, in the absence of misconduct: *Randle v. Carter*, 62 Ala. 95. It has also been held that the attorney for an administrator violates no obligation to his client by acting as attorney for one of the heirs, as against the others, in a controversy between them on a matter in which the administrator has no interest, and which does not affect his relation to the estate in his hands; that this double representation by the attorney does not of itself incapacitate the administrator, or indicate that he is in any respect unfaithful to his trust; and that such action by the attorney is no ground for the administrator's removal: *In re Healy's Estate*, 137 Cal. 474, 70 Pac. 455.

### XII. Refusal to Prosecute Suits.

As it is the duty of an executor or administrator to collect the assets of the estate, and distribute the same according to law, he must bring suits for that purpose when necessary. Thus, if an administrator refuses to take steps to try the question whether an alleged conveyance made by his decedent is fraudulent or not, he may be removed and another appointed in his place: *Dunbar v. Kelly*, 189 Mass. 390, 75 N. E. 740. The refusal of an administrator to act in



the matter of recovering new assets of the estate represented by him is good cause, in Massachusetts, for his removal, and an equity of redemption constitutes new assets. Thus, if the administrator, more than two years after he gave notice of his appointment, first discovered the existence of a bond executed to the intestate by a person to whom the intestate had conveyed a parcel of land, and by the terms of which the obligor was to reconvey the land within five years on payment of a certain sum, the administrator is properly removed if he fails to bring a bill in equity to redeem, especially where he has been requested to do so by a creditor of the estate who has not presented or proved his claim, where such creditor offers to indemnify the administrator against costs, and where there is no other property of the estate except said equity of redemption: *Glines v. Weeks*, 137 Mass. 547.

But, under the New York statute, authorizing an administratrix to maintain an action to set aside fraudulent conveyances made by a deceased person, it is no ground for her removal that she, in her individual right, claims the ownership of a mortgage formerly belonging to her intestate under an assignment alleged to be fraudulent as to his creditors, because, if she refuses to bring an action to set aside the assignment, the creditors may bring such action, making the administratrix a defendant in her representative as well as her individual capacity, and alleging her refusal to bring the action. The creditors would thus have the full benefit of the statute to the same extent as if the action were brought by the administratrix: *In re Moulton's Estate*, 57 Hun, 589, 10 N. Y. Supp. 717.

An executor who refuses to take the proper steps to recover the money of his testator, converted during the latter's lifetime, and of which fact the executor, at the time he took charge of the estate, was apprised, should be removed from his trust, because he is guilty of gross mismanagement and waste: *Haynes v. Carpenter*, 86 Mo. App. 30. But the presumption is, that a representative will perform his duty, and this presumption must prevail until, as a matter of fact, he fails to perform his duty. Thus, where an executor has been removed and an administratrix appointed, and where the remaining asset of the estate unadministered consists of a large demand against her husband, which demand has already been put in suit, resulting in a judgment in his favor, and from which an appeal has been taken, the administratrix may be removed by the surrogate if she fails to prosecute the appeal diligently and vigorously, but that she will neglect to discharge this duty is not, upon a simple conjecture, to be assumed: *Matter of Place*, 4 N. Y. St. Rep. 533.

The beginning of a partition suit to partition the lands of a decedent, who died testate, affords no ground for the removal of an administrator with the will annexed during the pendency of that suit: *Stevens v. Larwill*, 110 Mo. App. 140, 84 S. W. 113.

### XIII. Refusal to Defend Suits.

It is the duty of an executor or administrator, as such, and as agent of the heirs, to protect the estate from invalid and doubtful claims; and he should interpose every legal objection to them that industry and care can furnish. He is not liable to be removed for doing this: *Andrews v. Carr*, 2 R. I. 117; but he may be removed for not doing it: *Reynolds v. Zink*, 27 Gratt. (Va.) 29. If he has an

adverse personal interest in an action against himself in his representative capacity, and makes no defense, he may be removed upon the petition of distributees, who allege that there is a valid defense, which they desire to set up: *Simpson v. Jones*, 82 N. C. 323.

Where the executor or administrator is under the bias of an interest in opposition to that of the estate he represents, in holding a note to the payment of which he expects part of the moneys that may be recovered out of the estate, in a suit against it, will be applied, and its influence is seen in his inattention to the suit and his neglect of preparation to resist it, the court will interpose, upon application, and remove the representative from office, for the law frowns upon any act on the part of a fiduciary which places interest in antagonism to duty, or tends to that result: *Simpson v. Jones*, 82 N. C. 323. So, where a petition, made by parties in interest, for the removal of an executrix, charges that she has refused to defend suits brought against her as executrix, one suit by her brother and another suit by her sister, although she was notified by the petitioners that the demands made in said suits were unjust and were not properly chargeable against the estate, and that she had colluded with her brother and sister to defraud the petitioners of their respective interests in the estate of the testator, such charges, if supported by proof, justify the removal of the executrix from office: *Cox v. Chalk*, 57 Md. 569.

#### XIV. Incapacity, Unfaithfulness or Neglect of Trust.

An administrator will not ordinarily be removed on the ground of want of capacity, if he seems to possess the same capacity that he did when he was appointed, though the appointment was, in all probability, a very injudicious one: *Lehr v. Tarball*, 3 Miss. (2 How.) 905. But if the acts or omissions of an executor show a want of honesty, or a want of proper capacity to execute the duties of his trust, or a want of reasonable fidelity, he may be removed where the trust fund is in danger, or further security be required: *Holcomb v. Coryell*, 12 N. J. Eq. 289.

Negligence is a good ground for removing an executor or administrator: *Lucich v. Medin*, 3 Nev. 93, 93 Am. Dec. 376. Thus, if he fails for four months to file an inventory, or to cause an appraisal to be made, or to give notice to creditors, or to require vouchers to be presented for money paid out by him, these facts abundantly justify his removal, especially where he has temporarily removed from the state and is without a present residence therein: *In re Dietrich's Estate*, 39 Wash. 520, 81 Pac. 1061.

Whatever may be the right of an executor to appointment, he may always be removed after appointment, unless he discharges the duties of his trust faithfully, and as directed by law: *In re Banquier's Estate*, 88 Cal. 302, 26 Pac. 178, 532; and if an executor or administrator neglects or refuses to perform the duties of his office, he may be removed: *Glines v. Weeks*, 137 Mass. 547; *In re Wheaton's Estate*, 37 Misc. Rep. 184, 74 N. Y. Supp. 938; *In re Partridge's Estate*, 31 Or. 297, 51 Pac. 82; *Knight v. Hamakar*, 40 Or. 424, 67 Pac. 107; *Kellberg's Appeal*, 86 Pa. 129.

It must be borne in mind, however, that an executor is the creature and representative of the testator, and not, like an administrator, the creature of the law. A testator has a right to repose confidence in whom he will, and, if he selects as his representative an irre-

sponsible, insolvent person, it is an exercise of power not vested in the court, and a violation of the rights of the executor, to require him, in the absence of fraud or misconduct, or breach of trust, to give security, and thereby remove him from office, thus defeating the will of the testator: *Holcomb v. Coryell*, 12 N. J. Eq. 289. Of course, the refusal of an administrator to perform the duties of his trust is a sufficient cause for revoking his authority and conferring it upon another: *Marsh v. People*, 15 Ill. 284.

Where it appears that the sole surviving executor has neglected the estate and due administration of its affairs; that claims due the estate have not been collected; that the executor has filed a voluntary petition in bankruptcy; and that the circumstances of the estate are such that parties interested therein are not afforded adequate security for the proper administration thereof, an order for the removal of the executor is properly granted: *In re Truesdell's Estate*, 40 Misc. Rep. 336, 81 N. Y. Supp. 1038. So, where the principal, if not the only, valuable asset of an estate is a retail liquor store, which had been carried on by decedent, and as to which he had a lease which had about five months to run at the time of his death, it is a breach of trust for the administratrix, the widow of decedent, to allow the fixtures of the store to be sold under a chattel mortgage, and to be bought in by the bartender, who executed a new chattel mortgage, and, with the widow's assistance, obtained a renewal of the lease for her benefit, though the business was carried on in his name. Such acts constitute misconduct and dishonesty on the part of the administratrix, and her letters will be revoked therefor: *In re Heyen's Estate*, 40 Misc. Rep. 511, 82 N. Y. Supp. 791. An administrator may also be removed, in the discretion of the court, for unfaithfulness or neglect of his trust to the probable loss of persons interested in the estate, where he fails, within the time prescribed by statute, to publish notice to creditors to present their claims, and to file an inventory of the estate: *In re Barnes' Estate*, 36 Or. 279, 59 Pac. 464.

While a court of equity may not remove an executor who has neglected to account in the proper court, as required by the statute, when called upon to account, who has refused to account and evades doing so, until compelled by the court, and who is then found to be the principal debtor of the estate, it is justified in compelling the executor to secure the trust where the estate has little or no security for such indebtedness: *Holcomb v. Coryell*, 12 N. J. Eq. 289.

An executor who makes improper investments, who mixes the trust funds with his own, who fails to keep proper accounts, and who withholds from the cestui que trust money in his possession that belongs to and should have been paid over to the beneficiary, should be dismissed: *In re Simon's Estate*, 155 Pa. 215, 26 Atl. 424.

If an administrator is appointed, and qualifies, but does no further act for a number of years, the court may, upon a showing that the estate is unadministered, that there are claims against it, and that some of its real property is claimed by others, remove the administrator, and appoint another: *Kuck v. Dixon* (Tex. Civ. App.), 127 S. W. 910. But where an executor has used all reasonable care and diligence in administering the estate, but has found it impossible to complete the administration thereof within the time prescribed by statute, the court will refuse to remove him and appoint an adminis-

trator *de bonis non*: *Ford v. Ford*, 88 Wis. 122, 59 N. W. 464. And the court will not remove an administrator because of the mere fact that the administration of the estate has been continued for sixteen years without a final account, as such fact alone does not overcome the presumption of fair conduct and the faithful performance of official duty: *In re Moore's Estate*, 83 Cal. 583, 23 Pac. 794.

In Louisiana, an executrix who fails to deposit in bank the money of a succession, as required by law, must be dismissed upon proof of that fact, made in the manner prescribed by statute: *Depas v. Riez*, 2 La. Ann. 30; except where the amount is inconsiderable, being not more than enough to pay expenses: *Peale v. White*, 7 La. Ann. 449; or where there is no bank in the parish in which the executors reside: *Succession of Peytavin*, 7 Rob. (Va.) 477. The purpose of the law requiring the deposit of funds belonging to estates is not so much the safety of the funds as the rendering of them productive during the delays which attend the final "winding up" of estates: *Succession of Peytavin*, 7 Rob. (Va.) 477.

Administrators are not to be dismissed for intermeddling with the assets of the succession before they were appointed, where they were appointed without objection; nor for drawing money from the hands of commission merchants, and failing to deposit it as money of the succession, where it does not conclusively appear that they are not entitled to so draw; and it does not follow that because one administrator is dismissed others must also be dismissed: *Hansell v. Hickox*, 121 La. 721, 46 South. 784.

If an administratrix has proceeded with reasonable diligence and intelligence to perform her duties in the administration of the estate, has caused an inventory to be made, and has advertised for sale the personal estate of the decedent, she is not to be removed because of her age, lack of vigor, or want of acquaintance with business affairs, because neither youth nor vigor are required of an administratrix, and neither lack of education not amounting to illiteracy, nor weakness of mind not amounting to want of understanding, will suffice to debar one from his right to administer: *In re Ireland's Estate*, 47 Misc. Rep. 545, 95 N. Y. Supp. 1077.

A statute requiring the court to revoke the letters of an administrator who neglects for two months after his appointment to give notice to creditors does not apply to the administratrix of an estate of a specified limited value, where the whole estate, if it does not exceed such value, is to be assigned to the widow; and her letters cannot, therefore, be revoked for her failure to give notice to creditors where the whole estate is set off to her: *In re Atwood's Estate*, 127 Cal. 427, 59 Pac. 770.

#### **XV. Misconduct, Waste, Mismanagement or Misappropriation of Assets.**

Misconduct on the part of the representative of a decedent's estate is a good ground for his removal: *In re Estate of Hood*, 104 N. Y. 103, 10 N. E. 35; *In re Havemeyer*, 3 App. Div. 519, 38 N. Y. Supp. 292; *In re Wallace*, 68 App. Div. 649, 74 N. Y. Supp. 33; *In re Estate of Wheaton*, 37 Misc. Rep. 184, 74 N. Y. Supp. 938; *In re Patterson*, 41 Misc. Rep. 66, 83 N. Y. Supp. 649. It is ground for the removal of an executor that his acts are such as to show a want of honesty or capacity to execute the duties of his office, especially where the

trust property is endangered: *In re Ireland's Estate*, 47 Misc. Rep. 545, 95 N. Y. Supp. 1079.

He may be removed from office for inducing a residuary legatee, by false representations and suggestions, to sell her interest to him for one-fourth of its value: *Lett v. Emmett*, 37 N. J. Eq. (10 Stew.) 535; or where he has a contract to sell certain stock for two hundred and fifty dollars, for purchasing the same from the estate at one hundred and fifty dollars a share, and retaining the difference: *In re Sandrock's Estate*, 49 Misc. Rep. 371, 99 N. Y. Supp. 497; or for giving an unauthorized preference to creditors in distributing the assets of the estate: *Foltz v. Prouse*, 17 Ill. 487; or where he, being also a testamentary trustee, wrongfully continues the business of the testator: *In re Hutchinson*, 10 N. Y. St. Rep. 10; or where he, being a son of decedent and a coexecutor, refused to join in a deed, authorized under a power of sale, on the ground that he ought to have the property himself at less than the stipulated price, at the same time stating that it was worth, to an outsider, more than such price: *Oliver v. Frisbie*, 3 Dem. Sur. 22; or for conveying a part of his decedent's estate to sureties on his official bond for their protection: *Fleet v. Simmons*, 3 Dem. Sur. 542; or where he claims the benefit of a contract between himself and the testator, there being strong evidence that the testator was of unsound mind at the time of its execution, and by the terms of which contract the executor secured great pecuniary advantage, to the detriment of the estate: *In re Gleason's Estate*, 17 Misc. Rep. 510, 41 N. Y. Supp. 418, 75 N. Y. St. Rep. 820.

It is also ground for an executor's removal from office that he refuses to account in the proper court, wherein he has charged himself, where he, after the rejection by such court of a claim made by him, invokes the aid of the courts of another state to have such claim allowed; and especially where he has, in addition to such acts, wasted and misapplied the estate: *Gray v. Gray*, 39 N. J. Eq. 332. So where he alleges that he cannot account because the data for such an accounting is in the hands of an assignee, in assignment proceedings, his letters will be revoked, so that a creditor may procure the appointment of an administrator with the will annexed, through whom proper proceedings may be instituted against the fund which had been used in the business: *In re Hickey*, 34 Misc. Rep. 360, 69 N. Y. St. Rep. 844. Where a husband is entitled to letters of administration on his deceased wife's estate, and he is prevailed upon to have his sister in law associated with him as administratrix, upon the ground that it would tend to establish peaceful relations, but she, for the first time, sets up a claim to a large portion of the personal property, when an attempt is made at appraisal, and refuses to produce for appraisal certain personal property, and uses language toward and concerning her brother in law, the coadministrator, that is disrespectful, unbecoming, uncalled for, and not provoked by him, the court may revoke the letters granted to the administratrix, on the ground that they were "obtained by a false suggestion of a material fact": *In re West*, 40 Hun, 291.

But in those jurisdictions where an administrator, as such, has no authority or control over the real estate of his intestate, it is not misconduct for him to purchase such real estate upon a foreclosure sale, and to hold the same in his own right. He cannot, therefore, be removed for so doing: *Campbell v. Allen*, 142 N. Y. 484, 37 N. E.

517. Nor is it any ground for removing an executor or requiring him to give security for assets in his hands, that he made for the legatee an investment in government bonds, purchasing them at a premium, instead of on bond and mortgage, as requested, where all the interest collected has been paid over to the legatee; or, that he has no real estate in this state, where there is no proof that the assets are insecure in his hands, or in danger of being wasted: *Carpenter v. Gray*, 32 N. J. Eq. 692.

Waste of the property of an estate is, of course, as good a ground for the removal of an executor or administrator as actual fraud: *Scott v. Smith* (Ind. App.), 82 N. E. 556; *Haynes v. Carpenter*, 86 Mo. App. 30; *Lucich v. Medin*, 3 Nev. 93, 93 Am. Dec. 376; *Fernbacher v. Fernbacher*, 17 Abb. N. C. 339, 4 Dem. Sur. 227; *In re Mus-sault's Exr.*, T. U. P. Charlt. (Ga.) 259; and all coexecutors who have committed waste should be removed therefor: *Fernbacher v. Fernbacher*, 17 Abb. N. C. 339, 4 Dem. Sur. 227.

Mismanagement is good ground for the removal of an executor or administrator: *Miller v. Hider*, 9 Colo. App. 50, 47 Pac. 406; *Proth-ingham v. Petty*, 197 Ill. 418, 64 N. E. 270; *Haynes v. Carpenter*, 86 Mo. App. 30; *Lewellyn v. Lewellyn*, 87 Mo. App. 9; *Lucich v. Medin*, 3 Nev. 93, 93 Am. Dec. 376; *In re Heyen's Estate*, 40 Misc. Rep. 511, 82 N. Y. Supp. 791.

A court will correct errors made by an executor or administrator in his accounts, or mistakes made by him in the construction of the will, but it will not remove him unless there has been willful misconduct, waste or improper disposition of the assets of the estate: *Witherspoon v. Watts*, 18 S. E. 396. If there is no ground upon which to charge mismanagement, there is no reason for the summary removal of an executor or administrator, nor for requiring a bond at his hands: *In re Fisher's Estate*, 128 Iowa, 626, 104 N. W. 1023. An executor's delay to convert real property, which has greatly increased in value, into personalty, is not a moral wrong, and is not misconduct justifying his removal: *Wilcox v. Quimby*, 65 Hun, 621, 20 N. Y. Supp. 5. Errors of judgment not amounting to malfeasance are not sufficient causes for the removal of an administrator, or to authorize one of his sureties to withdraw from his bond: *Succession of Spar-row*, 39 La. Ann. 696, 2 South. 501. The relief allowed under the statute of Georgia to a surety upon the bond of an administrator does not extend to the removal of the administrator except upon proof of mismanagement by him: *Girardey v. Dougherty*, 18 Ga. 259.

The payment, by administrators, of expenses for saving a crop, though made without an order of court, is not a good ground for dismissing them; nor is the payment of a debt in anticipation, in order to extricate a succession from embarrassment, a cause for dismissal, provided it is done in good faith, and provided the succession has been released from the burden of a legitimate indebtedness. Neither does an offer to sell, which offer was stopped, necessarily place the administrators in a position which would justify dismissal: *Hansell v. Hickox*, 121 La. 721, 46 South. 784.

In a proceeding to remove an administrator for misappropriation of the assets of the estate, the removal will be made, where the evidence tends to show that the charges are true, and some other person be appointed as administrator of the estate whose interest it will be to cause the alleged delinquencies to be thoroughly investigated, but

the court will not, in such proceeding, determine the truth of the charges of misappropriation: *Bean v. Pettengill* (Or.), 109 Pac. 865.

#### **XVI. Hostile Feeling Between Representative and Heirs.**

If there is such a hostile feeling between an administrator and the beneficiaries of the estate as would or might interfere with the management thereof, nothing but some controlling necessity will justify his retention as administrator: *Kellberg's Appeal*, 86 Pa. 129. If there is a continued acrimonious and hostile feeling between the executor and widow of the decedent, which intercepts and prevents such a management and husbanding of the estate of the decedent, as prudence, sound policy, and the interests of devisees and creditors require, it is within the discretion of the court to remove him: *In re Pike's Estate*, 45 Wis. 391; but a merely hostile or unfriendly feeling of an administrator toward persons interested in the estate is of no consequence where it does not prevent such management of the estate of the deceased by him as prudence, sound policy, and the interests of heirs, devisees, and creditors require: *Stevens v. Larwill*, 110 Mo. App. 140, 84 S. W. 113.

#### **XVII. Absence from State or Nonresidence.**

If an executor or administrator becomes a nonresident, he may be removed upon the application of any person interested in the estate: *Sylvester's Admr. v. Willson's Admr.*, 2 Alaska, 325; *Harris v. Dillard*, 31 Ala. 191; especially where he has withdrawn from the jurisdiction of the court the funds of the estate: *In re Rice's Estate*, 153 Mich. 53, 122 N. W. 212; or has failed for years to render any account: *Harris v. Dillard*, 31 Ala. 191; *In re Rice's Estate*, 158 Mich. 53, 122 N. W. 212. He cannot be removed, however, without his first having been cited to return and settle; and, if an administrator *de bonis non* is appointed before such citation, all proceedings by him are void: *Humes v. Cox*, 1 Pinn. (Wis.) 551.

In Louisiana, in case of the temporary absence of an executor from the state, he may delegate his trust, and, in proceedings to remove an administrator for absenting himself without executing a power of attorney, as required by the statute, the curator *ad hoc*, representing the administrator, must show that such a power has been executed. He can easily show this by the recorder of mortgages, where the power has been executed: *Yerkes v. Broom*, 10 La. Ann. 94; *Scott v. Lawson*, 10 La. Ann. 547. Curators, administrators, tutors and testamentary executors, who absent themselves from the state for a time will lose their administrations of successions unless they execute such power of attorney and have it registered: *Scott v. Lawson*, 10 La. Ann. 547. But the permanent departure of an executor from the state authorizes his removal, though he may have left a power of attorney: *Yerkes v. Broom*, 10 La. Ann. 94.

An application for the removal of an executrix on the ground of nonresidence will be denied, though she has been absent from the state for a greater part of the year following the issuance of letters, where it appears that she is the sole beneficiary of the decedent; that she has omitted no step in her duties as the representative of her husband; and that the year given her for the administration of the estate has not yet elapsed, so that no accounting is yet due; especially where these facts are coupled with her denial of any intent to become

a nonresident: *In re Magoun*, 41 Misc. Rep. 352, 84 N. Y. Supp. 940. So it is no ground for the revocation of an executor's letters testamentary that he has maintained a temporary residence outside of the state, for the benefit of his family's health. This does not show that he "has removed" from the state within the intent of the statute: *In re McKnight's Will*, 80 App. Div. 284, 80 N. Y. Supp. 251. If the statute prescribes that an administrator may be removed where he absents himself for a specified time without the permission of the court, he cannot be removed for that cause without proof that he has been absent for the period designated: *Hall v. Monroe*, 27 Tex. 700.

The statute of California forbids the appointment of a nonresident as administrator, but nonresidence is not made a disqualification to the appointment of an executor. But a nonresident named as executor in a will must come here within a reasonable time, personally submit himself to the jurisdiction of the court, and personally conduct the settlement of the estate. If, upon receiving his appointment and filing his inventory, he permanently removes from the state, and does not at any time return to personally conduct the business of the estate, or place himself within the jurisdiction of the court, he may be removed: *In re Kelley's Estate*, 122 Cal. 379, 55 Pac. 136. An executor should not be removed on the ground of nonresidence where the statute does not authorize removal for such cause and there has been no neglect of duty: *Walker v. Torrance*, 12 Ga. 604; *Wiley v. Brainerd*, 11 Vt. 107. The statute of South Carolina, however, does not prohibit the appointment of a nonresident as administrator. His administration may continue as long as he presents his accounts in person to the court to be passed on in obedience to the law, and by his coming into the state subject himself to the jurisdiction of the court, but his letters may be revoked where he appears only by attorney and fails to show that he is, by actual residence, subject to the jurisdiction of the court: *In re Peele's Estate*, 85 S. C. 140, 67 S. E. 135. If letters testamentary have been issued to one not a resident of New York, they cannot be revoked because of his continued nonresidence, nor can an official bond be required of him because of such fact: *Postley v. Cheyne*, 4 Dem. Sur. 492. A nonresident executor who continues his nonresidence, but nevertheless comes into the state to attend to the business of his executorship, cannot be suspended or removed solely on the statutory ground that he "has permanently removed from the state": *Hecht v. Carey*, 13 Wyo. 154, 110 Am. St. Rep. 981, 78 Pac. 705.

#### XVIII. Misconduct Respecting Sales of Property of Estate.

Where an administrator has been authorized to sell real property belonging to decedent's estate for cash, and does make a sale thereof under the power conferred, but falsely reports that he has received the cash therefor, and the court, relying on such statement, confirms the sale, in pursuance of which the administrator executes and delivers a deed to the purchaser, the administrator may be removed as having neglected his trust: *Knight v. Hamaker*, 40 Or. 424, 67 Pac. 107. So, where an executor, having agreed to transfer for its full value a security held by him for the estate, signed and delivered to a member of the bar, representing the purchaser, the assignment, upon payment of only a part of the consideration therefor, and upon the unsecured promise of the one to whom the security was delivered



to afterward pay the full consideration, but which was never paid, there was a plain dereliction of duty justifying the executor's removal although the executor made up the loss sustained by the estate out of his own funds: *In re Marsh's Will* (N. J.), 56 Atl. 886. And the same is true where he loaned a sum of money belonging to the estate, taking the borrower's bond therefor, secured by a mortgage, and, at the request of the borrower, withheld the mortgage from record, with the result that the borrower mortgaged the lands to another person, and afterward conveyed them away, so that the security of the mortgage taken by the executor became injuriously affected, although a fortunate concurrence of circumstances not only prevented loss, but actually produced gain, to the estate. These circumstances do not justify his retention in office: *In re Marsh's Will* (N. J.), 56 Atl. 886.

An executor or administrator may be removed for selling property of the estate without an order of court: *Levering v. Levering*, 64 Md. 399, 2 Atl. 1; or for failing to execute an order of court for the sale of land, although he may claim that such order is illegal, because it includes the homestead: *Wright v. McNatt*, 49 Tex. 425. But an executor cannot be removed for refusing to comply with a void order of court directing him to sell property of the estate: *Snook v. Zentmyer*, 90 Md. 705, 45 Atl. 1006. So, if an administrator, who has not the remotest personal right in himself, who is not called for by any party having rights, who worms himself into office, and right upon the heel of his induction into office files a petition for a sale of all the personal property of the estate, for cash, to pay its debts, when the facts show that the estate is a large one, solvent, and free from debt, except a medical bill or two, and some other small debts, and expenses of the last illness, and the administrator makes an irregular sale of nearly all of the property to the surviving member of the firm of which decedent was a member, but allows him to retain the price contrary to law, does not even demand payment, and does not pay in a cent, he should be removed as unfaithful to his trust. Administrators are expected and intended to be faithful agents, regarding strictly what the law requires from them, and conforming in all their proceedings to its requirements; not speculators and spoliators looking to their own aggrandizement, reckless of the injury and ruin of those whose interests they have under their control: *Travis v. Insley*, 28 La. Ann. 784. Where it appears that an executrix has sold a portion of the estate at private sale, but is not now a resident of the state, and that she has not given a power of attorney, duly recorded as required by law, to anyone to represent her, she may be destituted of her trust on the petition of a creditor: *Succession of Winn*, 27 La. Ann. 687. So if an estate has no personal property, but does have existing debts, and a mortgage on the realty which the mortgage creditor threatens to foreclose, and which, if done, would sacrifice the real estate, deprive the heirs of their rights and interests, and jeopardize the claims of other creditors, and with the estate in this condition, the administrator removes from the county, and refuses to petition for a sale of the real property, the court may properly order his removal: *Frothingham v. Petty*, 197 Ill. 418, 64 N. E. 270.

It is no cause, however, to dismiss an executor, or to require him to give security, that he has sold the real estate of his testator, and

himself become the purchaser thereof, where the statute does not make this a cause of removal: *Webb v. Dietrich*, 7 Watts & S. (Pa.) 401. Nor can he be removed for refusing to comply with a void order of the court directing him to sell certain real property of the estate: *Snook v. Zentmyer*, 90 Md. 705, 45 Atl. 1006.

After a sale of decedent's real property has been consummated, the refusal or failure of an administrator, pending his report of sale before the probate court, to consider the bid of another person for the property, who is known by the administrator to be without means to make good his offer, and who has not, at the time such report is under consideration, given the bond he said he would give, and who does not then offer or tender such bond, is no such evidence of waste or bad faith as to justify the administrator's removal. On the contrary, he acts with wise discretion in insisting that the sale should be approved as he made it: *In re Rinkel's Estate*, 107 Mo. App. 74, 80 S. W. 716.

Where an executor has power, under a will, to sell the testator's land, and the direction to sell is imperative, but the time of selling is left to his discretion, his failure for five years to sell is no ground for his removal, as the court cannot control his discretion in that respect, so long as the executor acts in good faith. Where there was no demand for the property, owing to the condition of the real estate market, and the executor had at all times been ready and willing to sell the property at a fair price, and had taken the usual means, by advertising and otherwise, to make that disposition known, it cannot be said that the failure to sell was owing to any fault on his part: *Haight v. Brisbin*, 96 N. Y. 132.

Nor is the refusal of the executor to execute a power of sale of real estate, vested in his discretion by the terms of the will, such a wasting, mismanaging, or jeopardizing of the estate as to justify his removal, although he had at one time agreed, at the solicitation of creditors, to make a sale under the will at a certain price, but afterward refused unless a bonus should be paid to him, and held the property for two years in the hope of obtaining a larger price through the revival of business: *In re Parson's Estate*, 82 Pa. 465.

Although an administrator makes intentional misstatements in his application for the sale of land of the estate for division among the heirs, as to matters required by the statute to be stated in the application, this is not such an act of "maladministration of the estate" as will authorize the removal of the administrator, although such misstatement is certainly an act of misconduct on the part of the representative: *Forrester v. Forrester's Admrs.*, 37 Ala. 398.

#### XIX. Unauthorized Investments or Loans.

If a foreign corporation is acting as executor, its letters testamentary will be revoked for investing the funds of the estate in securities not authorized by the laws of the state in which the estate is to be administered: *In re Avery's Estate*, 45 Misc. Rep. 529, 92 N. Y. Supp. 974. If an executor or administrator loans money of the estate without taking proper precautions as to security, he may be removed for dereliction of duty: *In re Marsh's Will* (N. J.), 56 Atl. 886.

An administrator cannot properly be removed for mingling the trust property of the estate with his own, if it appears that he had

the money of the estate on deposit in his own name in a bank; that he had no money of his own in such bank; and that the money of the estate was intact at the time of the order of removal: In re Welch's Estate, 86 Cal. 179, 24 Pac. 943. And some courts are not disposed to remove an executor for making investments of the testator's estate in a manner unauthorized by law, if they were made in good faith, were repaid in full, and the decree on the intermediate accounting, including all the investments questioned, shows that the estate never lost anything by reason of such investments: In re Burr, 118 App. Div. 482, 104 N. Y. Supp. 29.

If an executor has engaged in a business venture, and there is nothing to indicate that the whole transaction, considered as an entirety, was not for the best interests of the estate, there is no ground for his removal because of such venture. Nor is an executor guilty of any wrong, justifying his removal, in purchasing at par a note due the estate at a time when the estate is in pressing need of money, and the value of the collateral is less than the amount due on the note. The estate is not wronged, because it has gotten all to which it was entitled, and has lost nothing: Houghteling v. Stockbridge, 136 Mich. 544, 99 N. W. 759.

It is not an abuse of discretion to refuse to remove an administrator who made an improper loan, which was afterward repaid with interest, as the devastavit was only technical: Scott v. Smith, 171 Ind. 453, 85 N. E. 774.

### XX. Payments of Money.

Whenever there is a surplus, ready for distribution, in the hands of the administrator, after a time specified in the statute, and without the appearance of any heirs to claim such surplus, he may be ordered to pay the same to the proper county treasurer, for the use of the state, and may be removed for a failure to obey such order: Fuhrer v. State, 55 Ind. 150. An executor may also be removed, on the ground of mismanagement, for refusing to pay his own debt to the estate. His refusal to account to the estate for money owing to it by himself cannot be characterized by any milder term than that of "mismanagement": Haines v. Christie, 17 Colo. App. 272, 68 Pac. 669.

An administrator may be removed for paying his individual debt out of funds of the estate in his hands, but this will not be done if the amount paid is small when compared with the aggregate value of the trust estate in the hands of the administrator, and the interests of the beneficiaries are not imperiled, and no improper motive can be attributed to the administrator. "It is not every technical maladministration, or devastavit, that will authorize the removal of an administrator. It must be a devastavit involving actual, or the reasonable apprehension of, injury, or be attended with circumstances indicative of fraud": Killam v. Costley, 52 Ala. 85. Thus, an administrator ought not to be removed for paying money to an attorney for minor heirs upon a forged order of the court, where it appears that he had previously paid him money under an allowance of the court on the advice of his attorney, and was led by the representations of the attorney for minor heirs to believe that the court would allow him a large sum, and had loaned him sums from his own money upon the faith of such representations, and advanced the remainder

of the forged order out of his own money, which was not charged against the estate: *In re Welch's Estate*, 86 Cal. 179, 24 Pac. 943.

But if an executrix fails to deposit moneys of the estate coming into her hands in the manner provided by law, and pays out such funds without authority of the court, for matters in which the succession is not concerned, she should be destituted of her office: *Succession of Benton*, 106 La. 494, 31 South. 123, 59 L. R. A. 135. So where the deceased, an inventor, had assigned all his interest in certain patents to a company, for a royalty, among other considerations, to be paid quarterly, and the widow was induced to renounce to the secretary or business manager of the company her right to administer, and the secretary, as representative of the estate, refused to assert any claim against the company for the quarterly payments accruing after the decedent's death, on the ground that the right to them ceased at that time, in the face of a contention that the term of the letters patent had still several years to run, the administrator may be removed on the ground of mismanagement of the estate: *Appeal of Kellberg*, 86 Pa. 129.

It is to be observed, however, that no man is infallible. The wisest make mistakes; but the law holds no man answerable for the consequences of his mistakes "which are the result of the imperfection of human judgment and do not proceed from fraud, gross carelessness, or indifference to duty." It is not for every unwarranted act of omission or commission that an executor is to be removed. If he has strayed from the path of fiduciary duty, he may be compelled to secure those who might suffer loss by reason of his dereliction; but the stigma of removal is to be placed upon him only in a flagrant case. Thus, the misconduct of an executor and trustee in making excessive payments to the testator's widow on account of her dower, thus rendering the estate insecure, is, though subject to criticism, not ground for his removal, but the court may properly require him to give a bond for the faithful performance of his duty under the will and thus secure the estate: *Pfefferle v. Herr*, 75 N. J. Eq. 219, ante, p. 518, 71 Atl. 689.

The fact that an administrator paid an attorney's fee improperly is no ground for his removal: *In re Welch's Estate*, 110 Cal. 605, 42 Pac. 1089. Nor is the fact that he, while attorney for his predecessor, was paid an exorbitant fee for his services: *Miller v. Hider*, 9 Colo. App. 50, 47 Pac. 406. Where the executor is the guardian of certain infants, and, in proceedings to remove the executor, the main charge is that his testator was surety upon his bond as such guardian, and that, after the testator's death, the executor invested the moneys of the infants in his own name in the stock of a California corporation, and thereby lost the same; but the executor, upon his accounting, is charged with the amount of such loss, and, being insolvent, his co-executors, recognizing the liability of the estate upon the guardian's bond, make good the loss to the infants by paying it, the removal of the executor is not necessary for the protection of the estate, but the court will require him to give a bond for the faithful performance of his duty: *In re Kasson's Estate*, 46 App. Div. 348, 61 N. Y. Supp. 569.

### **XXI. Fraud or Embezzlement.**

An executor or administrator should be removed where he has committed or is about to commit a fraud on the estate: *In re Rathgeb's*

Estate, 125 Cal. 302, 57 Pac. 1010; or for obtaining the estate of an heir by fraud. Thus, if the representative and his agents search out the heir; inform him that he has rights, but trick and deceive him as to their value; prepare documents for his signature in which the fact that he is the legitimate child of his father is recited; demand and receive from him an affidavit of his birth and identity; teach him how to sign his real family name to these documents; and then pay him an utterly inadequate consideration therefor, such consideration being in part, at least, made up of trust funds in their hands, in which he has an interest, such acts justify the removal of the representative on the petition of the heir. To deal with the heir as legitimate, secretly planning to justify their evil treatment of him by subsequently asserting his illegitimacy, is not honest, and the perpetrator of such a fraud is unfit to act as trustee: *In re Sterling*, 68 Misc. Rep. 3, 124 N. Y. Supp. 894.

Where an ignorant and illiterate person retained an attorney to protect his interest in the estate of a deceased relative, and the attorney, after procuring his own wife to be joined as administratrix with such illiterate person as administrator, immediately took possession of the estate, neglected to proceed in a proper and orderly manner in the settlement of the estate, appropriated the income thereof to his own use, under the guise of acting as attorney for the administrators, and then, having made a grossly excessive charge for his professional services, procured the administrator and administratrix to sign an account, which recited that payment for such professional services had been made, and endeavored to have such account passed and such payment allowed, it is entirely proper to remove the administratrix upon the application of the administrator, and to charge her with the costs of the proceedings: *In re Ferrigan's Estate*, 42 App. Div. 1, 58 N. Y. Supp. 920.

The court is required to remove an administrator for fraudulently procuring the allowance against the estate of an unfounded claim in his own favor: *Owens v. Link*, 48 Mo. App. 534. So an administratrix is guilty of such malfeasance in her representative capacity as authorizes and justifies her removal, where she compromises and settles a claim of the estate against a railway company by collusion with an employee of, and acting in the interest of, the company, although such employee had no authority to represent the company in the premises, and though the settlement which was made between her and the company's authorized agents may be valid and binding on the estate: *Bozeman v. May*, 132 Ala. 233, 31 South. 491.

An executor may be removed on the ground of his misconduct in connection with the payment of a certain pretended claim against the estate of the deceased: *In re Patterson*, 41 Misc. Rep. 66, 83 N. Y. Supp. 649.

But an administrator cannot be removed on the ground of fraud, unless fraud is alleged, and, if alleged, it must be shown that the representative participated in such fraud: *In re Griffith's Estate*, 84 Cal. 107, 23 Pac. 528, 24 Pac. 381; *Jones v. Harbaugh*, 93 Md. 269, 48 Atl. 827.

If he is induced by the sole distributee of an estate to make a distribution before the time for filing claims has expired, the distributee agreeing that he may retain a certain compensation for the services of himself and his attorney, the distributee cannot subse-

quently insist upon the administrator's removal on the ground of fraud in retaining such compensation: *Jones v. Harbaugh*, 93 Md. 269, 48 Atl. 827.

An executor or administrator may be removed for squandering or embezzling the estate: *Newcomb v. Williams*, 50 Mass. (9 Met.) 525; *Levering v. Levering*, 64 Md. 399, 2 Atl. 1.

#### XXII. Poverty and Insolvency.

Poverty is no reason for superseding an executor, though bankruptcy might furnish a reason therefor. The selection of a trustee is the indication of the highest degree of personal confidence; and character, rather than pecuniary responsibility, controls the selection: *Shields v. Shields*, 60 Barb. (N. Y.) 56. The mere poverty of the executor does not authorize the court, against the will of the testator, to remove him by placing a receiver in his place. There must be, in addition, some maladministration or some danger of loss from the misconduct or negligence of the executor for which he will not be able to answer by reason of his insolvency: *Fairbairn v. Fisher*, 57 N. C. (4 Jones Eq.) 390.

The mere insolvency of an executor is no ground for removing him: *Gill v. Riley*, 28 Ky. Law Rep. 639, 90 S. W. 2; *Schanck v. Schanck*, 7 N. J. Eq. 140; *In re Hart's Estate*, 6 N. Y. St. Rep. 535; especially where it does not appear that his circumstances are such as not to afford adequate security for the due administration of the estate: *In re Hart's Estate*, 6 N. Y. St. Rep. 535; or where it appears that his insolvency existed before the will was made, was known to the testator, and has had no effect upon the payment of debts of the estate: *McFadyen v. Council*, 81 N. C. 195; and it does not appear that he is wasting or misapplying the assets: *In re Knowles' Estate*, 148 N. C. 461, 82 S. E. 549.

Insolvency, however, rendering a continuation of the trust dangerous to creditors is a good ground of removal: *Gibson v. Maxwell*, 85 Ga. 235, 11 S. E. 615; *In re Truesdell's Estate*, 40 Misc. Rep. 336, 81 N. Y. Supp. 1038; *In re Mussault's Exr.*, T. U. P. Charl't. (Ga.) 259.

#### XXIII. Coexecutors.

The power to remove an executor extends to a case where there is more than one executor. If there are constant dissensions between coexecutors, one of them who has failed to do his part in the management of the estate may be removed, where it is evident that his continuance in office will prejudice the best interests of the estate: *In re Wheaton's Estate*, 37 Misc. Rep. 184, 74 N. Y. Supp. 938. Any coexecutor may be removed for cause and the others execute the trust: *Winship v. Bass*, 12 Mass. 198. A coexecutor, unfit for his trust, should be removed. Thus, if the will directs that the two executors and trustees appointed therein shall in all things act jointly, keep bank accounts in their joint names, in which all moneys received from the estate shall be deposited, and all disbursements made therefrom be withdrawn by check, signed by both, and that no investment, sale, lease, or other change in the estate shall be made except by the concurrence of both executors and trustees for the time being, one of the representatives of the estate is unfit for his trust, either as executor or trustee, and should be removed upon evidence that he has deposited money of the estate in bank in his

own name, withdrawn the same by his own check, payable to himself, and loaned it on call; that he has made other investments without the consent of his cotrustee; that he has made investments unauthorized by law; and that he has appropriated money of the estate to his own use, as commissions, which have never been allowed: *In re Havemeyer*, 3 App. Div. 519, 38 N. Y. Supp. 292.

Where it is incumbent upon executors to protect the interests of their estate, and in the proper management of it to take steps necessary to preserve it, or save it from loss, or where the knowledge concerning the interests of the estate is known to some of the executors, and not to the others, and they persistently refuse to furnish the information necessary for the proper protection of the estate, they are, to say the least, guilty of mismanagement. Thus, if it appears that two of three executors are largely in debt to the estate, and are insolvent; that they have, for a large sum, disposed of their business, in which a considerable part of the decedent's estate was invested: that they have refused to disclose to their coexecutors the disposition made of such business; and that they refuse to furnish a statement of the condition of the account between the estate and their insolvent firm at the time of decedent's death, such facts clearly justify a removal of the two coexecutors: *In re Sharpless' Estate*, 209 Pa. 69, 57 Atl. 1128.

But the refusal of a trustee of a large estate, who has the custody of the books and papers thereof, to deliver them up to his cotrustees upon their joint demand, is not such misconduct as calls for his removal, it not appearing that the estate suffers by such refusal: *Bronson v. Bronson*, 48 How. Pr. (N. Y.) 481. And the same is true where two of three executors refuse to transact business of the estate in the presence of the attorney of the third executor, where such attorney has made himself obnoxious to them: *In re Waterman's Estate*, 112 App. Div. 313, 98 N. Y. Supp. 583. So, with a mere disagreement between two executors, added to the fact that one is a man of limited means. The court will not, because of a mere misunderstanding between executors, take the estate out of their hands and commit it to a receiver: *Fairbairn v. Fisher*, 57 N. C. (4 Jones Eq.) 390.

#### XXIV. Persons Entitled to Apply for Removal.

a. *In General*.—The judge of the probate court is sometimes expressly authorized by the statute to remove an executor or administrator, without an application in writing, when the facts justify it: *In re Partridge's Estate*, 31 Or. 297, 51 Pac. 82. He may do this for the reason, among others, that the representative has removed from the state: *Crawford v. Tyson*, 46 Ala. 299. The source of the information upon which the judge acts in removing the representative is immaterial. He may act upon his own knowledge or from credible information; and, under the California practice, the suspension of an executor, before citing him to appear and show cause why his letters should not be revoked, is not a necessary preliminary step: *In re Kelley's Estate*, 122 Cal. 379, 55 Pac. 136.

As a general rule, no one is entitled to apply for the removal of an executor or administrator without showing that he has some interest in the estate: *Godwin v. Hooper*, 45 Ala. 613; *Vail v. Givan*, 55 Ind. 59; *Chicago etc. R. R. Co. v. Gould*, 64 Iowa, 343, 20 N. W. 464; *Succession of Winn*, 26 La. Ann. 162; *Succession of Burnside*,

34 La. Ann. 728; *Dowdy v. Graham*, 42 Miss. 451; *Missouri Pac. Ry. Co. v. Jay's Estate*, 53 Neb. 747, 74 N. W. 259. The surety on the representative's bond may, if authorized by statute, make such application: *Vail v. Givan*, 55 Ind. 59; but not for his own individual relief: *Girardey v. Dougherty*, 18 Ga. 259.

b. **Representative of Estate.**—An application for the removal of an executor may be made by a coexecutor: *Vail v. Givan*, 55 Ind. 59; *Hesson v. Hesson*, 14 Md. 8; *In re Wheaton's Estate*, 37 Misc. Rep. 184, 74 N. Y. Supp. 938; but not by the executor of a deceased coexecutor: *Shook v. Shook*, 19 Barb. (N. Y.) 653; though it is held in Mississippi that the petition for the removal of an executor or administrator must be made by some one interested in the estate and not by one coexecutor or administrator against the other: *Dowdy v. Graham*, 42 Miss. 451. An executor, however, by his own petition or application for removal, cannot divest himself of the trust devolved upon him by the testator, particularly at a time when many actions are pending against him, and the obligations are shifted from his shoulders to those of an administrator: *In re Mussault's Exr.*, T. U. P. Charlt. (Ga.) 259.

c. **Widow, Tutrix and Heirs.**—An application for the removal of an executor or administrator may be made by the widow of decedent: *Pace v. Oppenheim*, 12 Ind. 533; *Evans v. Buchanan*, 15 Ind. 438. But if she has failed to take out letters of administration within the time prescribed, it is improper to remove, on her petition, an administrator appointed after the expiration of the statutory time: *Withrow v. De Priest*, 119 N. C. 541, 26 S. E. 110. Such application may also be made by a tutrix, after an order for her appointment, although she has not, at the time of such application, furnished the requisite bond and security: *McComas v. Ronquillo*, 4 La. Ann. 123. It may be made, too, by one having the right to administer: *Williams v. Neville*, 108 N. C. 559, 13 S. E. 240; or by a portion of the heirs named in the will: *Reed v. Crocker*, 12 La. Ann. 445. A creditor who has been appointed administrator will not be removed on the application of a cousin, or next of kin to the deceased, where no good cause is shown therefor: *Rogers v. May*, 2 Hayw. & H. 185, Fed. Cas. No. 12,015b.

d. **Legatees and Devisees.**—An application for the removal of an executor or administrator may be made by a legatee: *Susz v. Forst*, 4 Dem. Sur. 346; though he is named as executor in the will, which has been declared null and void, and has appealed from such decree: *Newhouse v. Gale*, 1 Redf. Sur. 217. It may also be made by the assignee of the interest of a residuary devisee under the will: *Yeaw v. Searle*, 2 R. I. 164.

e. **Public Administrator.**—In Louisiana, the public administrator cannot urge the removal of an executor or administrator for neglecting his duties: *Succession of Burnside*, 34 La. Ann. 728; but in California he may do so, though he is a volunteer without any interest in the estate, the statute not requiring him to show any such interest: *In re Kelley's Estate*, 122 Cal. 379, 55 Pac. 136.

f. **Creditors of Estate.**—A creditor of an estate may apply for the removal of an executor or administrator: *Carroll v. Huie*, 21 La. Ann. 561; *Barnes v. Brown*, 79 N. C. 401; *Knight v. Hamaker*, 40 Or. 424, 67 Pac. 107; but he must first allege and prove that he has



been injured by the representative's misappropriation or maladministration of the property of the estate: *Succession of Decuir*, 23 La. Ann. 166. He must show, too, that he is a creditor of the estate or succession. It is not sufficient for him to show that he is a creditor of the representative of the estate, or of the heirs: *Carroll v. Huie*, 21 La. Ann. 561.

The statutory provision of North Carolina, authorizing such removal on the petition of the executor's bondsmen only is not exclusive, and, under the constitution of that state, the creditors of an estate may petition for the removal of an executor: *Barnes v. Brown*, 79 N. C. 401. An attorney, who has performed services for an estate, is not a creditor of the estate until his claim is approved, but he has an interest therein sufficient to authorize him to petition for the removal of the administrator: *Knight v. Hamaker*, 40 Or. 424, 67 Pac. 107. A person, however, whose claim as a creditor has been denied, cannot disturb the administration, in which those interested have acquiesced, by a proceeding to dismiss the administrator: *Succession of Connolly*, 5 La. Ann. 753. For circumstances under which a creditor of the estate was allowed to petition for the removal of an administrator, although the petitioner had never proved his debt, and the administration account had been settled, see *Brackett v. Williams*, 110 Mass. 549. The decedent's wife will not be removed from her office as administratrix, upon the petition of the divorced wife of decedent, to test the question as to whether or not a conveyance of real estate made by the decedent in his lifetime was in fraud of creditors, as such removal for that purpose is unnecessary: *McFarlan v. McFarlan*, 155 Mich. 652, 119 N. W. 1108.

**g. Strangers or Volunteers.**—The question whether cause exists for the removal of an executor or administrator cannot, as a general rule, be determined at the suit of a stranger to the estate, showing no interest whatever therein: *Succession of Winn*, 26 La. Ann. 162. A person whom the representative has sued cannot petition for the latter's removal, because he is not one "interested in the estate": *Chicago etc. R. R. Co. v. Gould*, 64 Iowa, 343, 20 N. W. 464; *Missouri Pac. Ry. Co. v. Jay's Estate*, 53 Neb. 747, 74 N. W. 259. But in California, the statute does not require the petitioner for the removal of an executor or administrator to show any interest in the estate, and the application may be made even by a volunteer or stranger: *In re Kelley's Estate*, 122 Cal. 379, 55 Pac. 136.

#### XXV. Effect of Removal.

When an administrator is removed from office, and a substituted administrator is appointed in his stead, the removed officer is bound to pay to his successor the whole of the personal estate of his decedent, except what has been properly paid out or distributed. In an accounting by the removed officer, he cannot be allowed for the retainer of a claim on the estate made by himself, if it has not then appeared that the estate is clearly solvent; and where he sought his appointment and obtained renunciation from those entitled to administer, upon his promise that his services should be gratuitous, he will not be entitled to commissions, nor for money paid to a lawyer for services which the administrator should have performed: *Midleton v. Carter*, 73 N. J. Eq. 624, 68 Atl. 763. If the probate court had jurisdiction to remove an administrator, the removed officer has

no locus standi as administrator to file a bill for the purpose of having the estate administered in a court of equity: *Milton v. Hundley*, 52 Fla. 540, 42 South. 185.

If executors are removed for failure to give notice to creditors, or other cause, the court has power, pending an appeal from the order of removal, to appoint a special administrator, and also to proceed to hear a petition for the appointment of an administrator with the will annexed, but it has no jurisdiction to appoint a general administrator with the will annexed until such order of removal becomes final: *In re Chadbourne's Estate* (Cal. App.), 112 Pac. 472.

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### BURR v. NIVISON.

[75 N. J. Eq. 241, 72 Atl. 72.]

**SUNDAY CONTRACT—Ratification.**—A Contract Illegal because made on Sunday cannot be validated by subsequent ratification. (By the editor.) (p. 555.)

**SUNDAY CONTRACT—Consummation of Conveyance on Secular Day.**—Negotiations for the sale and conveyance of land in New Jersey were had in Connecticut, on Sunday, between the vendor and the agent of the vendee; the written memorandum required by the statute of frauds was signed by the vendor and delivered to the agent, who in return delivered the vendee's check, made and dated on Saturday, for the first payment; the memorandum embodied terms to which the agent was not authorized to agree, and it was not delivered to the vendee nor assented to by him until Monday. Held, that the contract was made on Monday, and not invalid as a Sunday contract. (p. 556.)

(Syllabi by the court except when stated to be by the editor.)

Winfield S. Parker, for the appellant.

Thomas P. Fay, for the respondent.

**242 SWAYZE, J.** The bill seeks to set aside and cancel of record an agreement for the sale of land by complainant to the defendant Rosenstein, because it was secured by fraud and because it is invalid by reason of the fact that it was made on Sunday. We agree with the vice-chancellor that the complainant failed to establish fraud. As to the other ground of invalidity we reach the same result, but by a somewhat different process. Our view renders it unnecessary to pass upon the legal question whether the court will intervene at the instance of one of the contracting parties to cancel a contract made on Sunday; we express no view on that question.

The vice-chancellor found that Mrs. Nivison was not the agent of Rosenstein, but of Burr. We think that she went from New Jersey to Connecticut as Rosenstein's agent to buy the farm upon the terms agreed upon between Rosenstein and

the complainant's son. We are led to this conclusion by the fact that most of the terms of sale were agreed upon with Burr's son before she went to Connecticut, that she took with her Rosenstein's check for the first payment, and took from Burr an agreement for the conveyance to Rosenstein. These facts are hardly consistent with the view that she was only Burr's agent for the purpose of making the sale. The fact that Burr was to pay her a commission is not inconsistent with our conclusion; this he might well do, and if it was done with the knowledge of Rosenstein and without objection on his part, there was no impropriety. Rosenstein gave his check for the first payment on Saturday. Mrs. Nivison went to Connecticut and secured from Burr the written memorandum required by the statute of frauds and delivered Rosenstein's check on Sunday; the memorandum was dated on Monday and delivered to Rosenstein on that day. If this memorandum contained only the terms that had been agreed upon between Rosenstein and the complainant's son on Saturday, we should hold that the contract was made on Sunday, since we think that Mrs. Nivison was authorized to assent as Rosenstein's agent to those terms. The memorandum, however, <sup>243</sup> does not contain merely the terms to which Mrs. Nivison had been authorized to assent; it adds a provision that if Rosenstein fails to pay the purchase price in accordance with the agreed terms, he shall forfeit five hundred dollars, and give up possession.

We recognize the rule adopted long ago in the supreme court that where a contract is illegal because made on Sunday, it cannot be validated by subsequent ratification, for the reason, as stated by Chief Justice Beasley, that the parties have no power to give life to an act which from reasons of public policy has been ordained by the legislative authority to be absolutely void: *Reeves v. Butcher*, 31 N. J. L. 224. Nothing short of a new bargain can be valid: *Ryno v. Darby*, 20 N. J. Eq. 231. These views have been frequently reaffirmed in the supreme court and the court of chancery in cases which are collected and cited with his usual thoroughness by the present chancellor in *Newbury v. Luke*, 68 N. J. L. 189, 52 Atl. 625. If, therefore, the assent of Rosenstein on Monday amounted merely to a ratification of Mrs. Nivison's act on Sunday, the contract would be invalid. It is a question of some nicety to determine whether his act was a mere ratification or whether it was an assent on his part to the terms finally offered by Burr, by which assent, for the first time, there came into existence a completed contract. The solution of this question depends upon the intention of the parties. Burr meant to make a binding contract; he is presumed to have known the law of Connecticut forbidding Sunday contracts; it was in view of this that the memorandum was dated

on Monday; the memorandum was meant to be delivered in New Jersey to Rosenstein, and Burr could not be ignorant that he had added a term to the contract which would require Rosenstein's assent. He must, therefore, be held to have intended that there should be no final contract until the delivery of the memorandum to Rosenstein and his assent to the terms. This imputes to him only a knowledge of the legal situation and an intent to abide thereby. In our view the contract was consummated on Monday.

The question remains whether it is vitiated by reason of what took place on Sunday. In *Cannon v. Ryan*, 49 N. J. L. 244 314, 8 Atl. 293, the supreme court held that where a notice to a tenant, that after the expiration of his existing term he would be charged an increased rent, was given on Sunday, and the tenant simply remained in possession after his term ended, there was no valid contract to pay the increased rent. This was put upon the ground that the mere retention of possession had no significance without proof of the notice, and Justice Reed was careful to distinguish the case from one in which a preliminary conference held on Sunday had been merged into a contract made upon a secular day. In that case the landlord was seeking to avail himself of his own act done upon a Sunday.

It has been held in other jurisdictions that a contract completed on a secular day is not invalid because negotiations leading up to it were had on Sunday. Of the cases collected in 27 American and English Encyclopedia of Law, 405, it will suffice to refer to *Tuckerman v. Hinkley*, 9 Allen, 452, *Dickinson v. Richmond*, 97 Mass. 45; *Gibbs & Sterrett Mfg. Co. v. Brucker*, 111 U. S. 597, 4 Sup. Ct. Rep. 572, 28 L. ed. 534. The last case is quite in point. The defendants had delivered a written contract of guaranty to the plaintiff's agent on Sunday, but the agent had no authority to sign or close the contract on behalf of the plaintiff; it was necessary to send it to the plaintiff to be accepted and signed, and it was so accepted on a secular day. The court said: "In order to make good the defense set up in the answer, it is necessary to prove not only that the defendant signed his name to the contract on Sunday, but that he delivered it on Sunday. The mere signing of a contract on Sunday, which is not delivered on that day, does not avoid the contract." In that case the defendant relied upon the delivery to the agent, but the court held that he was not the agent of the plaintiff for that purpose, but a mere messenger to transmit the contract to the other party for approval or disapproval. So in the present case, when Burr added the provision as to forfeiture and delivery of possession to which Mrs. Nivison was not authorized to assent, he made her his messenger to trans-

mit the offer to Rosenstein, and there was no contract until Rosenstein assented.

Let the decree be affirmed, with costs.

*Sunday Contracts* are discussed in the note to *Henry Christian etc. Assn. v. Walton*, 59 Am. St. Rep. 641. According to *Orr v. Kenworthy*, 143 Iowa, 6, 136 Am. St. Rep. 728, the delivery and acceptance of the consideration on Monday, in pursuance of an arrangement for the transfer of personal property on Sunday, is a ratification removing the taint of illegality, if any, from the transaction. When an oral agreement to sell potatoes is made on Sunday, but they are not weighed, delivered, nor paid for until Monday, this is tantamount to a complete contract of sale on the latter day: *King v. Graef*, 136 Wis. 548, 128 Am. St. Rep. 1101, and see cases cited in the cross-reference note thereto.

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## LLOYD v. PENNSYLVANIA ELECTRIC VEHICLE COMPANY.

[75 N. J. Eq. 263, 72 Atl. 16.]

**CORPORATION.**—Calling Stock "Preferred Stock" does not of itself determine the rights of the holders, for the extent of the preference is to be determined by the contract. (By the editor.) (p. 556.)

**CORPORATION.**—Preferred Stock, in the Absence of Express stipulation or direction to the contrary, simply gives the holder a right of preference in the division of profits, and not in the distribution of capital. (By the editor.) (p. 556.)

**CORPORATION.**—Preferred Stock.—The General Corporation Act of 1896 (Pub. Laws 1896, p. 277) authorizes the creation of two or more kinds of stock, of such classes, with such designations, preferences and voting powers, or restriction or qualification thereof as shall be stated or expressed in the certificate of incorporation. A corporation organized under that act provided in its certificate for the creation of preferred stock, "the holder thereof to receive and the company to pay a fixed yearly dividend of six per cent before any dividend shall be set apart or paid on the general stock." Held, that upon the winding up of the corporation the preferred stockholders were entitled only to the preference set forth in the certificate of incorporation, and were not to be paid on account of the par value of their shares in preference to the common stockholders. (pp. 560, 562.)

(Syllabi by the court except when stated to be by the editor.)

Louis Marshall, Edgar J. Kohler, Morris Wolf and George J. Bergen, for the appellants.

Martin V. Bergen, Jr., and Gilbert Collins, for the trustees in liquidation.

Sherrerd Depue, for William H. Page, the respondent.

<sup>264</sup> SWAYZE, J. The question involved in this case is the distribution of a surplus remaining in the hands of the

trustees in liquidation of the Pennsylvania Electric Vehicle Company after payment of the debts. The controversy is between the preferred stockholders, whose claims will absorb the whole surplus in case they are entitled to a preference in the distribution, and the common stockholders. The vice-chancellor decided in favor of the preferred stockholders.

The question to be decided is one of contract, and the contract of the preferred and common stockholders inter sese is determined by the provisions of the statute and of the certificate of incorporation. The sections of the statute that are material to the inquiry are sections 8, 18 and 86.

Section 8, as amended in 1898 (Pub. Laws 1898, p. 408), requires that the certificate of incorporation shall set forth the amount of the authorized capital stock, the number of shares into which the same is divided, and the par value of each share, and if there be more than one class of stock created by the certificate of incorporation, a description of the different classes, with the terms on which the respective classes of stock are created.

Section 18 authorizes every corporation organized under the act to create two or more kinds of stock, of such classes, with such designations, preferences and voting powers or restrictions, or qualifications thereof as shall be stated and expressed in the certificate of incorporation, or in any certificate of amendment thereof. It provides that at no time shall the total amount of the preferred stock issued and outstanding exceed two-thirds of the capital stock paid for in cash or property, and such preferred stock may, if desired, be made subject to redemption at any time after three years from the issue thereof at a price not less than par, and the holders thereof shall be entitled to <sup>205</sup> receive, and the corporation shall be bound to pay thereon, dividends at such rates and on such conditions as shall be stated in the original or amended certificate of incorporation, not exceeding eight per centum. It also provides that in case of insolvency, the debts or other liabilities shall be paid in preference to the preferred stock.

The provision of the certificate of incorporation, as amended, is as follows: "Forty thousand of said shares are to be preferred stock, the holder thereof to receive, and the company to pay, a fixed yearly dividend of six per cent before any dividend shall be set apart or paid on the general stock."

The company was organized in 1899, pursuant to the act of 1896.

Section 86 of the present act is substantially the same as section 80 of the act of 1875. Sections 8 and 18 introduced new provisions, in that the former requires that the certificate of incorporation shall contain a description of the different classes, with the terms on which the respective classes of stock

are created, in case more than one class of stock is created by the certificate; and the latter, which takes the place of section 25 of the act of 1875, authorizes the creation of more than two kinds of stock, with such designations, preferences and voting powers or restrictions or qualifications thereof as shall be stated and expressed in the certificate of incorporation.

It has been held, and may be regarded as entirely settled, that calling stock "preferred stock" does not of itself determine the rights of the holders, for the extent of the preference is to be determined by the terms of the contract: *McGregor v. Home Ins. Co.*, 33 N. J. Eq. 181; *Elkins v. Camden etc. R. R. Co.*, 36 N. J. Eq. 233.

It was also said, upon equally good grounds, in the *McGregor* case, that preferred stock, in the absence of an express stipulation or direction to the contrary, simply gives the holder a right of preference in the division of profits, and not in the distribution of capital. The learned vice-chancellor cited as authority the opinion of Vice-Chancellor Maline in the case of *In re London India Rubber Co.*, L. R. 5 Eq. 519, 37 L. J. Eq. 235, and of Sir George Jessel in *Griffith v. Paget*, L. R. 6 Ch. D. 511, 46 L. J. Eq. 493. It was, however, held in the *McGregor* case (33 N. J. Eq. 181) that the terms of section 80 of the act of 1875, now section 86, required that the preferred stockholders should be preferred in the distribution of assets upon insolvency. It is unnecessary to consider whether the opinion of the vice-chancellor in this respect was, as Mr. Cook says (*Cook on Corporations*, sec. 278, note), a mere dictum. We are satisfied that it has been acted upon as a correct statement of the law of the state, and that, if the legislature, in the revision of the corporation act in 1896, had done no more than re-enact this provision, it would be necessary to hold that they had adopted the construction which had been put upon the section sixteen years before. This, however, is not the situation presented by the act of 1896, for that act contained the provisions in section 8 and in section 18 that we have quoted. The insertion of those provisions in the act indicates an intent upon the part of the legislature to make some change in the then existing law. We think the change that they intended was to require that all preferences or special privileges to be conferred upon any class of stock be set forth in the certificate of incorporation. If they did not intend this result, it would have been unnecessary to require, by section 8, that the certificate should set forth the terms on which the respective classes of stock were created, and it was probably because they intended that the stock should not have any other preferences that in section 18, attempting to define the rights of preferred or special stockholders, they limited the special rights or special restrictions to such preferences and voting powers or restrictions.

or qualifications thereof "as shall be stated or expressed in the certificate of incorporation." The power to create preferred stock is granted by section 18, and it is granted upon the terms set forth in that section. To enact that the stock should have such preference as is stated or expressed in the certificate was equivalent to enacting that it should have no other preferences, upon the general principle of interpretation that the expression of one thing is the exclusion of another. The very fact that section 18 provided for more than one class of preferred or special stock leads to the same conclusion, <sup>267</sup> for it can hardly be claimed that the rights of more than one kind of preferred stock would be determined by the language of section 86 standing alone. That section is a survival of legislation going back to the early days of corporations in this state, at a time when only one class of preferred stockholders was authorized. Such is not now the case. Under the present act it is possible, for example, to issue what are called sometimes "founders' shares." Unless the rights of such shares are determined by the certificate of incorporation, they cannot be determined by the provisions of section 86, and the same reasoning is applicable to other classes of shares (aside from the ordinary preferred shares) which are issued by modern corporations. We recognize the necessity of construing the several sections of the act so as to give effect to each and to all the language of each. We think that can well be done. Section 86 is still necessary, notwithstanding the changes made in 1896, in order to cover the case of corporations existing under special charters, or corporations under the general acts prior to 1896. A greater difficulty, perhaps, is presented by the provision of section 86, that the surplus funds after payment of creditors, costs, expenses and allowances and the preferred stockholders, shall be paid to the general stockholders proportionally according to their respective shares. It requires no strained construction, however, to hold that this provision as to the payment of preferred stockholders in preference to the general stockholders is a payment to them not of the par value of their stock, but of the amount to which they are entitled as a preference by virtue of the contract contained in the certificate of incorporation. Section 86 does not say that the preferred stockholders shall be paid the par value of their stock with the unpaid dividends that may have accrued thereon. It requires only that the preferred stock shall be paid in preference to the general stockholders, and that means that they shall be paid so much, and so much only, as their contract gives them. The amount of the surplus to be paid to the general stockholders is not necessarily the amount that may be left after paying the preferred stockholders the par value of their stock. It may just as well mean the surplus that is left after paying them the amount



to which they are entitled by their contract. Nor is any <sup>268</sup> difficulty presented where the terms of the contract entitle the preferred stockholder to a preference in dividends only. In this case which, as Vice-Chancellor Van Fleet said, and as the authorities show, was the ordinary case in the absence of such a provision as that contained in section 86, the preferred stockholders and the general stockholders would share pro rata in the distribution of assets after the payment of dividends due the preferred stockholders. That such would be the rule is well illustrated by a thoroughly considered case in the English courts which presented the novel situation of a fund upon dissolution of a corporation sufficient to pay not only the debts and the amount invested by the preferred and common stockholders, but to leave a large surplus for distribution. In that case the preferred stock had been fully paid up to the extent of ten pounds per share. The common stock had been paid for only to the extent of three pounds ten shillings per ten pound share. It was held in the court of first instance and in the court of appeal that after paying to each preferred stockholder ten pounds per share, and to each common stockholder three pounds ten shillings per share, the surplus should be divided among all the stockholders, preferred and common, in proportion to the amount of money actually contributed by each. The common stockholders insisted that the whole of this surplus was profits, and that, as they were entitled to all of the profits after paying the five per cent to the preferred stockholders, they were entitled to the whole of the fund. The court, however, held that this position was untenable, and that the rule contended for by the common stockholders applied only to annual profits, and not to the large profits arising from the sale of the property of the corporation. In this respect the decree was affirmed by the house of lords, but it was there held that the surplus should be divided among the stockholders in proportion to the number of shares held by each and not in proportion to the amount contributed by each: *In re Bridgewater Nav. Co.*, L. R. 39 Ch. D. 1, 57 L. J. Ch. D. 809, 14 App. Cas. 525, 59 L. J. Ch. D. 122. We see no reason why, if the case is ever presented, the same rule should not be applicable under section 86, and the amount to be paid to <sup>269</sup> the preferred stockholders in such a case would be, first, what they were entitled to under the certificate of organization, and, second, their proportional share of the remaining assets. The surplus, after making that payment, would, by the terms of section 86, belong to the general stockholders.

Section 18 provides that in case of insolvency the debts or other liabilities shall be paid in preference to the preferred stock. With our present notions of the character of stock,

such a provision seems unnecessary, and, unless explained, it might be supposed that it implied that preferred stockholders were to be paid as creditors next after the debts. We think, however, that there is an explanation of the insertion of this provision in the act of 1875, growing out of the efforts that had been made in other jurisdictions to give preferred stock more the character of a security for money loaned than of an investment in the business, subject to the ordinary hazards. Attempts to give preferred stockholders the status of creditors rather than of shareholders are referred to in Cook on Corporations, third edition, 271. Some of these efforts were directed to securing a dividend to the preferred stockholders whether profits were made or not; some were directed to securing him by way of mortgage: Taft v. Hartford etc. R. R. Co., 8 R. I. 310, 5 Am. Rep. 575; Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156; Chaffee v. Rutland etc. R. R. Co., 55 Vt. 110; Warren v. King, 108 U. S. 389, 2 Sup. Ct. Rep. 789, 27 L. ed. 769; Miller v. Ratterman, 47 Ohio St. 141, 24 N. E. 496. In view of these cases, it is not surprising that the legislature inserted the clause in question in the act of 1875, and has retained it in the act of 1896. The effect of it is to prevent the incorporators from giving the preferred stockholders a claim superior to that of creditors by an insertion of a provision to that effect in the certificate of organization, and in that respect this clause still serves a useful purpose.

It is important that investors in a corporation should be able to ascertain their rights by an examination of the certificate, and it was no doubt with that end in view that the legislature made the changes in the act of 1875, which now appear in section 8 and section 18. It is true, as was forcibly argued on behalf of the respondents, that it can hardly be that all of the <sup>270</sup> rights of preferred stockholders need be set forth in the certificate of organization, but this fact does not require that we should hold that the certificate of organization cannot limit such rights. Manifestly it can, for if it were not so, it would be beyond the power of the incorporators to take away the right to a preference on distribution of assets conferred by section 86. Since the corporators have this power to limit the rights of preferred stockholders, the question in any particular case is whether they have in fact done so. When they have undertaken, as in this case, to set forth the preference to which preferred stock is entitled, we think that they must set forth that preference fully, and that, so far as they fail to express a preference, the preferred stock can have no other rights than the common stock.

The decree must be reversed with costs, and the record remitted to the court of chancery for further proceedings therein in conformity with this opinion.

*What is Preferred Stock and What are the Special Rights of its holders* are discussed in the note to *Heller v. National Marine Bank*, 73 Am. St. Rep. 227. Preferred stockholders are entitled to share with the common stockholders in all profits distributed after the latter have received an amount equal to the stipulated dividend on the preferred stock, in the absence of contract stipulations to the contrary: *Sternbergh v. Brock*, 225 Pa. 279, 133 Am. St. Rep. 877. An agreement that the preferred stock of a corporation is to be paid out of the surplus profits arising from its business a dividend equal to six per cent per annum before any dividend shall be paid to the common stock is valid, binds all the stockholders and is inviolable: *Roberts v. Roberts Wicks Co.*, 184 N. Y. 257, 112 Am. St. Rep. 607.

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BUCHANAN v. BUCHANAN.

[75 N. J. Eq. 274, 71 Atl. 745.]

**ESTATE OF DECEDENT—Right of Heirs to Recover Property.**—The next of kin of a decedent have no standing in a court of law or equity to maintain an action for the recovery of property alleged to belong to the estate of their decedent. Such actions can be brought only by the duly appointed personal representative of the deceased. (pp. 564, 565.)

**ESTATE OF DECEDENT—Right of Heirs to Recover Property.**—The exception to this rule arises where the personal representative of the deceased, by reason of collusion with the defendant or otherwise, is derelict in the performance of his duty, as in the case of a delinquent trustee, the next of kin, like the cestui que trust, may maintain the action, joining the administrator as a party defendant. (p. 569.)

(Syllabi by the court.)

Carrow & Kraft, for the appellant.

John W. Wescott, for the respondents.

**275 DILL, J.** This suit was brought in equity by the heirs at law and next of kin of Dr. John Buchanan, deceased, to impress a trust ex maleficio upon certain real and personal property in the possession of the defendant, which it was claimed was derived from or purchased with moneys embezzled from the decedent. The complainants allege in their bill that they are the only next of kin of the late Dr. Buchanan; that at his death he owed no bills; that no letters of administration were taken out on his estate; that Dr. Buchanan was the owner of and conducted a large and profitable business in proprietary medicines and in the publication of medical works, and that the defendant, while acting as his clerk or assistant, appropriated to her own use, both before and after his death, the profits of the business, together with moneys and other property of the decedent, and invested the same in specific real and personal property. The relief prayed for

was that the defendant be required to deed to the complainants the real estate in her name; that she pay over to them and account for all moneys and deliver all securities in her possession or under her control, all of which were claimed to belong to the decedent's estate, and that the complainants should have full discovery and an injunction against the disposition of the property.

The defendant by her answer denied that the business referred to belonged to the deceased, and averred that the business and its earnings and the real and personal property described were all her own, and that Dr. Buchanan had no money or property at the time of his death.

The learned vice-chancellor found the essential facts to be as stated in the bill, and advised a decree, enjoining the defendant from in anywise disposing of the property in her possession or under her control until the appointment of an administrator, <sup>276</sup> to whom, when appointed, defendant is required to surrender the same.

The decree, in accord with the theory of the bill, was in effect an adjudication, which stripped the defendant of all title to the property in her possession or under her control, and directed her to surrender it to an administrator, when appointed.

The defendant appeals from the decree, and urges that the complainants, as next of kin, have no standing in equity to recover or to establish a resulting trust as to property of a decedent which is in the actual possession of and claimed by a third person, but that such equitable rights and remedies vest only in the executors or administrators as the duly appointed personal representatives of the decedent.

We think that this position is well taken. Heirs, next of kin and creditors cannot, in their own names, prosecute actions at law or suits in equity to recover the unadministered estate of a decedent or to collect debts or other choses in action due him. Such suits can be maintained only by the qualified personal representatives of the deceased.

Heretofore the precise question involved in this case does not appear to have been fully considered by this court, although the basic principle was recognized and applied by our supreme court in 1813 in *Mathis v. Sears*, 3 N. J. L. 594, and by the court of chancery in 1831 in *Shaver v. Shaver*, 1 N. J. Eq. 437. In 1889 the court of chancery (Vice-Chancellor Van Fleet) touched upon the doctrine in *Hayes v. Hayes*, 45 N. J. Eq. 461, 17 Atl. 634, affirmed by this court as *Hayes v. Berdan*, 47 N. J. Eq. 567, 21 Atl. 339.

Chancellor Williamson, in 1857, in *Harrison v. Righter*, 11 N. J. Eq. 389, applied the rule even where the next of kin of a deceased partner sought to call the surviving partner to

account, the administrator being a party defendant, and held that in the absence of collusion a suit could not be maintained.

In *Mathis v. Sears*, 3 N. J. L. 594, the children of Paul Sears, deceased, sued the defendant on the ground that their father during his lifetime had paid the defendant for a piece of land; that the defendant had promised their father a deed, but had failed <sup>277</sup> to perform. The plaintiffs recovered judgment below. The supreme court reversed, saying: "A child, as such, cannot sue for a debt due to his father; it must be his executor or administrator."

From the opinion in *Shaver v. Shaver*, 1 N. J. Eq. 437, a chancery suit by the next of kin to recover a legacy claimed to be due their ancestor, the following is applicable: "Next of kin are not personal representatives, and cannot come as such into court representing the ancestor. If they were permitted to do so, it is conceived that much inconvenience would result from it, more, probably, than can well be foreseen. I have examined the books with some care, and have not been able to find a single case or principle to support the present proceeding."

After referring to and recognizing the right of next of kin to bring executors or administrators to an account, the court adds: "But in this case the complainants seek to get in their hands the moneys of the estate or of the intestate, not from the administrator, but from some third person in whose hands the property happens to be, and to get it, not for the purpose of paying debts or applying it in a course of administration, but of appropriating it directly to their own use."

The same principle was recognized in the decision of Vice-Chancellor Van Fleet in *Hayes v. Hayes*, 45 N. J. Eq. 461, 17 Atl. 634: "The title to the debt in question, on the probate of the testator's will, vested in his executrix, together with the right to all remedies given by law for its recovery. All goods and chattels, actions and commodities which were of the testator in right of action or possession, as his own, at the time of his death, pass, on his death, to his executor."

That the law has been so applied whether the next of kin sue at law upon debt or for conversion of property belonging to the estate of the deceased, or whether they invoke the aid of a court of equity, may be shown by a brief review of the leading cases in England and the United States.

An early case (1737) is *Bickley v. Donington*, 2 Eq. Cas. Abr. 253, in which a legatee brought suit against the executor and <sup>278</sup> debtors of the estate of the deceased. Lord Chancellor Hardwicke dismissed the bill in the following words: "The bill is totally improper and inconsistent with the principles of law and the rules of this court. . . . The whole management of the estate belongs to the executor, and the

right of it is vested in him, and not to be taken out of him by creditors or legatees."

In 1802 Lord Eldon, in deciding the case of *Alsager v. Rowley*, 6 Ves. 748, followed the same rule and quoted with approval from the notes of Lord Hardwicke.

Later the court of chancery applied the doctrine strictly in *Stainton v. Carron Co.*, 18 Beav. 146. Legatees filed a bill against the defendant company in which the testator had been shareholder and agent, and against the legal representatives of the estate, for an accounting and settlement of alleged dealings between the testator and the company, and for a decree requiring the company to turn over certain funds to the executors. Sir John Romilly, master of the rolls, sustained a demurrer to the complaint in the following concise language:

"It is obvious that the relief prayed by this bill, if proper to be sought by anyone, ought to be at the instance of the trustees and executors of the testator's will. . . .

"I think it unnecessary to go in detail through all the cases to be found on this subject. I think that they may be summed up thus: that the persons interested in the estate of the testator, not being the legal personal representatives, will not be allowed to sue persons possessed of assets belonging to the testator, unless it is satisfactorily made out that there exist assets which might be recovered, and which, but for such suit, would probably be lost to the estate."

In *Walker v. Walker* (1871), 25 L. T. 481, a bill was brought by legatees against Margaret Walker and the executors of the will. The complaint alleged that the testator, during his lifetime, had purchased stock of the Bank of Scotland in the name of his sister Margaret; that she held it merely as trustee for the testator, and that it formed part of his estate. Complainants prayed for a declaration accordingly, and for a transfer of the said stock to the executors.

<sup>279</sup> Lord Romilly dismissed the bill on the ground that "the executors were the proper persons to sue to recover assets belonging to the testator's estate."

In the United States courts, *Allen v. Simons*, 1 Curt. 122, Fed. Cas. No. 237, is not only parallel to the case at bar, but a leading authority. William Simons died intestate, leaving personal property consisting of a newspaper plant. The bill alleges that after the death of the intestate, William Simons, Jr., continued to run the business under an apparent title; that he had been merely an agent before his father's death, and that the documents under which he claimed title were invalid. The answer of the heirs of William Simons, Jr., was that he held a valid title to the property in his own name and not as trustee.

Judge Curtis, in refusing to allow the bill for account and surrender of the property, adhered to the well-established rule: "Whatever may have been the interest of William Simons, Jr., in this property, his children did not acquire that interest by his decease. The rule of the common law laid down by Lord Coke (Coke on Littleton, 8a), that a man, by the common law, cannot be heir to goods or chattels, for haeres dicitur ab haeriditate, is in force in Rhode Island, and upon the decease of anyone having personal estate, his children do not become its owners. They acquire only that qualified equitable right to distributive shares of what shall remain after payment of the just debts and funeral charges of the deceased, and the expenses of settling his estate, which is conferred upon them by the statute of distributions. This qualified equitable right can only be worked out through a settlement of the estate by an administrator, appointed according to the laws of the state, who alone has the title to personalty cast on him by those laws, and who alone is competent to sue, either at law or in equity, to reduce the personal property and rights of the intestate to possession."

Flynn v. Flynn, 183 Mass. 365, 67 N. E. 314, decided by the supreme court of Massachusetts in 1903, is directly in point.

The plaintiff, widow of David Flynn, brought a bill in equity to recover personal property which, she alleged, had been fraudulently <sup>280</sup> conveyed by her husband to his son, the defendant, with the intention of depriving her of her estate.

Defendant demurred on the ground that there was no cause for equitable relief and that the plaintiff was not the proper party to sue. Judge Knowlton sustained the demurrer and stated his reasons as follows: "If the property was wrongfully conveyed, as the plaintiff alleges, the executors or administrators, who are the personal representatives of the deceased, are the proper parties to recover it for the benefit of those who are entitled to it. The title to all the personal property of a deceased person vests in his executor or administrator by relation from the time of his death, and no one else can maintain an action for it. Not even the sole heir at law, or a legatee, has any title which he can enforce by suit against a third person. But the plaintiff's rights cannot be enforced by a suit in equity in her own name against those holding her husband's property."

The supreme court of errors of Connecticut ruled upon the question in 1803, in Tabor v. Packwood, 1 Day, 150: "The right of action, . . . if an action can be maintained, does not belong to the defendant in error, as heir at law, the only capacity in which he sues, but to the executors or administrators on the estate."

Likewise in *Hunter v. Hallett*, 1 Edw. Ch. 388, the court ruled: "Although a husband holds a bond and mortgage made out in favor of his wife, and receives the interest, yet this is not a reduction into possession. And if she dies, he cannot sue upon it without taking out letters of administration, even though he may be exclusively entitled. . . . This appears to be a well-established rule, and one which cannot be dispensed with even in a court of equity."

Again, in *Jenkins v. Freyer*, 4 Paige, 47, it was held that one of the next of kin cannot maintain a suit in equity for an account and distribution of the decedent's estate without first taking out letters of administration, although he is exclusively entitled to the beneficial interest therein.

In *Muir v. Trustees*, 3 Barb. Ch. 477, the complainants, as next of kin of the deceased, filed a bill in equity against the representatives <sup>281</sup> of deceased persons, who, pursuant to a paper-writing which had been admitted to probate and which appointed them executors, had transferred a large part of the estate of the deceased to the defendant trustees and to the other defendants. The bill alleged that the paper-writing was void and that the deceased died intestate, and prayed for an accounting and that the property of the deceased which had been transferred as above stated be turned over to them. Chancellor Walworth dismissed the bill, and held that the defendants were "liable to the personal representatives, whenever such shall have been appointed, but not to the complainants. The proper course for the complainants, in that case, would be to procure the appointment of an administrator, and have a suit instituted in his name, to recover the property from any person into whose hands it may have come, and who had converted it to his own use."

Further analysis is unnecessary, but other leading cases, which enforce the same rule strictly, are: *West v. Howard*, 20 Conn. 581; *Lawrence v. Wright*, 23 Pick. 128; *Woodin v. Bagley*, 13 Wend. 453; *Caleb v. Hearn*, 72 Me. 231; *Lee v. Gibbons*, 14 Serg. & R. 105; *Champollion v. Corbin*, 71 N. H. 78, 51 Atl. 674; *Douglass v. McCarer*, 80 Ind. 91; *Pond v. Sweetser*, 85 Ind. 144; *Somervail v. McDermott*, 116 Wis. 504, 93 N. W. 553; *Palmer v. Palmer*, 55 Mich. 293, 21 N. W. 352; *Davis v. Corwine*, 25 Ohio St. 668; *McChord v. Fisher's Heirs*, 13 B. Mon. 193; *Davidson v. Potts*, 42 N. C. 272; *Leamon v. McCubbin*, 82 Ill. 263.

These authorities are conclusive of the case at bar. If the defendant embezzled and misappropriated the property of Dr. Buchanan, investing it in the real estate, bank stock and other property described, she may be liable to the legally qualified personal representative of Dr. Buchanan, but not to the complainants.



On the same principle that permits a cestui que trust to maintain actions which his trustee should bring when the latter neglects or refuses to bring them, the exception to the rule above stated arises when, although there is an administrator, he neglects or refuses to prosecute suits for the recovery of his decedent's estate. In such case, the next of kin may sue to recover <sup>282</sup> the property, joining the personal representative as a party defendant.

The complainants contend that the decree may be supported upon the doctrine that the next of kin of a decedent may obtain an injunction and the appointment of a receiver for the purpose of conserving the property of a decedent pending the appointment of an administrator. But in our opinion this principle is inapplicable to the present case. The learned vice-chancellor apparently adopted this theory of the complainants, citing *Flagler v. Blunt*, 32 N. J. Eq. 518; *Hansford v. Elliott*, 9 Leigh, 79. Although these authorities establish the jurisdiction of a court of equity to conserve property of a decedent in the possession of a third person, yet an analysis of the cases cited and many others shows that this equitable jurisdiction has been assumed only where there is danger of loss if the property, presumptively or actually belonging to the estate, is not protected by an injunction or the appointment of a receiver, pending an application for administration upon the estate, but not to finally adjudicate as to the title.

In *Flagler v. Blunt*, 32 N. J. Eq. 518, it clearly appeared in a suit by a creditor of a decedent that the defendant was in possession, through a sale made by himself under a claim of ownership, of the proceeds of all the property of which his uncle died possessed, and was about to remove the same from the jurisdiction.

We fully agree with the decision of Chancellor Runyon when he rules that in such a case a court of equity has power to appoint a receiver to conserve the property, and that "If it had not such power, there would be a failure of justice. The property would be liable to be taken away out of the state, by any designing person, before administration could be obtained, and thus those entitled to the estate be defrauded. It must be within the power of this court to prevent so obvious and gross a wrong."

With *Hansford v. Elliott*, 9 Leigh, 79, also relied upon by the vice-chancellor, we likewise agree so far as the court there said: "It would be productive of much inconvenience and injustice if they [the legatees or distributees] could not avail themselves of their equitable rights to enjoin a sale (as in the present case) or to prevent other irreparable mischief, before an administration <sup>283</sup> of the estate could be obtained, or

where an executor or administrator should be indisposed to interfere."

But further than this we decline to follow this case as an authority, because the judgment apparently affirmed a decree in favor of the complainants for a distribution of the property in question.

The recent case of *McCarter v. Clavin*, 72 N. J. Eq. 642, 66 Atl. 599, in our court of chancery, is not only consistent with the views herein expressed, but well illustrates the precise situation to which the rule of *Flagler v. Blunt*, 32 N. J. Eq. 518, is applicable. In the *Clavin* case the deceased died seised of real estate of value, and the defendant, claiming to be a creditor of the deceased, had obtained letters of administration, but had permitted the property to be sold for taxes. Foreclosure proceedings had been brought and the property was likely to be entirely lost. Moreover, a paper had been offered for probate as the will of the deceased, giving rise to litigation that threatened to be protracted. The state claimed the property by escheat, and filed a bill asking that a receiver be appointed to collect the rents and to pay off and discharge the taxes. The prayer was granted, the vice-chancellor holding that: "Equity would seem to require that a receiver should be appointed to protect the property from loss, and to hold it for the benefit of those to whom it may be finally determined it belongs. . . . The property is in great danger of loss owing to tax sales and threatened foreclosure. It is clear that, in the absence of an heir, in the absence of an executor or of any lawful appointee entitled to hold the property together, it will be lost, and, in any event, the rents and profits will be misapplied."

*Flagler v. Blunt*, 32 N. J. Eq. 518, and like authorities, go no further than to maintain that creditors or next of kin of a decedent may appeal to equitable jurisdiction to conserve a decedent's property, which is in danger of loss, pending the appointment of a personal representative or pending the trial of title to such property in a legal proceeding to which the personal representative of the decedent is a party.

But essentially different is the contention that creditors or next of kin may dispense altogether with a personal representative<sup>284</sup> and proceed, either at law or in equity, to recover, in their own name and for their own use, property alleged to belong to the estate of the decedent, and that in the same proceeding they may have the title adjudicated and a decree entered ousting a third party of title and possession, whether the decree is that such third party shall deliver to an administrator appointed or otherwise.

This theory of the law has been rejected by a long line of authorities which follow Lord Chancellor Hardwicke's vigorous declaration in 1737 (*Bickley v. Donington*, 2 Eq. Cas.

Abr. 253), that such a proposition is "totally improper and inconsistent with the principles of law."

It was upon the view of the law condemned by Lord Chancellor Hardwicke that the bill was framed, the case was tried and a decree was entered finally adjudicating upon the title to the property described therein, by the terms of which defendant was ousted of title and possession of the property standing in her name, leaving her no alternative but to deliver the same to an administrator when appointed. Such decree, as matter of law, cannot be upheld.

The result of this determination as to the law would be to dismiss the bill if the issue of law had been presented by demurrer.

But although, for the reasons stated, the bill cannot be maintained in its present form, justice requires that the complainants be permitted to amend its frame so that it seeks for the appointment of a receiver to conserve the property which is the subject of the litigation, until an administrator of the estate of Dr. Buchanan shall have been appointed and the true ownership of the property determined by judicial decision, provided the proofs which have been submitted raise a presumption that the property is that of that estate. We have therefore examined these proofs for the purpose of determining whether such an amendment should be permitted. They are quite fully set out in the opinion below, and a full recital of them here is unnecessary. We quite agree with the vice-chancellor that the story told by the defendant of the way in which she came into possession of the property must be rejected as false; and further, that the proofs justify <sup>235</sup> the conclusion that the property was purchased with moneys which came out of the business of Buchanan & Company. But this alone will not support the presumption that this property belongs to the estate of Dr. Buchanan rather than to the defendant.

The business was that of Buchanan & Company. The name raises the presumption that it was a partnership business. The only persons engaged in carrying it on were the doctor and the defendant. This raises the presumption that they were the partners. Most of the property was purchased by the defendant during the doctor's lifetime. The defendant presumably was entitled to half the earnings. There is nothing to show that her investments exceeded that. But if they did, there is nothing to justify the conclusion that she fraudulently and without the knowledge of her partner abstracted more than her share from the partnership funds. On the contrary, the presumption is that the excess, if any, was appropriated by her with the knowledge and approval of the doctor, particularly in view of the relation existing between them.

So, as to all investments made during the life of the doctor, there is no presumption that they were made in fraud of his rights. This includes fourteen shares of stock of the Farmers' and Mechanics' National Bank of Philadelphia; twenty-one shares of stock of the Kensington National Bank of Philadelphia; sixteen shares of stock of the Manufacturers' National Bank of Philadelphia; six shares of stock of the Corn Exchange National Bank of Philadelphia; thirteen shares of stock of the Market Street National Bank of Philadelphia; the proceeds of the sale of the real property in the city of Brooklyn, state of New York, designated as No. 1129 Forty-second street, in said city.

As to investments made from the proceeds of the sale of the business after his death, the presumption is that, as to one-half of it, the defendant holds such proceeds in trust for the doctor's estate, for the reason that, as the doctor had a half interest (presumably) in the business, his estate was entitled to half of the proceeds of its sale.

<sup>286</sup> Complainants, therefore, should be permitted, if they desire, to amend their bill for the purpose of applying for a receiver appointed to take possession of so much of the property as represents the one-half of such proceeds of the business, and hold the same until an administrator of the estate shall be appointed and an opportunity afforded him to litigate the question of the true ownership of this part of the property.

The decree of the court below is accordingly reversed, with costs, and the cause is remanded in order that the complainants may, if by counsel so advised, reframe their bill of complaint in accordance with this opinion and apply for a receiver to take possession of so much of such property as it shall appear are such proceeds of the sale of the business since the death of Dr. Buchanan, and to hold the same pending the appointment of an administrator who may litigate the claim of ownership of this portion of the property.

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*For Authorities in Support of the Principal Case, see Trotter v. Mutual etc. Life Assn., 9 S. D. 596, 62 Am. St. Rep. 887; Magel v. Milligan, 150 Ind. 582, 65 Am. St. Rep. 382; note to McBride v. Vance, 112 Am. St. Rep. 731; Alerding v. Allison, 170 Ind. 252, 127 Am. St. Rep. 363; Mayer v. Kornegay, 163 Ala. 371, 136 Am. St. Rep. 79; note to Sifford v. Cutler, 135 Am. St. Rep. 329.*

BAYERISCHEN NATIONAL VERBAND VON NORD  
AMERIKA v. KNAUS.

[75 N. J. Eq. 363, 72 Atl. 952.]

**INTERPLEADER**—When Insurer may Maintain.—Where a policy of insurance is payable to a person named and designated as the wife of the insured, and after his death two women claim to be the beneficiary so named and designated, a bill of interpleader may be maintained by the insurance company. (p. 575.)

Frederick Dieffenbach, for the complainant.

Weller & Lichtenstein and John D. Pierson, for the defendants.

<sup>363</sup> GARRISON, V. C. This is a bill filed by a beneficial society to cause two claimants of a fund it holds to interplead.

The bill sets up that by its certificate, No. 7717, issued to Joseph Knaus, it was obligated, upon his death, to pay the sum of four hundred dollars to his wife, Anna Knaus. It charges his death, and that a woman living in America and named Anna Knaus has demanded the money of them, as has also a woman living in Germany, and that the latter's name is also Anna Knaus. Each claims to be the legal wife of the member, and to be entitled to the money.

Anna Knaus of America has brought a suit in the Hoboken district court for the money, and it is sought by the bill to enjoin this suit.

The Anna Knaus of America filed an answer denying the right of the complainant to cause the defendants to interplead.

The Anna Knaus of Germany did not file any answer, her solicitor acting under rule 221.

<sup>364</sup> The sole question to be determined at this time is whether the complainant has made out a case entitling it to a decree of interpleader.

The pleadings and proofs before the court show that on the twelfth day of July, 1904, the complainant issued a certificate as follows:

"Death certificate No. 7717 issued by the Bavarian National Union of North America for compatriot Joseph Knaus of Bavarian Section 1, in Jersey City, N. J.

"This Certificate attests, that compatriot Joseph Knaus is a member of said Union and member of Hudson County Section 1, in Jersey City, State of New Jersey, and is fully entitled to the privileges of membership of the Bavarian National Union of North America and shares in the fund for mutual aid in said Bavarian National Union according to the following terms:

"In case of his wife's demise said member receives the sum of Two hundred fifty dollars (\$250) and in case of the said

member's demise, his wife or children, or that person or persons or body to whom the death-money has been assigned during the said member's lifetime by him shall be paid the sum of Four hundred dollars (\$400).

"According to direction by above mentioned member now this latter sum of four hundred dollars (\$400) shall be paid to his wife Mrs. Anna Knaus after his death within the lawful time.

"This certificate stipulates, or has full validity only, if compatriot Joseph Knaus remains a member and fulfills all obligations, laws and regulations of the Bavarian National Union of North America at all times.

"In Witness Whereof the Bavarian National Union of North America ordains the signatures of the Grand-President and Grand Secretary, provided with the National Union's Seal.

"Buffalo, N. Y. on the 12th day of the month of July in the year 1904."

The Joseph Knaus named therein is dead. The complainant admits its liability to pay, under the certificate, to whomsoever is legally entitled thereto.

Joseph Knaus wrote letters to a woman in Germany, whom he called Mrs. Anna Knaus, and to whom he referred as his wife, and in these letters refers to their children.

<sup>365</sup> Joseph Knaus also, coming to America and leaving the woman in Germany, took up with another woman here, and lived with her, calling her his wife, and she also is known as Mrs. Anna Knaus.

The death certificate recites that they are to pay the money "to his wife, Mrs. Anna Knaus."

The American Mrs. Anna Knaus has brought suit. The German Mrs. Anna Knaus has lodged a claim and authorized certain relatives in America to act as her attorneys in fact to collect the same.

The contention of the American Mrs. Anna Knaus is that she clearly is entitled to the money, and, therefore, the complainant has not the right to cause her and the other defendant to interplead. She bases her claim upon what appears in the application for membership, which she says, if read in connection with the certificate, would indicate clearly that she was the person entitled and the person to whom, under the authority of Prudential Ins. Co. v. Morris (N. J. Eq.), 70 Atl. 924, the money must be paid.

The application is not mentioned in the certificate, and there would seem to be a grave question as to whether it is any part of the contract. Under the by-laws there may be a grave question as to whether whichever one of these parties is not his wife could take the money as if she were his wife.

In my view, there is no doubt that under the authorities in this state and the proper principle to be applied, the complainant is entitled to cause the defendants to interplead. In the case of *Pennsylvania R. R. Co. v. Stevenson*, 63 N. J. Eq. 634, 54 Atl. 696, a very similar contention was presented to the court. In that case the widow of a member of a beneficial order claimed that by the perfectly plain terms of the contract she was entitled to the money, and that the stakeholder, therefore, was not entitled to file a bill of interpleader. Although the vice-chancellor was inclined to agree with her contention that she showed the better right to the money, he held that the complainant had an equity not to be sued twice when it had but one liability and had no duty to decide between the respective contentions of the <sup>366</sup> claimants upon the fund, but was entitled to protection from both.

This holding was in consonance with the previous decisions in this state: *Packard v. Stevens*, 58 N. J. Eq. 489, 46 Atl. 250; *Pennsylvania R. R. Co. v. Wolfe*, 203 Pa. 269, 52 Atl. 247; *Wakeman v. Kingsland*, 46 N. J. Eq. 113, 18 Atl. 680; *Supreme Council of Chosen Friends v. Bennett*, 47 N. J. Eq. 39, 19 Atl. 785; *Ireland v. Kelly*, 60 N. J. Eq. 308, 47 Atl. 51; *Catholic Benevolent Legion v. Murphy*, 65 N. J. Eq. 60, 55 Atl. 497.

The wisdom of the rule is curiously exemplified by the very case from which I have cited it. In that case (*Pennsylvania R. R. Co. v. Stevenson*, 63 N. J. Eq. 634, 54 Atl. 696) the vice-chancellor was clearly of the opinion that the widow had the better claim, and, in the suit itself over the fund after the interpleader, so decided.

Upon appeal, however, to the court of errors and appeals his decision in that respect was reversed, and it was held that she had no interest in the fund whatever: *Stevenson v. Earl*, 65 N. J. Eq. 721, 103 Am. St. Rep. 790, 55 Atl. 1091, 1 Ann. Cas. 49.

If, in the case at bar, the court should determine that an interpleader does not lie, the complainant must solve many debatable questions, and all of them at its own peril. I do not think that this burden should be cast upon a stakeholder who is willing to bring the money into court, who is not a wrongdoer as to any of the defendants, and who seeks protection against conflicting claims, each of which has some debatable basis.

I will advise a decree of interpleader, and will order that the defendants frame an issue between themselves and bring on the hearing as to their rights in the fund.

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*The Right of Interpleader* is the subject of a note to *Connecticut Mut. Life Ins. Co. v. Tucker*, 91 Am. St. Rep. 593. The right of insurance companies to invoke this remedy is discussed at page 612 of this note.

## CARPENTER v. SHANLEY.

[75 N. J. Eq. 369, 73 Atl. 64.]

**JUDICIAL SALE—Assessment Confirmed Before Delivery of Deed.**—Where the conditions of a judicial sale provide for a sale of the property clear of encumbrance, the purchaser is not entitled to have the amount of an improvement assessment, which was confirmed after the confirmation of the sale but before delivery of the deed, paid out of the purchase money so as to get a title free of encumbrance. In such case the encumbrance arises after the completion of the sale. (pp. 576, 577.)

J. Merritt Lane, for the petitioner.

Melosh & Morten, for the complainant.

<sup>369</sup> GARRISON, V. C. This is a petition on behalf of the purchaser at a master's sale, praying that the master be directed to pay out of the purchase money the sum of three hundred and fifty dollars, which is the amount of an assessment for an improvement to the property, which assessment was confirmed against the property on the ninth day of February, 1909.

The property was sold by the master on the thirtieth day of December, 1908, and the conditions of sale provide that it was sold free and clear of encumbrance. Both parties admit without argument that whatever the law might otherwise be, the conditions of sale control the question involved in this case. The order confirming the sale was filed on the 7th of January, 1900. The time fixed by the conditions of sale for the delivery of the deed was February 1, 1909, but because the master did not, for some reason, receive the order confirming sale, it was adjourned to the nineteenth day of February, 1909.

<sup>370</sup> As before stated, the assessment was confirmed on the 9th of February, 1909. Both parties concede that the assessment became a lien and encumbrance from the date of its confirmation: *Cadmus v. Fagan*, 47 N. J. L. 549, 4 Atl. 323.

The petitioner's contention is that since this assessment became a lien before the deed was delivered to him, he is entitled, under the conditions of sale, to have the amount of the assessment paid out of the purchase price so that he will, at the time of the delivery of the deed, get a title free and clear of encumbrance. I think that the authorities in this state settle the point against the contention of the petitioner. It has been held by the court of errors and appeals that the date of the delivery of the sheriff's deed is a circumstance of no importance. A purchaser at a sheriff's sale acquires by the act of purchase a right to a conveyance of the premises in pursuance of the sale. The delivery by the sheriff of a deed is a mere ministerial act which the officer is required to per-



form to consummate the sale and vest in the purchaser a title in compliance with the law under which the sale was made: *Walker v. Hill's Exrs.*, 22 N. J. Eq. 513. The sheriff's deed, when delivered, has relation back to the time of the sale of which it is the consummation: *Jacobus v. Mutual Benefit Life Ins. Co.*, 27 N. J. Eq. 604; *Morse v. Hackensack Savings Bank*, 47 N. J. Eq. 279, 20 Atl. 961, 12 L. R. A. 62. See, also, *Wimpfheimer v. Prudential Ins. Co. of America*, 56 N. J. Eq. 585, 39 Atl. 916.

If a confirmation by the court is to be considered as a necessary step in completing the sale, that act took place in the suit at bar before the assessment became a lien upon the premises. It seems entirely clear, therefore, that the sale was completed and was free of encumbrance at the time of its completion, and that the encumbrance in question arose thereafter.

The petition must be dismissed, with costs.

*A Sheriff's Deed Ordinarily Relates Back* to the date of the execution or judgment on which it rests: *Knox v. Doty*, 81 Kan. 138, 135 Am. St. Rep. 351; *Mason v. Perkins*, 180 Mo. 702, 103 Am. St. Rep. 591; *Greer v. Wintersmith*, 85 Ky. 516, 7 Am. St. Rep. 613; note to *Keaton v. Thomasson*, 58 Am. Dec. 57. But according to *International Wood Co. v. National Assur. Co.*, 99 Me. 415, 105 Am. St. Rep. 288, until the delivery of the deed of real estate sold at a judicial sale the title does not pass.

*After a Judicial Sale is Confirmed*, it is said that confirmation relates back to the date of the sale, and the purchaser is entitled to everything he would have been entitled to had the confirmation and conveyance been contemporaneous with the sale: See the note to *Watson v. Tromble*, 29 Am. St. Rep. 497. Consult, also, *Knox v. Doty*, 81 Kan. 138, 135 Am. St. Rep. 351.

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## ORDINARY v. CONNOLLY.

[75 N. J. Eq. 521, 72 Atl. 363.]

**ADMINISTRATOR.—Administrators' Bonds are Given to** Secure the creditors and next of kin of the deceased from loss through the default or fraud of the administrator, and amount to indemnity to the estate. (p. 579.)

**ADMINISTRATOR.—The Condition of an Administration Bond** under the statutes of New Jersey is not restricted merely to the rendering of an account, but is designed to secure a faithful administration of the estate. (p. 579.)

**ADMINISTRATOR.—Extent of Liability on Bond.**—The ordinary is appointed by statute to make good to all persons the damages sustained by occasion of the breach of the condition of an administration bond, and he must have the whole penalty, if he should find it necessary, for that purpose. (p. 579.)

**SURETYSHIP—Extent of Liability on Bond.**—On failure to perform the condition of a bond, the penalty becomes an absolute debt, and at law is recoverable; but in equity relief is granted against the enforcement of the penalty on payment of a sum as damages ascertained to be an equitable equivalent of the condition not performed. (p. 580.)

**ADMINISTRATOR.**—The Sureties of an Administrator are Required to bear any injurious consequences arising from loss to the estate, and have no right to any favor or immunity that would not be accorded to him. (p. 580.)

**ADMINISTRATOR—Liability of Sureties for Attorney Fees.** The sureties on an administrator's bond are liable for counsel fees incurred in his removal and in the suit upon the bond. (p. 581.)

**ATTORNEY FEES.**—An Attorney Who Acts for Himself is generally not entitled to a counsel fee against his adversary. (p. 581.)

**ADMINISTRATOR—Counsel Fees.**—An Administrator, Who is an Attorney, cannot recover for professional services rendered the estate, but this rule does not apply when such costs are not payable out of the trust funds, and will not diminish the estate. (p. 581.)

**ADMINISTRATOR—Counsel Fees.**—An Administrator, Who is an Attorney, is entitled to recover counsel fees in his suit on the bond of a former derelict administrator and his surety. (p. 582.)

Floyd H. Bradley, for the application.

S. Conrad Ott, contra.

<sup>522</sup> **WALKER, V. O.** An administrator appointed by the Camden county orphans court for the personal estate of Elizabeth M. Stigale, deceased, was removed by that court for certain derelictions, and Mr. Bradley was substituted as administrator in his place and stead.

Subsequently, by an order of this court, suit was directed to be brought upon certain bonds given by the administrator and the American Bonding Company of Baltimore, his surety. Such suit was brought and judgment was recovered for three thousand five hundred dollars, the penalties of the bonds, and twenty-three dollars and thirty-one cents costs of suit.

<sup>523</sup> Application is now made to assess the damages, and for direction that execution issue upon the judgment to make such damages, with costs, including counsel fees. The application, so far as it refers to counsel fees, is resisted.

The solution of the question at issue depends, in my judgment, upon the conditions in the bonds upon which the judgment was recovered. There were three bonds. The first one was an ordinary administration bond (in the penal sum of one hundred dollars), and contained the following conditions: First, that the administrator will make and exhibit an inventory; second, that the goods, chattels and credits he will well and truly administer according to law; third, that he will make a true account of his administration; fourth, that all the residue of the goods, chattels and credits found remaining upon

the account, as allowed by the proper court, he will deliver and pay over to persons entitled: Ordinary v. Cooley, 30 N. J. L. 271. In this case (Ordinary v. Cooley) the history and origin of the different conditions of an administrator's bond are set forth and commented upon, and it is shown that the first two conditions were to secure the making and exhibition of an inventory and the payment of debts (Ordinary v. Cooley, 30 N. J. L. 277), and the last two were to secure an accounting and to pay over the surplus to the next of kin: Ordinary v. Cooley, 30 N. J. L. 278.

The second bond (in the penal sum of one thousand dollars) recited that surplus money amounting to four hundred and eighty-seven dollars and six cents arising from the sale of mortgaged premises which were of the decedent, was about to come to the hands of the administrator for the payment of debts, and contained three conditions: First, to well and truly administer the surplus money; second, to account for the surplus which should be found remaining upon the account of such surplus money; third, to distribute and pay such surplus unto such person or persons as should be entitled to receive the same.

The third bond (in the penal sum of two thousand four hundred dollars) contained three conditions: First, to well and truly administer the moneys arising from the sale of lands, tenements or real estate of the deceased directed by order of the orphans court to be sold; second, to account for his administration; third, and the surplus money <sup>524</sup> which should remain upon the account of such sale to distribute and pay unto the person or persons entitled to receive the same.

Administrator's bonds are given to secure the creditors and next of kin of the deceased from loss through the default or fraud of the administrator, and amount to indemnity to the estate. Indemnity is that which is given to a person to prevent his suffering damage: 1 Bouvier's Dictionary (Rawle's Rev.), 1010. These bonds are given to the ordinary for the benefit of creditors and next of kin.

In Hazen v. Durling, 2 N. J. Eq. 133, it was held that the condition of an administration bond under the statute of this state is not restricted merely to the rendering of an account, but is designed to secure a faithful administration of the estate. And in Williamson v. Snook, 10 N. J. L. 65, the supreme court held (at page 69) that the ordinary is appointed by statute to make good to all persons the damages sustained by occasion of the breach of the condition of an administration bond, and that he must have the whole penalty, if he should find it necessary, for those purposes.

A bond is a form of obligation under seal by which the party making it, the obligor, acknowledges himself bound to the other party, the obligee, in a specified form. Literally,

the obligor, by the terms of the instrument, says that he is absolutely obliged to pay the penalty unless he fulfills the condition. On failure to perform the condition, the penalty became an absolute debt, and at law was recoverable. In equity, however, it was treated as security for the performance of a condition, and relief was granted against the enforcement of the penalty on payment of a sum as damages, ascertained to be an equitable equivalent of the condition not performed; in other words, the court would not allow the obligee to take more than in conscience he ought: 2 Sutherland on Damages, 3d ed., sec. 470.

The application now made is to include in the assessment of damages a fee for the counsel who took the proceeding in the orphans court for the removal of the administrator, and for a fee to the administrator himself, who is an attorney, and who prosecuted the same in the supreme court which resulted in a judgment on the administrator's bonds.

<sup>525</sup> The judgment is against the administrator and his surety. Whatever can be recovered against the administrator on this judgment can, of course, be recovered from the surety.

In *Re Gaston Trust*, 35 N. J. Eq. 60, Vice-Chancellor Van Fleet said (at page 64) that if the accounts of a trustee become lost through his carelessness, he should be required to bear any injurious consequences arising from their loss, and that the persons bound as sureties for the defaults and fraud of the trustee have no right to any favor or immunity that would not be accorded to the trustee. This case (*In re Gaston Trust*) was affirmed for the reasons given by the vice-chancellor: S. C., sub nom. *Veghte v. Steele*, 35 N. J. Eq. 348.

In *Osborne v. Eales*, 2 Moore P. C., N. S., 125, it was held that recovery could be had to the full amount of the penal sum named in a bond of indemnity to protect a purchaser of land against adverse claims, notwithstanding that the penalty greatly exceeded the original purchase money, the purchaser having in discharge of the claim and expenses incident thereto expended a larger sum than the amount of the penalty named in the bond. The report of the case discloses that the amount recovered included two bills of costs amounting to over three thousand five hundred dollars, one of which, amounting to over two thousand dollars, was costs between attorney and client, and must, of necessity, have included a large amount of attorney's fees.

In *Ellis v. Norman* (Ky.), 44 S. W. 429, the court of appeals of Kentucky held that the surety of a forfeited bail bond is entitled to reimbursement out of indemnity given him by the principal to the extent of attorneys' fees and other expenses incurred by him in good faith. As to the recovery of expenses on a forfeited bail bond, see, also, *Fisher*

v. Fallows, 5 Esp. 171, and Sparkes v. Martindale, 8 East, 593.

A surety may recover of his principal the costs which he has been compelled to pay in an action brought to recover of him the amount for which he was surety: Apgar's Admrs. v. Hiler, 24 N. J. L. 812. And a surety is entitled to indemnity against the principal debtor; that is, he is entitled to be reimbursed and made whole: Delaware <sup>526</sup> etc. R. R. Co. v. Oxford Iron Co., 38 N. J. Eq. 151.

It seems to me clear, upon principle and authority, that a reasonable counsel fee, necessarily incurred in the removal of an administrator, is recoverable as part of the damages resulting from his dereliction and sustained by occasion of the breach of the condition that he would well and truly administer the estate, or the breach of any of the other conditions, and for which purpose the ordinary may have the whole penalty of the bond, if necessary, as we have seen.

It remains to be considered whether the attorney who prosecuted the suit upon the bail bonds in the supreme court may be awarded a fee, in addition to costs, against the administrator and his surety. The general rule is that an attorney who acts for himself is not entitled to a counsel fee against his adversary: Flaacke v. Jersey City, 33 N. J. Eq. 57. An executor, administrator, guardian or trustee who is an attorney cannot recover for professional services rendered the estate, but the rule does not apply when such costs are not payable out of the trust funds: Flaacke v. Jersey City, 33 N. J. Eq. 57, note, and authorities cited.

The reason usually assigned for not giving the solicitor profit costs, in such cases, is that he is not to profit by the trust estate. The value of that reason is only apparent when he is seeking to diminish that estate: Colonial Trust Co. v. Cameron, 24 Grant Ch. 548.

Now, the attorney who prosecuted the suit at law upon the administration bonds is not here asking for a counsel fee out of the estate of the decedent which will come to his hands upon recovery under his judgment, but he is asking that the derelict administrator and his surety pay him a fee in addition to the costs of suit, just as they might be compelled to make such payment to counsel other than himself had he not prosecuted the suit in pro. per. The defendants in the suit at law cannot complain. The administrator undertook well and truly to administer the estate, and the surety was bound to see that he did so. The administrator having failed to perform this duty, he and his surety must indemnify and save harmless the estate to the full <sup>527</sup> extent up to the penalty of the bond. There is no reason that counsel securing the removal of the administrator and prosecuting the administration bonds should not be paid reasonable and proper fees for their ser-

vices, and, on the contrary, there is every reason why they should be compensated. The estate should not be made to bear the burden of these charges, but they should be imposed upon the administrator and his surety who became bound that the estate should be well and truly administered according to law, for the benefit both of creditors and the next of kin of the deceased.

My conclusion upon the whole matter is, that both counsel are entitled to fees to be included in the assessment of damages against the derelict administrator and his surety. The sum of fifty dollars will be awarded to counsel who took the proceedings which resulted in the removal of the administrator by the orphans court, and fifty dollars will be allowed to the administrator himself, who, in his capacity as attorney, prosecuted the suit which resulted in the recovery of the judgment upon which the assessment is now to be made.

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*"In Case an Executor or Administrator is Himself an Attorney, he cannot charge the estate with the expense of another attorney to assist him in conducting an ordinary administration, unattended with any legal or other complications. He is required to exercise his own professional skill, and this without extra compensation. Undoubtedly complications or litigation may arise which will entitle an administrator, though himself a lawyer, to the assistance of legal advice and counsel, but he cannot enlist such assistance, and have the cost thereof allowed in his account, in conducting ordinary probate proceedings":* 1 Ross on Probate Law and Practice, 765; Doss v. Stevens, 13 Colo. App. 535, 59 Pac. 67; Noble v. Whitten, 38 Wash. 262, 80 Pac. 451; Estate of Young, 4 Wash. 534, 30 Pac. 643; Willard v. Bassett, 27 Ill. 37, 79 Am. Dec. 393. That an executor or administrator, who is a lawyer, may be entitled to compensation for legal services rendered the estate, under some circumstances, as in the event of litigation, see Estate of Mabley, 74 Mich. 143, 41 N. W. 835; Alexander v. Bates, 127 Ala. 328, 28 South. 415; Morgan v. Nelson, 43 Ala. 586. In Clark v. Knox, 70 Ala. 607, 45 Am. Rep. 93, it is affirmed that an administrator ad litem, who is also an attorney, and as such renders services to the estate, is entitled, not to the usual professional charges, but to a fair and reasonable allowance therefor.

**CASES AT LAW**  
**IN THE**  
**COURT OF ERRORS AND APPEALS**  
**OF**  
**NEW JERSEY.**

**McCARTER v. McKELVEY.**

[78 N. J. L. 3, 74 Atl. 316.]

**CONSTITUTIONAL LAW.**—The Classification of Cities on the Basis of Population, for the purpose of legislation regulating their internal affairs, does not violate the constitution, if population bears a reasonable relation to the subject matter of the legislation. (p. 584.)

**CONSTITUTIONAL LAW.**—Classification of Cities by Population.—A statute which creates a board of fire and police commissioners, a board of finance, and a board of public works in cities having a population of not less than one hundred thousand nor more than two hundred thousand inhabitants, is not special legislation. (p. 585.)

**CONSTITUTIONAL LAW.**—Political Qualifications for Office. A statute is not unconstitutional which provides that a certain municipal board shall be composed of four members, "not more than two of whom shall be members of the same political party." (pp. 585, 587.)

Richard V. Lindabury, for the informant.

William B. Gourley and John W. Griggs, for the demurrants.

\* GUMMERE, C. J. These suits were instituted by the attorney general for the purpose of testing the right of the several defendants therein to exercise the liberties, privileges and franchises of members of the board of fire and police commissioners, the board of finance, and the board of public works of the city of Paterson, under appointment by the mayor of that city, made pursuant to the terms of three acts of the legislature of this state passed in the year 1907, and constituting chapters 45, 46 and 62 of the laws of that year. The informations assert that these several acts are unconstitutional and void, and that the offices held thereunder are unlawfully held; the demurrers challenge the soundness of this assertion.

The framework of each of these acts is the same; each is made applicable to cities having a population of not less than one hundred thousand nor more than two hundred thousand inhabitants; each act gives the mayor power to appoint boards consisting of four resident members, not more than two of whom shall be members of the same political party; under each of these acts the boards created thereby are substituted for and vested with the powers and duties previously exercised by any board, committee or governing body having<sup>5</sup> control or management of the matters treated of in the various acts. In each act there is a repealer of all inconsistent acts. Taken together they clothe these three boards which they create with all the important governmental powers, and impose upon them all the important governmental duties which, prior to their enactment, were exercised and performed by the boards of aldermen or common council in the cities affected by the legislation.

The first contention made on behalf of the attorney general in support of the informations is that each of these statutes violates the provision of article 4, section 7, paragraph 11 of the constitution of our state, which prohibits the legislature from passing any private, local or special law regulating the internal affairs of cities and counties, appointing local offices or commissions to regulate municipal affairs. It has been settled by a long line of decisions by our courts that this constitutional provision does not prohibit the legislature from classifying cities for the purpose of passing acts regulating their internal affairs. It has further been conclusively determined by our courts that the classification of cities upon the basis of population, for the purpose of legislation regulating their internal affairs, does not violate the constitutional provision referred to when population bears a reasonable relation to the subject matter of the legislation. It is conceded on behalf of the attorney general that the power of the legislature, to the extent indicated, cannot be successfully challenged. The ground upon which he attacks the statutes under review is that population does not bear any reasonable relation to the matters with which they deal; that cities having a population between one hundred thousand and two hundred thousand have no characteristics which so distinguish them from those having a larger or smaller population as to render the statutory provisions which are under consideration fit and appropriate to them alone, and unfit and inappropriate to municipalities having a greater or less number of inhabitants; that, for this reason, the classification is illusive and unsubstantial, and, consequently, makes the law special, although it sounds in general terms.

<sup>6</sup> This contention is identical with that raised in this court by counsel in the case of *Owens v. Fury*, 55 N. J. L. 1, 25 Atl.



934, in which the constitutionality of an act passed in 1892, creating a board of public works and other offices in cities having a population of not less than fifty thousand, nor more than one hundred thousand inhabitants, was under consideration. The scope of that act was practically the same as that of chapter 62 of the laws of 1907 (now under scrutiny), and it conferred largely the same powers upon the board which it created. The conclusion reached in that case was that the classification by population was substantial, not illusory, and that such legislation was general, not special. In the case of *Varney v. Kramer*, 62 N. J. L. 483, 41 Atl. 711, the constitutionality of an act similar in its purport was attacked, because, by its terms, it was applicable only to cities having a population of not less than fifty-five thousand, nor more than one hundred thousand inhabitants, the contention there also being that the classification by population was illusory and unsubstantial. This court there considered the decision of *Owens v. Fury*, 55 N. J. L. 1, 25 Atl. 934, as controlling, and affirmed the constitutionality of the statute on that decision. The same course should be pursued in the present case. The doctrine of *Owens v. Fury* has never been overruled by the court of errors and appeals; on the contrary, it would seem to have been approved (obiter) in the case of *Wanser v. Hoos*, 60 N. J. L. 482, 64 Am. St. Rep. 600, 38 Atl. 449. Until that decision is overruled by the court of last resort, it should be accepted as settling the question that legislation of the character under review is general, not special.

The attorney general further insists that the statutes under review are unconstitutional, "in that they prescribe political qualification for the holding of public office." No specific provision in the constitution, which prohibits such prescription, is referred to by counsel, and none such can be found. His argument is apparently based upon the theory that the imposing of political qualifications upon the right to hold public office violates the spirit of the constitution. Assuming that this proposition is sound, are these statutes in conflict with it? We think not. They do not require that any of the officers named therein shall have any political qualification whatever. In fact, the matter of the political faith of the officers to be appointed under them is not referred to at all, except with relation to the appointment of members of the several boards created thereby. As to them the statutes declare that each of those boards shall be composed of four members, "not more than two of whom shall be members of the same political party." Instead of prescribing political qualifications as a requisite for membership in these boards, the statutes permit them to be filled by persons who belong to no political party, who have no political affiliations. Nor do they make membership of a political party a ground of disqualifi-

cation. All that they do is to limit the representation in the board of any existing political party. These provisions differ entirely from that which appeared in the statute under consideration in the case of Attorney General v. Detroit, 58 Mich. 213, 55 Am. Rep. 675, 24 N. W. 887, the principal authority relied upon before us by counsel for the informant. In that case the legislature provided that the municipal board which it created should be composed of four members, "two members thereof to be from each of the two leading political parties in the said city." This legislation rendered ineligible to membership in the board any person who belonged to a political party other than the two leading ones in the city, as well as all those citizens who had no political affiliations. So, too, the legislation before the court in the case of City of Evansville v. State, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93, referred to by counsel for the informant, was of the same character as that declared unconstitutional in the Michigan case. The statutes now before us have no such effect as those under consideration in the cases cited. They render no citizen ineligible on account of political affiliations or lack of them. On the contrary, every citizen of a city affected by this legislation is as eligible to membership in these boards as he is to any other office in the city, or in the county in which it is located, or in the state.

The only other authority relied upon in behalf of the informant <sup>s</sup> as supporting his contention is Barker v. People, 3 Cow. 686, 15 Am. Dec. 322. The question in that case was whether a statute for the suppression of duelling, which provided, as a punishment for sending a challenge, that the person so sending should, on conviction, be disqualified from holding public office, was constitutional. In the discussion contained in the opinion delivered by Chancellor Sanford it is declared that eligibility to office belongs equally to all persons whomsoever not excluded by the constitution; but the legislature cannot establish arbitrary exclusions from office, or any general regulation requiring qualifications which the constitution has not required. The explanation of this expression of view to be found in the later case of Rogers v. Buffalo, 123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579, makes it plain that it affords no support for the contention made by the attorney general. Rogers v. Buffalo involved the question of the constitutionality of a statute very similar in its scope to those now before us. The conclusion reached by the New York court of appeals was that it was not unconstitutional because it contained a provision similar to that which we are now considering. Discussing the expression which has been quoted from the case of Barker v. People, 3 Cow. 686, 15 Am. Dec. 322, Mr. Justice Peckham, who delivered the opinion, speaks as follows: "What the chancellor

meant by such expressions is rendered clear by the examples he gives. Legislation would be an infringement upon the constitution, he thought, which should enact that all physicians, or all persons of a particular religious sect should be ineligible to hold office, or that all persons not possessing a certain amount of property should be excluded, or that a member of assembly must be a freeholder, or any such regulation. But, in our judgment, legislation which creates a board of commissioners consisting of two or more persons, and which provides that not more than a certain proportion of the whole number of commissioners shall be taken from one party, does not amount to an arbitrary exclusion from office, nor a general regulation requiring qualifications not mentioned in the constitution. The 'qualifications' which were in the mind of the learned chancellor were obviously \* those which were, as he said, arbitrary, such as to exclude certain persons from eligibility under any circumstances. Thus a regulation excluding all physicians would be arbitrary. But would a regulation which created a board of health, and provided that not more than one physician from any particular school, or none but a physician, should be appointed thereon, be arbitrary or unconstitutional as an illegal exclusion from office? I think not. The purpose of the statute must be looked at and the practical results flowing from its enforcement. If it be obvious that its purpose is not to arbitrarily exclude any citizen of the state, but to provide that there shall be more than one party or interest represented, and if its provisions are apt for such purpose, it will be difficult to say what constitutional provision is violated, or wherein its spirit is set at naught."

We concur in the view expressed in *Rogers v. Buffalo*, 123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579, that a statute, the purpose of which is to secure the appointment of persons who are not all of the same political views, and thus provide for a representation in the body so appointed of different and probably conflicting interests in the municipality, does not, because it carries such a purpose into execution, violate either the letter or the spirit of the constitution by reason of the fact that it prohibits the appointment to the board which it creates of more than a certain proportion of members of the same political party, and are entirely content to rest this conclusion upon the reasoning of Mr. Justice Peckham in the very elaborate and able opinion from which we have quoted.

The defendants are entitled to judgment upon their respective demurrers.

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*Classification on the Basis of Population* in a statute relating to the machinery and powers of municipalities is legitimate, if the population bears a reasonable relation to the necessities of the municipalities. Classification in such cases is necessarily committed to the

judgment of the legislature, and its judgment must prevail unless the classification is plainly illusory or applied illusively: *Wanser v. Hoos*, 60 N. J. L. 482, 64 Am. St. Rep. 600; *Commonwealth v. Moir*, 199 Pa. 534, 85 Am. St. Rep. 801; *Cravens v. State*, 57 Tex. Cr. 135, 136 Am. St. Rep. 977; note to *Croom v. State*, 21 Am. St. Rep. 184. But a classification of counties by population as a basis for legislation is not valid, unless there is some reasonable relation between the situation of the counties classified and the purposes and objects to be attained: *Strong v. Dignan*, 207 Ill. 385, 99 Am. St. Rep. 225; *State v. Jones*, 66 Ohio St. 453, 90 Am. St. Rep. 592. A statute of Minnesota providing for the appointment of a superintendent of highways in counties having less than two hundred thousand inhabitants is held unconstitutional in *Hjelm v. Patterson*, 105 Minn. 256, 127 Am. St. Rep. 560.

*The Legislature may Provide for a Board of Public Works*, composed of four persons, not more than two of whom shall be members of the same political party: *Attorney General v. McKelvey*, 78 N. J. L. 621, 77 Atl. 94. But a statute providing for the appointment of election inspectors in Detroit by a board to be appointed by the mayor and council, and to consist of two persons from each of the two leading political parties, is held unconstitutional in *Attorney General v. Board of Councilmen*, 58 Mich. 213, 55 Am. Rep. 675. As to the constitutionality of statutes alleged to invade the right of local self-government in that the legislature provides for the appointment of officers of municipal corporations, see *Davidson v. Hine*, 151 Mich. 294, 123 Am. St. Rep. 267; *State v. Broatch*, 68 Neb. 687, 110 Am. St. Rep. 477.

### OKIN v. SELIDOR.

[78 N. J. L. 54, 78 Atl. 770.]

**STATUTE OF FRAUDS—Contract Concerning Land.**—A contract by which one who had laid a cement sidewalk took in part payment the sand excavated in the course of the work is not a contract in or concerning an interest in land within subdivision 4 of section 5 of the statute of frauds. (p. 590.)

**STATUTE OF FRAUDS—Contract not to be Performed Within Year.**—Although a contract in term covers a period of five years, yet, if under its terms performance may be required of the promisor within one year, an action is not barred by the statute of frauds if within such year the event upon which the duty of performance depended actually happened. (p. 590.)

**STATUTE OF FRAUDS—Contract not to be Performed Within Year.**—A contractor who agreed that a sidewalk laid by him should stay in good condition for five years is liable to an action based upon a breach of such contract occurring within one year from the date; such agreement not being one "that is not to be performed within one year from the making thereof." Subdivision 5 of section 5 of the statute of frauds. (pp. 590, 591.)

(Syllabi by the court.)

Franklin W. Fort, for the appellant.

Michael J. Tansey, for the appellee.

<sup>55</sup> GARRISON, J. Action was brought by the appellee in the district court to recover the sum expended in repairing a cement sidewalk that had been badly laid by the appellant, who had agreed that the sidewalk should remain in good condition for five years. The making of this oral agreement was established to the satisfaction of the trial court. It was also proved without contradiction that within one year after the making of this agreement it was broken by the upheaval of the sidewalk, and that the amount paid by the appellee in the repair of the sidewalk was one hundred and sixty-five dollars, for which amount judgment was rendered. To reverse this judgment two sections of the statute of frauds are relied upon: First, that the agreement was one concerning an interest in land, and, second, that it was not to be performed within one year from the making thereof.

The first ground is entirely untenable. It requires no argument to show that under an agreement to lay a sidewalk the contractor takes no interest in the land, and the circumstance relied upon in the present case, viz., that the contractor accepted a lower price upon condition that he might have the sand excavated in the course of the work, does not bring the agreement within the statute. This was a mere mode of payment, and the sand when excavated and applied to such payment was personal property and not land or any interest therein.

The second ground cannot avail the appellant, for the reason that although his agreement covers five years, it was not one that was not to be performed within one year and within <sup>56</sup> such period its performance was required. The section of the statute of frauds is cast in this negative form, hence it applies wherever by no contingency covered by the contract the promisor can within one year from the making of his agreement be required to perform it. That was not the case here. The agreement was not that after the first year the sidewalk should be in good condition for four more years, but that it should be in such condition during the first year as well. As to a breach occurring during the first year, this agreement was therefore not one that was not to be performed within one year. The fact that an action for breaches occurring after the first year would be barred by the statute does not enter into the present case, in which the cause of action arose within the year. The state of the case shows that the appellee, who was a builder, sold the property after the sidewalk had been laid, warranting the condition of the property for one year. The purchaser, one Butman, immediately notified the appellee that the sidewalk was broken up, and was authorized to employ and pay one Jackson to repair it. Butman did this, paying Jackson for his work one hundred and sixty-five dollars, which he was reimbursed by the appellee,

who then brought this suit. Jackson testified at the trial without contradiction that he repaired the sidewalk about eight months after its installation. The appellee's action is not, therefore, barred by the statute. This result is in accord with the consensus of decisions under this section of the statute, which are collected in Cyc. under the title "Statute of Frauds," and in 29 American and English Encyclopedia of Law, 942, under the somewhat less obvious title of "Verbal Agreements."

The judgment of the second district court of the city of Newark is affirmed.

#### **STATUTE OF FRAUDS—AGREEMENTS NOT TO BE PERFORMED WITHIN A YEAR.**

- I. Scope of Note, 590.**
- II. Agreements Indefinite as to Time of Performance.**
  - a. General Rule, 590.
  - b. General Applications of Rule, 592.
  - c. Time for Performance Extended Beyond Year, 593.
  - d. Performance Delayed Beyond Year, 594.
  - e. Contracts of Employment, 597.
  - f. Partnership Contracts, 598.
  - g. Promises to Marry, 598.
- III. Agreements Dependent upon the Happening of a Contingency.**
  - a. In General, 599.
  - b. Contracts of Employment, 600.
  - c. Agreements Dependent upon Life of Party, 601.
  - d. Agreements in Restraint of Trade, 604.
  - e. Time Enlarged or Abridged by Contingency, 606.
  - f. Agreements Determinable by Contingency, 607.
  - g. Liability Accruing Within Year on Ultra-year Contracts, 608.
- IV. Part Performance of Agreements.**
  - a. In General, 609.
  - b. Ultra-year Contracts, 610.
  - c. Possibility of Performance by One Party, 610.
- V. Computation of Period of Performance, 611.**

#### **I. Scope of Note.**

In the consideration of the fifth subdivision of the fourth section of the statute of frauds, this note will concern itself entirely with the matter of the time of the performance of the contract, omitting any extended consideration of the nature and subject matter of the contracts to which this subdivision of the statute applies. We divide our subject into four principal divisions, viz.: Agreements indefinite as to time of performance; agreements dependent upon the happening of a contingency; part performance of agreements; and computation of the period of performance.

#### **II. Agreements Indefinite as to Time of Performance.**

a. **General Rule.**—The rule seems to be well established by the authorities that where no time is fixed by the parties for the performance of their agreement, and there is nothing in the agreement itself to show that it cannot be performed within a year according to its tenor and the understanding of the parties, such agreement is not within the statute of frauds, and parol testimony is admissible to

prove it: *Devalinger v. Maxwell*, 4 Penne. (Del.) 185, 54 Atl. 684; *Hiinkle v. Fisher*, 104 Ind. 84, 3 N. E. 624; *Fair v. Turner's Admr.*, 96 Ky. 634, 29 S. W. 628; *Duffy v. Patten*, 74 Me. 396; *Neal v. Parker*, 98 Md. 254, 57 Atl. 213; *Herron v. Raupp*, 156 Mich. 162, 120 N. W. 584; *Duff v. Snider*, 54 Miss. 245; *Warren Chemical & Mfg. Co. v. Holbrook*, 9 N. Y. St. Rep. 293; *Blakeney v. Goode*, 30 Ohio St. 350; *Nonamaker v. Amos*, 73 Ohio St. 163, 112 Am. St. Rep. 708, 76 N. E. 949, 4 L. R. A., N. S., 980, 4 Ann. Cas. 170; *Denn v. Peters*, 36 Or. 486, 59 Pac. 1109; *Thomas v. Hammond*, 47 Tex. 42; *Rogers v. Brightman*, 10 Wis. 49 (55); *White v. Hanchett*, 21 Wis. 420; *McPherson v. Cox*, 96 U. S. 404, 24 L. ed. 746; *Walker v. Johnson*, 96 U. S. 424, 24 L. ed. 834.

The rule is well illustrated in the case of *Valley Planting Co. v. Wise*, 93 Ark. 1, 123 S. W. 768. This was a case where the plaintiff, under a verbal contract with the defendant, was employed to superintend the making and gathering of a crop of cotton, no definite time being fixed for the performance of the contract. In upholding the validity of this contract, the court, through McCulloch, C. J., said: "The contract in question was one, not to perform service for a definite period of time, but to perform a particular service for a stipulated consideration; that is, to superintend the making and gathering of the crop for the stated compensation of one thousand dollars. . . . It cannot be said that it was, according to its terms, 'not to be performed within a year.' It may or may not, according to the agreement, have been performed within a year. This depended upon the course of the seasons, weather conditions during the planting and crop-gathering seasons, particularly the latter, and also the scarcity or plentifulness of farm labor, and appellee's ability to secure labor during the seasons. We are asked to say, by way of judicial cognizance, that a crop of cotton cannot be made and gathered within a year; or, at least, that such a feat is so unusual in this state that it could not have been within the understanding and contemplation of the parties to the present contract. But we are unwilling to make such a declaration. On the contrary, if we should resort to matters of common knowledge among residents of the cotton-growing localities as to the course of the seasons and as to the culture and production of cotton, we should say that a crop of cotton can be, under favorable conditions, planted, harvested, ginned and marketed within a year. . . . According to the terms of the contract in the present case, appellee agreed to perform certain work for a gross stipulated price. Self-interest was a natural incentive to conclude the engagement by getting the crop gathered as speedily as possible, and he impliedly agreed to do this; his employer having the right to expect and demand as much of him. That being true, we cannot say that it was the understanding and contemplation of the parties, when the contract was entered into, that it was not to be performed within a year."

In *Railway Co. v. Whitley*, 54 Ark. 199, 15 S. W. 465, 11 L. R. A. 621, it was said: "In determining when contracts come within the one year statute of frauds, courts have been governed by the words, 'not to be performed.' They have treated them as negative words. In construing them it is said: 'It is not sufficient to bring a case within the statute that the parties did not contemplate the performance within a year, but there must be a negation of the right to perform it within the year.' According to this rule of construction,

it is well settled that the statute only includes those contracts or agreements which, according to a fair and reasonable interpretation of their terms, in the light of all the circumstances which enter into their construction, do not admit of the performance, in accordance with their language and intention, within a year from the time they were made, and that it includes no agreement, if, consistently with its terms, it may be performed within that time."

"To be within the statute," says the court in *Blair Town Lot and Land Co. v. Walker*, 39 Iowa, 406, "the contract itself must show from the nature of its subject matter, by its express terms, or by its necessary implication, that its performance within the year is forbidden—it must show that it is not to be performed. The statute does not require that the contract must be performed within the year, but it requires that the contract shall show that it must not be performed in order to render it invalid."

b. **General Applications of Rule.**—The rule as stated has been applied in the following cases, and the statute held no bar to recovery upon the oral contracts sued upon: A contract to repair a certain log house belonging to defendant, and make certain additions thereto: *Suggett v. Cason*, 26 Mo. 221; a contract to convey land to another upon the latter's promise to sell the same and pay over the price received above a certain sum: *Linscott v. McIntire*, 15 Me. 201, 33 Am. Dec. 602; an agreement by a railway company to construct and maintain cattle-guards on plaintiff's land in consideration of a right of way: *Arkansas Midland Ry. Co. v. Whitley*, 54 Ark. 199, 15 S. W. 465, 11 L. R. A. 621; an agreement not to remove stock from the limits of a county, and not to dispose of real estate there situate: *Jones v. Green* (Tex. Civ. App.), 31 S. W. 1087; an agreement by an owner of land to lay out and construct certain streets through it, if another will buy lots therein and erect a house thereon: *Drew v. Wiswall*, 183 Mass. 554, 67 N. E. 666; an agreement by a wife to reconvey land deeded to her by her husband, no time for the reconveyance being stipulated: *Haussman v. Burnham*, 59 Conn. 117, 21 Am. St. Rep. 74, 22 Atl. 1065; an agreement to pay a certain sum of money as soon as it can be earned from a tract of land over and above the amount necessary to support the promisor's family, where no facts are shown from which the probable earnings from the farm can be determined: *Sutphen v. Sutphen*, 30 Kan. 510, 2 Pac. 100; an agreement that one is to retain property until he is reimbursed the cost of an improvement from the profits: *Dailey v. Cain*, 11 Ky. Law Rep. 936, 13 S. W. 424; an agreement to reimburse a tenant for improvements put on the land at any time that the tenant should desire to give up possession of the land: *Connolly v. Giddings*, 24 Neb. 131, 37 N. W. 939; an agreement made in the fall of 1888 for the renting of land to be cultivated in tobacco, although the tenant did not enter into possession of the land until March 1889: *Burden v. Lucas* (Ky.), 44 S. W. 86; an agreement by a surety on an administrator's bond to hold his cosurety, who had signed the bond at his request, harmless: *Blake v. Cole*, 39 Mass. (22 Pick.) 97; an agreement by one in consideration of a half-interest in a patent that he should use his utmost skill and power as a machinist in making the invention a success: *Blakeney v. Goode*, 30 Ohio St. 350; an antenuptial contract providing for the disposition of the property of the parties to their respective heirs: *Houghton v. Houghton*, 14 Ind. 505,



77 Am. Dec. 69; an agreement by one party to give to another the exclusive sale of his goods: *Durgin v. Smith*, 115 Mich. 239, 73 N. W. 361; a contract to bring certain business to a firm of attorneys—business that might not require more than a year to finish: *Vocke v. Peters*, 58 Ill. App. 338; a contract for the sale and delivery of patent roofing materials, to be manufactured and delivered as required by the buyer: *Warren Chemical & Mfg. Co. v. Holbrook*, 118 N. Y. 586, 16 Am. St. Rep. 788, 23 N. E. 908; a conditional sale of cattle providing that the cattle should remain the property of the seller until fully paid for: *Esty v. Aldrich*, 46 N. H. 127. For further illustrations, see *Sweet v. Desha Lumber & Planing Co.*, 56 Ark. 629, 20 S. W. 514; *Brown v. Throop*, 59 Conn. 596, 22 Atl. 436, 13 L. R. A. 646; *Worley v. Sipe*, 111 Md. 238, 12 N. E. 385; *Durham v. Hiatt*, 127 Ind. 514, 26 N. E. 401; *Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 45; *Thomas v. South Haven & E. R. Co.*, 138 Mich. 50, 100 N. W. 1009; *Thouvenin v. Lea*, 26 Tex. 612; *Kansas City M. & O. Ry. Co. v. City of Sweetwater* (Tex. Civ. App.), 131 S. W. 251.

**c. Time for Performance Extended Beyond Year.**—There are numerous cases—notably in building contracts—where the time for performance is extended beyond the statutory year, but where, nevertheless, performance being possible within the year, the contracts are held not obnoxious to the statute of frauds. Thus, in *Plimpton v. Curtiss*, 15 Wend. 336, a building contract case, the house to be built was to be completed within fifteen months from the time of making the contract. The court (Savage, C. J.) said: "The agreement set forth in the declaration in this case is not for the building of a house after the expiration of one year, but that it shall be performed at the furthest within fifteen months. There is nothing in the agreement prohibiting the defendant from completing the contract within six months or a shorter period. Suppose he had done so, and sued the plaintiff for compensation for his labor and materials found, would it have been permitted to the plaintiff to have said that the contract was not to be performed within a year, and therefore not obligatory upon him? Most clearly not. And if obligatory upon one party, it is equally so on the other. The defendant might have performed the contract within a year, and therefore it is not within the statute."

In *First Presb. Church v. Swanson*, 100 Ill. App. 39, a building contract was executed December 10, 1897, and was to be performed by the completion of the building on or before March 1, 1899. This contract was upheld, as there was nothing in the nature of the work to be performed, or in the terms of the contract, which prohibited its full performance within a year.

In *Powder River Livestock Co. v. Lamb*, 38 Neb. 339, 56 N. W. 1019, the plaintiff had sold to the defendant all of his corn, including the crop then in the field. The contract contained no stipulation as to the time when the corn should be delivered to the defendant, except in the stipulation that plaintiff was to receive for the corn the market price paid for such grain in the county on any day that should be thereafter designated by him, between the time of delivery and May, 1888. The oral agreement for this sale had been made in October, 1886. In upholding this agreement the court said: "Al-

though the agreement was not to be performed within a year from its making, as regards the selection of the date upon which to fix the price the seller should receive for the corn, yet there was nothing in the terms thereof which prevented it from being performed within a year. Under the terms of the agreement, plaintiff had a perfect right, had he so desired, to have selected such date at once, and without delay, even on the next day after the corn was delivered. It was entirely optional with him to do so or not. The agreement was therefore capable of performance within a year from its making, and is not void by reason of the statute under consideration."

So in *Marley v. Noblett*, 42 Ind. 85, where the defendant in an agreement collateral to the leasing of certain lands agreed to inclose the same with a substantial fence "during the term," which was three years. While he had the whole three years to build the fence, he might have built it within a year from the letting, in strict accordance with the terms of the contract.

Similarly, in *Jones v. Pouch*, 41 Ohio St. 146, where the verbal agreement was to construct a road in one year and twenty days, the twenty days being added for contingencies, and the work capable of being completed within a year; and in *Kent v. Kent*, 35 Mass. (18 Pick.) 569, where a party was at liberty to remove certain trees from land at any time within ten years; in *Parker v. Siple*, 76 Ind. 345, where A sold land to B under an agreement that the latter should pay to the former any excess over the purchase price for which he might sell the land within five years; in *Gault v. Brown*, 48 N. H. 183, 2 Am. Rep. 210, where, under a contract for the sale and delivery of a quantity of wood, the vendor was to deliver as much the first winter as possible and the remainder the following winter; and in *Booker v. Anderson* (Tex. Civ. App.), 86 S. W. 956, where vendor's lien notes maturing in one, two and three years were by oral agreement modified so as to authorize payment "at any time."

In *Shakespeare v. Alba*, 76 Ala. 351, the oral agreement sought to be specifically enforced was the execution of a lease for a term of five years. The duration of the lease, the court said, did not touch the question as to the time in which it was to be executed. When the lease was made in writing, and properly signed, in accordance with the provisions of the statute governing the conveyance of real estate, this would, when followed by a delivery of the instrument, be a full and complete execution of the lessor's agreement, whatever might be the mere number of years the leasehold estate was to endure.

In the same category with the preceding case are preliminary contracts for insurance where the policies thereafter to be executed and delivered are to run for a number of years; as in *Sanford v. Orient Ins. Co.*, 174 Mass. 416, 75 Am. St. Rep. 358, 54 N. E. 883, and *Carter v. Bankers' Life Ins. Co.*, 83 Neb. 810, 120 N. W. 455.

**d. Performance Delayed Beyond Year.**—Nor is a case brought within the statute of frauds from the fact that performance under the contract extends beyond a year, where it appears that the contract is capable of being completed within the year. Thus, in *Van Woert v. Albany & S. R. Co.*, 67 N. Y. 538, where the plaintiff agreed orally to sell and deliver to the defendant one thousand cords of wood without fixing a definite time for delivery, and part of the wood was delivered more than a year after the making of the contract. In *Soggins v. Heard*, 31 Miss. 426, a party agreed before

the sale to purchase property about to be sold under an execution against a judgment debtor, and to give the latter the benefit of the purchase. This agreement was held binding and enforceable although performance thereunder was delayed for several years.

In *Ford Lumber & Mfg. Co. v. Cobb*, 138 Ky. 174, 127 S. W. 766, the plaintiffs (appellees) verbally contracted with the defendant to float a lot of logs down a creek. This contract, on account of the varying stage of the waters of the creek, was prolonged over a period of more than two years. Nevertheless, the contract might have been performed within a year. "A great rise in the waters of the creek," said the court, "might have lasted long enough to float out all the logs in a few days, or ordinary freshets affording water enough to float the logs might have occurred so frequently as to have enabled appellees to get them to the place of destination in a few weeks, months, or, at any rate, within the year. It does not matter that none of the contingencies we have mentioned did happen, or that appellees were in fact more than a year in performing the contract. It is sufficient if the happening of any of them within the year would have made the performance of the contract within that year possible."

The case of *Sarles v. Sharlow*, 5 Dak. 100, 37 N. W. 748, was a well-considered case on the point now under consideration. Under an oral agreement in this case made on the fifth day of June, 1883, a dwelling-house, barn, and small granary were to be built by the defendant "during the season of 1883," and a large granary "during the season of 1884." The first three buildings were duly completed during the season of 1883, but the large granary was not completed until the 15th of September, 1884. In the course of a well-reasoned opinion Justice Thomas said: "It will be observed that the agreement was not performed within a year from its making as regards the large granary; but was there anything in the terms thereof which prevented it from thus being performed? It seems to us that, under the terms of this agreement, Sharlow had the right, if he so desired, to have completed these buildings, and demanded the delivery of the lumber for that purpose, at a time prior to the fifth day of June, 1884. If so, it was certainly possible to have performed the contract within a year from its making. That Sharlow had this right or privilege, under the terms of said agreement, is very clear, unless the word 'season,' as used in the agreement, be construed as referring alone to a period of the year subsequent to the fifteenth day of June. Such a construction would be entirely arbitrary, as there is nothing in the context of the agreement, or in the record of this case, tending to support such an interpretation. It is equally true that the record is silent as regards any other construction to be given it. But it is a familiar rule, and one of universal application, that, when the language of a contract is equally susceptible of two or more constructions, courts will invariably adopt that which will sustain the contract, rather than one which will destroy it. In an opinion it is not the duty of courts of justice to rummage through nebulous subtleties of nicely drawn theories of counsel, in order to discover some technicality or seeming defect upon which to impale a contract, and hold it void; but, on the contrary, it is the policy of the law that contracts should be sustained and enforced when this can be done without violence to the language used or the rules.

of construction. . . . We see no good reason to hold the word 'season,' as employed in the agreement, has reference alone to a period of the year subsequent to the fifth day of June; but, in our opinion, it embraces within its scope and meaning that season of the year which, by reason of the severely rigorous climate of this latitude, such work as the building of houses is necessarily confined, to wit, from the 1st of April until the 1st of December of each year. It may be said that we are driven de hors the record to arrive at this conclusion. We answer that we are driven to this conclusion by the exercise of common sense, aided by every-day experience and observation, the circumstances under and object for which the contract was made, which courts are bound to do, in order to give to language the force and effect intended by the parties using it. We therefore conclude that it was optional with defendant Sharlow, under the terms of the agreement, to have completed these houses and barns at any time during the building seasons of the years 1883 and 1884, and that said agreement is not void, but in all respects a good and valid contract": See, also, on this point, *Larimer v. Kelley*, 10 Kan. (298) 228; *Smalley v. Mitchell*, 110 Mich. 650, 68 N. W. 978; *McDonnell v. Home Bitters Co.*, 1 White & Wills, Civ. Cas. Ct. App., sec. 1159.

There are a number of cases that seem to go counter to the cases heretofore cited. But upon examination it will be found that the conflict is more apparent than real. Such cases will be seen to have involved contracts which, from the nature of their subject matter, were incapable of performance within the year, or which, in view of all the circumstances existing at the time and the intent and understanding of the parties, did not reasonably admit of performance within a year from the time of their making.

Thus, in *Groves v. Cook*, 88 Ind. 169, 45 Am. Rep. 462, where the plaintiff, being the owner of a breeding mare, and the defendant of a stallion, it was agreed that the latter should furnish the use of his horse, and pay to the plaintiff fifty dollars for the colt upon the delivery of the same to him when it should be five months old. In a suit by the plaintiff against the defendant on this agreement—the defendant having refused to accept the foal produced thereunder—it was held that the contract was plainly within the inhibition of the statute of frauds because according to its terms, and in the course of nature, it could not be performed within a year from the time it was made.

So, in *Swift v. Swift*, 46 Cal. 266, a verbal contract between a lender and borrower that money loaned was to be repaid when nut-bearing trees about to be planted on the borrower's farm yielded an income sufficient to pay the same, over and above the paying expenses of the farm, and of the borrower's family, was held unenforceable because a number of years would necessarily elapse before the money could be paid.

In *Day v. New York Cent. R. Co.*, 31 Barb. 548, the plaintiff agreed with the defendant by parol that it should have certain premises if the defendant would deliver to the plaintiff to feed and keep temporarily all the stock transported on defendant's road eastward which it was obliged to unload from its cars. The plaintiff was also to erect upon his own lands, adjoining the strip to be conveyed, cattle-yards, and pens for stock, swine, sheep, etc., that might be

wanted to accommodate the shipping and transferring the stock to and from the cars; and should build a house prepared to entertain the drovers and men in charge of the stock. This agreement was held unenforceable under the statute, as it was clearly a permanent arrangement to continue during the existence of the defendant corporation.

Similarly in *Warner v. Texas & P. R. Co.*, 54 Fed. 922, 4 C. C. A. 673, 13 U. S. App. 236, the parol agreement was held invalid where it appeared that in consideration of the plaintiff's agreement to grade the ground and furnish the ties for a switch on the defendant's railroad, the defendant would complete and maintain such switch for the plaintiff's benefit for shipping purposes "as long as he needed it." Here it was clear that the plaintiff would need the switch for a much longer period than one year from the time of the making of the agreement. This case was noted with approval, and followed in *Metropolitan Trust Co. v. Topeka Water Co.*, 132 Fed. 102, where the agreement was that in consideration of the erection of a standpipe and certain other considerations by the owner of a building, the receiver of a water company "would supply and furnish such standpipe at all times with a full, adequate, and sufficient supply of water, with sufficient pressure at all times for use in the extinguishment of fire." Obviously and of necessity, the court said, a permanent engagement was made, bringing the agreement within the purview of the statute of frauds and making it nonenforceable.

So, in *Mills v. O'Daniel*, 23 Ky. Law Rep. 73, 62 S. W. 1123, an agreement between a debtor and creditor that if the former would pay a certain amount "within two years," it would be accepted in full of the indebtedness was held an invalid contract, since there was no contingency in which it was possible to enforce collection of the debt within two years. A similar case was *McKeaney v. Black*, 117 Cal. 587, 49 Pac. 710, where the agreement was to pay "at its maturity" a note payable "on or before three years after date." So, in *Carney v. Mosher*, 97 Mich. 554, 56 N. W. 935, where there was a parol lease for one year, with the agreement that the tenant might sow the land to wheat, since there was the implied right to enter after the expiration of his lease to reap the crop.

Other decisions along this same line are, *Wilson v. Ray*, 13 Ind. 1; *Herrin v. Butters*, 20 Me. 119; *White v. Fitts*, 102 Me. 240, 120 Am. St. Rep. 483, 66 Atl. 533, 15 L. R. A., N. S., 313; *Frary v. Sterling*, 99 Mass. 461; *Spokane Canal Co. v. Coffman* (Wash.), 112 Pac. 383; *Kimmins v. Oldham*, 27 W. Va. 258.

**e. Contracts of Employment.**—Contracts of employment beginning in praesenti, and of indefinite duration, have been invariably held not obnoxious to the statute of frauds, being terminable at any time by the parties, and therefore susceptible of performance within a year from the time of their inception: *Kutz v. Fleisher*, 67 Cal. 93, 7 Pac. 195; *Russell v. Slade*, 12 Conn. 455; *Royal Remedy & Extract Co. v. Gregory Grocery Co.*, 90 Mo. App. 53; *Matthews v. Wallace*, 104 Mo. App. 96, 78 S. W. 296; *Burlingame v. Manderville*, 7 N. Y. St. Rep. 458; *Jagan v. Goetz*, 11 Misc. Rep. 380, 32 N. Y. Supp. 144; *Everitt v. New York Engraving & Printing Co.*, 35 N. Y. Supp. 1097; *Rochester Folding Box Co. v. Brown*, 53 App. Div. 350, 66 N. Y. Supp. 867; *Jackson v. Higgins*, 70 N. H. 637, 49 Atl. 574.

A contract of employment for "a reasonable time" is not within the statute: *Niagara Fire Ins. Co. v. Greene*, 77 Ind. 590; nor is an agreement to make the plaintiff weekly payments on account for his services, and to pay the balance of his wages when he learned his trade: *Myon v. Korb*, 21 Ky. Law Rep. 163, 50 S. W. 1108; nor is a contract of employment from month to month, although service thereunder continues for more than three years: *Kiene v. Shaeffing*, 33 Neb. 21, 49 N. W. 773. But a contract of employment for three years, at so much per day, is within the statute, for this is an entire contract for three years' service.

**f. Partnership Contracts.**—Parol contracts of partnership are governed by the same rule that applies to employment contracts, where they are to be entered into immediately and no definite time is fixed for the continuance of the partnership. The statute of frauds has no application to such contracts, for they are susceptible of performance within a year by the dissolution of the partnership at the pleasure of either party at any time within the year: *Stitt v. Rat Portage Lumber Co.*, 98 Minn. 52, 107 N. W. 824; *Jordan v. Miller*, 75 Va. 442; *Treat v. Hiles*, 68 Wis. 344, 60 Am. Rep. 858, 32 N. W. 517.

In *Smith v. Tarlton*, 2 Barb. Ch. 336, the court held valid a parol contract of partnership which was to continue three years unless sooner dissolved by the consent of the parties: See, also, *Shropshire v. Adams*, 40 Tex. Civ. App. 330, 89 S. W. 448.

In *Osment v. McElrath*, 68 Cal. 466, 58 Am. Rep. 17, 9 Pac. 731, where one of two partners, on dissolution of the partnership, agreed to wind up the business of the firm and pay to the other his share of the proceeds, the general rule was applied that there was nothing in this agreement to show that it could not be fully performed within a year, and it was, therefore, not within the statute of frauds.

The rule applies, of course, equally to quasi partnerships, as in *Sullivan v. Winters*, 91 Ark. 149, 120 S. W. 843, where two parties enter into an oral agreement for a future sale of land and a division of the proceeds of such sale, without fixing any time for the performance of the agreement. And likewise where it appears, as in *Jones v. McMichael*, 12 Rich. (S. C.) 176, that the work of the special partnership cannot be completed within a year and that the parties expected the contract to continue more than a year, the agreement for such special partnership is invalid under the statute of frauds.

**g. Promises to Marry.**—In some jurisdictions promises to marry are held not to be affected by the statute of frauds. But in the jurisdictions where the statute is held to apply, the rule governing their validity is the same as that applied to verbal contracts generally, touching the time of their performance. "If the promise of marriage was to be performed in the future, and no time was specified for the performance of it, and such contract is capable of entire performance within one year from its date, it is not within the statute of frauds. This question does not depend entirely upon the intention or understanding of the parties to the contract, nor upon the fact that the promise was not performed within one year; but if, when the contract was made, it was in reality capable of full performance in good faith within a year, without violating the terms of the contract, or without the intervention of extraordinary circumstances, then it is to be considered as not within the statute of frauds, and a valid and binding contract": *MacElree v. Wolfersberger*, 59 Kan. 105, 52 Pac. 69.

In *Clark v. Pendleton*, 20 Conn. 495, the promise was to marry after the defendant's return from a whaling voyage, which was expected to consume about eighteen months. This agreement was held not to be one which, by a true construction of the statute, was not to be performed within a year from the making of it. It did not appear that the promise was made with reference to, or that its performance was to depend on, the termination of a voyage which would necessarily occupy that time. It appeared only that it was expected by the parties that the defendant would be absent for the period of eighteen months. "But this expectation," said the court, "which was only an opinion or belief of the parties, and the mental result of their private thoughts, constituted no part of the agreement itself; nor was it connected with it, so as to explain or give a construction to it, although it naturally would, and probably did, from one of the motives which induced them to make the agreement. The thing thus anticipated did not enter into the contract, as one of its terms; and according to it, as stated, the defendant, whenever he should have returned, after having embarked on the voyage, whether before or after the time during which it was thus expected to continue, would be under an obligation to perform his contract with the plaintiff. As it does not, therefore, appear, by its terms, as stated, that it was not to be performed within a year from the time when it was made, it is not within the statute."

So in *Lawrence v. Cooke*, 56 Me. 187, 96 Am. Dec. 443, where the defendant said to the plaintiff that he was not able to marry her then, but promised to marry her within four years. This promise was held valid and binding, as it was obvious that it might have been performed within a year, and it did not appear that the parties understood that it was not to be performed within that time.

So where defendant promised to marry the plaintiff, but being at the time in a delicate condition of health, the performance of the agreement was made to depend upon his restoration to health: *McConahay v. Griffey*, 82 Iowa, 564, 48 N. W. 983. See, also, *Paris v. Strong*, 51 Ind. 339.

Where, however, the oral promise is upon a condition so uncertain and remote that it amounts to little more than a promise to marry when the promising party is so minded, as "when he could arrange his affairs properly," such a promise is really no promise at all so far as regards the time of performance, and is incapable of enforcement: *Nichols v. Weaver*, 7 Kan. 373.

### III. Agreements Dependent upon the Happening of a Contingency.

a. In General.—Where the performance of an agreement depends upon the happening of a contingency which may occur within the year, the statute of frauds does not apply: *Derrick v. Brown*, 66 Ala. 162; *Hedfin v. Milton*, 69 Ala. 354; *Dougherty v. Rosenberg*, 62 Cal. 32; *Raynor v. Drew*, 72 Cal. 307, 13 Pac. 866; *Indiana & I. C. R. Co. v. Seearce*, 23 Ind. 223; *Straughan v. Indianapolis & St. L. R. Co.*, 38 Ind. 185; *Bullock v. Falmouth & C. H. Turnpike Road Co.*, 85 Ky. 184, 3 S. W. 129; *Bartlett v. Mystic River Corp.*, 151 Mass. 433, 24 N. E. 780; *Drew v. Billings-Drew Co.*, 132 Mich. 65, 92 N. W. 774; *Burgesser v. Wendel*, 73 N. J. L. 286, 62 Atl. 994; *Hodges v. Richmond Mfg. Co.*, 9 R. I. 482; *Gadsden v. Lance*, 1 McMull. Eq. (S. C.) 87, 37 Am. Dec. 548; *Gonzales v. Chartier*, 63 Tex. 36; *Hintze v. Krab-*

benschmidt (Tex. Civ. App.), 44 S. W. 38; *Sherman v. Champlain Transp. Co.*, 31 Vt. 162; *McPherson v. Cox*, 96 U. S. 404, 24 L. ed. 746; *Nester v. Diamond Match Co.*, 143 Fed. 72, 74 C. C. A. 266; *Peter v. Compton, Skin.* 353, 90 Eng. Reprint, 157.

b. **Contracts of Employment** have been heretofore considered from the viewpoint of the indefiniteness of the time of their performance: *Supra*, II, subdivision e. We shall now notice such contracts when based upon some contingency that may happen within a year, and the possibility of the occurrence of which within that time rescues the contract from the operation of the statute of frauds.

Thus, in *Harrington v. Kansas City Cable Ry. Co.*, 60 Mo. App. 223, a verbal agreement by the defendant to give to the plaintiff, in consideration of the plaintiff's release of a personal injury claim, steady employment at a stipulated salary "so long as he should properly do the work assigned him," was held not to be within the statute; for the death of the plaintiff within a year would have worked a full performance, and that possibility saved the contract from the terms of the statute. A similar case was that of *Louisville & N. R. Co. v. Offut*, 15 Ky. Law Rep. 301, where the plaintiff was to be retained in the service of a railroad company "so long as he did faithful and honest work"; and *Sax v. Detroit etc. R. Co.*, 125 Mich. 252, 84 Am. St. Rep. 572, 84 N. W. 314, where the plaintiff's employment was to continue "as long as his services were satisfactory." So in *East Tennessee V. & G. R. Co. v. Staub*, 75 Tenn. (7 Lea) 397, an agreement to retain the plaintiff in the defendant's employ "until he got well" was held to be one that might be performed within a year, as by its terms it was to terminate whenever the plaintiff's disabilities by reason of the injuries received should cease, and it would of course terminate at the plaintiff's death, either of which events might occur within one year: See, also, *American Quarries Co. v. Lay*, 37 Ind. App. 386, 73 N. E. 608, and *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 51 Am. St. Rep. 289, 32 N. E. 802.

Similar cases of contingent employment are those where the services of parties are to be retained during the continuance of a certain business, as in *Yellow Poplar Lumber Co. v. Rule*, 106 Ky. 455, 50 S. W. 685; *Carnig v. Carr*, 167 Mass. 544, 57 Am. St. Rep. 488, 46 N. E. 117, 35 L. R. A. 512; *Carter White Lead Co. v. Kinlin*, 47 Neb. 409, 66 N. W. 536; *Texarkana Lumber Co. v. Lennard*, 47 Tex. Civ. App. 116, 104 S. W. 506. So where the plaintiff was to be employed at a specified salary so long as he continued to own his stock in a certain corporation: *Darknell v. Coeur d'Alene & St. Joe Transp. Co.*, 18 Idaho, 61, 108 Pac. 536; or "for the term of five years, or so long as A. shall continue to be the agent of the company": *Roberts v. Rockbottom Co.*, 48 Mass. (7 Met.) 46; or for one year to commence when the plaintiff secured a release from his former employer, as there was nothing to render it impossible for the service to begin on the day the agreement was made, if the plaintiff had secured an immediate release from former employment: *Baltimore Breweries Co. v. Callahan*, 82 Md. 106, 33 Atl. 460; or for one year with provision for removal beyond the year, without notice to terminate, as the services could be rendered, payment made, and notice to terminate given, all within the year: *General Electric Insp. Co. v. Ebling Brewing Co.*, 52 Misc. Rep. 145, 101 N. Y. Supp. 648.



So, oral contracts to employ a person for life, or to pay for services at death, being contingent upon the duration of life, may be performed within a year, and therefore are not within the statute of frauds: *Boggs v. Pacific Steam Laundry Co.*, 86 Mo. App. 616; *Sword v. Keith*, 31 Mich. 247; *Updike v. Ten Broeck*, 32 N. J. L. (3 Vroom) 105; *Kent v. Kent*, 62 N. Y. 560, 20 Am. Rep. 502; *Jilson v. Gilbert*, 26 Wis. 637, 7 Am. Rep. 100. Contracts of this character will be further considered in the next subdivision.

Contracts for personal services which by their terms are to continue for a longer period than one year are plainly within the statute, although subject to determination sooner on a given event: *Meyer v. Roberts*, 46 Ark. 80, 55 Am. Rep. 567; *Hill v. Hooper*, 67 Mass. (1 Gray) 131; *Pitcher v. Wilson*, 5 Mo. 46; *Biest v. Versteeg Shoe Co.*, 97 Mo. App. 137, 70 S. W. 1081; *Shute v. Dorr*, 5 Wend. 204; *Jones v. Hay*, 52 Barb. 501; *Chase v. Hineckley*, 126 Wis. 75, 110 Am. St. Rep. 896, 105 N. W. 230, 2 L. R. A., N. S., 738, 5 Ann. Cas. 328.

c. *Agreements Dependent upon Life of Party.*—Contracts such as to support another for a number of years, or for life, or a child until it reaches maturity, to make provision for another by will—in short, all contracts which by their terms are to be performed, or will be fully performed at the death of a party, are not within the statute of frauds, for death is a contingency which may, of course, occur within a year from the making of the agreement. It is in these cases, if anywhere, that, as it would seem, the courts have departed from the intention of the framers of the ancient statute. For there is an apparent inconsistency in holding invalid an agreement which by calculation extends beyond a year by a single day, and upholding an agreement where the great probability is that performance will extend over a dozen years or more. It was doubtless cases like these that the court, in *Sarles v. Sharlow*, 5 Dak. 100, 37 N. W. 748, had in mind when it spoke of some of the cases as “running the knife of judicial interpretation dangerously near the vitals of this clause of the statute.”

This liberal interpretation, however, in the class of cases now under consideration has been given to this clause of the statute ever since the early English cases of *Peter v. Compton*, Skin. 353, 90 Eng. Reprint, 157, and *Fenton v. Emblers*, 3 Burr. 1278, 97 Eng. Reprint, 831. The former case stands as an authority on the application of the statute to contingent contracts generally. The latter case approaches more nearly in its facts the cases we have immediately under consideration, in that it was a promise to reward a party for services by a legacy, or provision to be made in a will. The defendant's testator had promised the plaintiff that if she would become his housekeeper he would pay her a stipulated wage, and give her, by his last will and testament, a legacy or annuity of sixteen pounds a year, to be paid yearly. The plaintiff, on this agreement, which was by parol, entered into the testator's service, and became his housekeeper, and continued so for more than three years. Objection was made to this contract that it was within the statute of frauds, and invalid; but the court held otherwise, declaring that the statute plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed; that a contingency was not within it, nor any case that depended upon a contingency; and that it did not extend to cases where the thing might be performed within the year.

The case of *Thomas v. Armstrong*, 86 Va. 323, 10 S. E. 6, 5 L. R. A. 529, was a somewhat similar case. Here there was an agreement to leave a person a support when the promisor died, in consideration of services to be rendered by such person to the promisor during the remainder of her life. This contract the lower court had held unenforceable under the statute of frauds, not being in writing, and being a contract not to be performed within a year. In reversing this ruling the supreme court of appeals said: "The contracts contemplated by the statute are such as, by their terms, are postponed beyond a year; but when the agreement is to be postponed upon a contingency, and it does not appear within the agreement that it is to be performed after the year, then writing is not necessary, for the contingency might happen within the year. If by its terms, or by reasonable construction, a contract not in writing can be fully performed within a year, although it can be done only by the occurrence of some improbable event, as the death of the person referred to, it is not within the statute. . . . The full performance on both sides was not postponed beyond the year, but was contingent upon the death of Mrs. Busmiselle, which might have happened within the year. It is not, therefore, such a contract as is not to be performed within a year by its terms, and so was not required by the statute to be in writing."

By the same rule, and upon like reasoning, contingent verbal agreements have been upheld in the following cases: *Ellieott v. Turner*, 4 Md. 476, where a grandfather of two minor children agreed to pay their stepfather the expense incurred in their education and support; *Myles v. Myles*, 69 Ky. (6 Bush) 237, where the agreement was to devise lands in payment for services in caring for the owner for life; *Stewart v. Smith*, 6 Cal. App. 152, 91 Pac. 667, where a testatrix had agreed to make a will leaving certain property to her children at her death; *Wooldridge v. Stern*, 42 Fed. 311, 9 L. R. A. 129, where the agreement was to support a child until he came of age; *McCabe v. Green*, 18 App. Div. 625, 45 N. Y. Supp. 723, where the agreement was to pay for a person's board as long as she should live; *Martin v. Batchelder*, 69 N. H. 360, 41 Atl. 83, where a party agreed to keep a horse a year for its use, the agreement being made several days before the delivery of the horse; *Wynn v. Followill*, 98 Mo. App. 463, 72 S. W. 140, where a party agreed to furnish "help" to another for the purpose of assisting her in supporting and caring for his infant child; *Whitley v. Whitley's Admr.*, 26 Ky. Law Rep. 134, 80 S. W. 825, where a widow relinquished to a grantee of land all her right of dower therein in consideration of her support by the grantee during the remainder of her life; *Johnson v. Johnson*, 31 Utah, 408, 88 Pac. 230, an agreement by a grantee to give to his grantor for life half of the crops produced on the land; *McDaniel v. Hutcherson*, 136 Ky. 412, 124 S. W. 384, where the defendant agreed to give the plaintiff a home during the former's lifetime, and also to give him the defendant's home place when the latter should die; *McCormick v. Drummatt*, 9 Neb. 384, 2 N. W. 729, where under an agreement between a father and son, the latter was to have the use of his father's land during the father's life in consideration of his supporting his father for life; *McLees v. Hale*, 10 Wend. 426, where the agreement was to support a child until it reached the age of five or six years, or as long as it was a charge upon the town; *Atchison, T. & S. F.*

*B. Co. v. English*, 38 Kan. 110, 16 Pac. 82, where the railroad company agreed to give a grantor a pass for life in consideration of a grant of lands, the pass to be issued annually.

For further illustrations, see *Burney v. Ball*, 24 Ga. 505; *Birks v. Gillett*, 13 Ill. App. 369; *Riddle v. Backus*, 38 Iowa, 81; *Wiggins v. Keizer*, 6 Ind. 252; *Bell v. Hewett's Exr.*, 24 Ind. 280; *Frost v. Tarr*, 53 Ind. 390; *Harper v. Harper*, 57 Ind. 547; *Story v. Story*, 22 Ky. Law Rep. 1731, 61 S. W. 279; *Howard v. Burgen*, 34 Ky. (4 Dana) 137; *Bull v. McCrea*, 47 Ky. 422; *Stowers v. Hollis*, 83 Ky. 544; *Hutchinson v. Hutchinson*, 46 Me. 154; *Peters v. Westborough*, 36 Mass. (19 Pick.) 364, 31 Am. Dec. 142; *Scribner v. Flagg Mfg. Co.*, 175 Mass. 536, 56 N. E. 603; *Eiseman v. Schneider*, 60 N. J. L. 291, 37 Atl. 623; *Thorp v. Stewart*, 44 Hun, 232; *Dresser v. Dresser*, 35 Barb. 573; *McKinney v. McCloskey*, 76 N. Y. 594; *Westropp v. Westropp*, 13 Ohio C. C. 244, 7 Ohio Dec. 14; *Thompson v. Gordon*, 3 Strob. (S. C.) 196; *Gray v. Freeman*, 37 Tex. Civ. App. 556, 84 S. W. 1105; *Tipton v. Tipton* (Tex. Civ. App.), 118 S. W. 842; *Heath v. Heath*, 31 Wis. 223; *Taylor v. Deseve*, 81 Tex. 246, 16 S. W. 1008.

The rule seems to apply equally in case the agreement is contingent upon the life of more than one person, as in *Heery v. Reed*, 80 Kan. 380, 102 Pac. 846, where one agreed to live in another's family and work for him until he and his wife died; in *Carr v. McCarthy*, 70 Mich. 258, 38 N. W. 241, where a son obligated himself to support his parents during their lives; in *Thomas v. Feese*, 21 Ky. Law Rep. 206, 51 S. W. 150, where one promised that upon the death of himself and wife, the plaintiff should have all their property.

The early case of *Izard v. Middleton*, 1 Desaus. (S. C.) 116, opposes the general current of authority on the point we are now considering. In this case two young men, the heads of two collateral branches, sprung from one common ancestor, entered into a mutual, verbal agreement that if either of them should die without male issue, he should give and bequeath by will the sum of five thousand pounds sterling to the survivor, for the purpose of keeping up the name and consequence of the family. In holding this agreement unenforceable under the statute of frauds, as one not to be performed within a year, the chancellor said: "This agreement rested on a contingency whether either of the parties died within the year or not. This is the only doubtful point. But if the words and intent of the statute are thoroughly considered, the doubt vanishes and gives place to certainty. I consider it as a catching bargain; in which cases it is an invariable maxim, 'that contingency shall be of no avail.' The first object of the statute was to prevent improvident and loose bargains from being carried into execution, as they had been repeatedly found to have been productive of frauds and consequent perjuries. In most of those agreements contingency was set up as the ground for the apparent inequality, but it has been uniformly reprobated. If it were not so, how easily it might be evaded in every instance. It would be requisite only to make the agreement executory within the year, with a condition annexed to extend the time on any probable contingency; and which might be carried on to the end of a man's life. Would not this pave the way for the perpetuation of those very frauds against which the statute meant to apply a remedy? Would it not be too lax a construction of the statute to say that because the agreement might have taken effect within the year, that

this circumstance alone is to be regarded? And that the probability about it might not have taken effect within twenty years is to be totally laid out of the case? And yet it is by this construction alone that such an agreement could be taken out of the statute. I think the words do not admit of that construction; because it would be opening the door for the admission of fraud, when the statute intended to exclude it."

In *Vose v. Strong*, 45 Ill. App. 98, also, the court seems to take a view contrary to that in the cases cited. This was a bill filed against the executors of the estate of a deceased person, wherein it was claimed that a sum of money was due the complainant by virtue of a parol contract existing between him and the deceased, whereby the former was to transact the business of the latter during his life for a certain compensation. The decision in this case, however, so far as the clause of the statute we are considering is concerned, might be considered as obiter, for the evidence failed to show such a contract, and it further appeared that the alleged contract was one for the sale of an interest in land, and therefore void under another section of the statute of frauds.

In *Deaton v. Tennessee Coal & R. Co.*, 59 Tenn. (12 Heisk.) 650, a verbal contract between a railroad company and the widow of a person killed by one of its trains provided that in consideration of the widow's agreement not to sue for damages, the company would support her and her three children (all then minors) during her life, and in the event of her death before the majority of the youngest child, to support the children until then. This contract was held to be within the statute as one not to be performed within a year, the court drawing a distinction between the case at bar and cases of contract to support a person during life; in the latter class of cases the contract being fully performed on the happening of the death within a year, whereas in the former the death of the widow and the youngest child before the latter came of age would have the contract not fully performed, but defeated.

In *Goodrich v. Johnson*, 66 Ind. 258, a verbal agreement between the mother and the putative father of a bastard child that the father should support the child until majority was held to be an agreement which by its express terms was not to be, and could not be, performed within one year from the making thereof. It was a continuing promise, extending through the period of twenty-one years from the making thereof, and was not to be fully performed until after the lapse of all those years.

In its facts the above case is similar to that of *Wooldridge v. Stern*, 42 Fed. 311, 9 L. R. A. 129, but squarely conflicts with that and kindred cases in the conclusion reached.

**d. Agreements in Restraint of Trade.**—Similar, in some respects, to the agreements we have just been considering, are contracts in restraint of trade, so called, agreements not to carry on a certain business or profession in a particular locality, either for a number of years, or indefinitely. Such contracts are not within the statute of frauds, as in *Blanchard v. Weeks*, 34 Vt. 589, where the defendant stipulates that he would "refrain from the practice of medicine and surgery at McIndoes Falls, while the plaintiff should reside and practice medicine and surgery at said McIndoes Falls, forever." "This stipulation," said the court, "in its character is strictly per-

sonal, to be performed by the defendant himself, and one which can never become binding upon his representatives, or any other person. It is not to be performed by any active agency of the defendant, but only requires a passive acquiescence in its provisions. It is binding upon the defendant while he lives, but at his death all obligation terminates; the end sought to be attained by it is fully accomplished, and the contract is then performed. Although the expressions are that the defendant will refrain from the act forever, it is but saying that he will not do the act, the obligation of which ceases at his death. It is a contract, therefore, to be performed during the life of the defendant, and if not violated during his lifetime, is fully performed at his death." The conclusion followed that the contract, being one that was to be performed during the lifetime of the contracting party, was not within the statute of frauds, the court upon this point following the rule established by the cases heretofore cited involving contracts contingent upon life.

So, in *Doyle v. Dixon*, 97 Mass. 208, 93 Am. Dec. 80, an agreement by the defendant not to go into the grocery business in a certain city for five years was held not to be within the statute, the court (Gray, J.) saying: "It is well settled that an oral agreement which according to the expression and contemplation of the parties may or may not be fully performed within a year is not within that clause of the statute of frauds which requires any 'agreement not to be performed within one year from the making thereof' to be in writing in order to maintain an action. An agreement, therefore, which will be completely performed according to its terms and intention if either party should die within the year is not within the statute. Thus in *Peters v. Westborough*, 19 Pick. (Mass.) 364, 31 Am. Dec. 142, it was held that an agreement to support a child until a certain age at which the child would not arrive for several years was not within the statute, because it depended upon the contingency of the child's life, and, if the child should die within one year, would be fully performed. On the other hand, if the agreement cannot be completely performed within a year, the fact that it may be terminated or further performance excused or rendered impossible by the death of the promisee or of another person within a year is not sufficient to take it out of the statute. It was therefore held in *Hill v. Hooper*, 1 Gray (Mass.), 131, that an agreement to employ a boy for five years and to pay his father certain sums at stated periods during that time was within the statute; for although by the death of the boy the services which were the consideration of the promisee would cease, and the promise therefore be determined, it would certainly not be completely performed. So if the death of the promisor within the year would merely prevent full performance of the agreement, it is within the statute; but if his death would leave the agreement completely performed and its purpose fully carried out, it is not. It has accordingly been repeatedly held by this court that an agreement not hereafter to carry on a certain business at a particular place was not within the statute, because, being only a personal engagement to forbear doing certain acts, not stipulating for anything beyond the promisor's life, and imposing no duties upon his legal representatives, it would be fully performed if he died within the year: *Lyon v. King*, 11 Met. (Mass.) 411, 45 Am. Dec. 219; *Worthy v. Jones*, 11 Gray (Mass.), 168, 71 Am. Dec. 696. An agree-

ment not to engage in a certain kind of business at a particular place for a specified number of years is within the same principle; for whether a man agrees not to do a thing for his life or never to do it, or only not to do it for a certain number of years, it is in either form an agreement by which he does not promise that anything shall be done after his death, and the performance of which is therefore completed with his life. An agreement to do a thing for a certain time may perhaps bind the promisor's representatives, and at any rate is not performed if he dies within that time. But a mere agreement that he will himself refrain from doing a certain thing is fully performed if he keeps it so long as he is capable of doing or refraining. The agreement of the defendant not to go into business again at Chicopee for five years was therefore not within the statute of frauds."

Similar parol agreements have been upheld in the following cases: *Hampton v. Caldwell* (Ark.), 129 S. W. 816; *Hall v. Solomon*, 61 Conn. 476, 29 Am. St. Rep. 218, 23 Atl. 876; *Hill v. Jamieson*, 16 Ind. 125, 79 Am. Dec. 414; *O'Neal v. Hines*, 145 Ind. 32, 43 N. E. 946; *Wolverton v. Bruce*, 6 Ind. Ter. 185, 89 S. W. 1018; *Dickey v. Dickinson*, 105 Ky. 748, 88 Am. St. Rep. 337, 49 S. W. 761; *Foster v. McO'Brien*, 18 Mo. 88; *Blanding v. Sargent*, 33 N. H. 239, 66 Am. Dec. 720; *Slocumb v. Seymour*, 7 Ohio Dec. 563; *Richardson v. Pierce*, 7 R. I. 330; *Zanturjian v. Boornazian*, 25 R. I. 151, 55 Atl. 199; *Erwin v. Hayden* (Tex. Civ. App.), 43 S. W. 610.

e. **Time Enlarged or Abridged by Contingency.**—Where it appears that the time of performance of a contract is either enlarged or abridged by the option of the parties or some other contingency, the exercise of which option or the happening of which contingency will bring the performance of the contract within the statutory year, such contract does not fall under the condemnation of the statute of frauds. Thus in *Phoenix Ins. Co. v. Ireland*, 9 Kan. App. 644, 58 Pac. 1024, a parol agreement that a fire insurance policy should be renewed from year to year, such agreement to be terminable at any time upon notice by either party thereto, is not void under the statute; nor is a verbal agreement to teach school for a year with the option of a further term of one year at the same salary: *Smith v. Conlin*, 19 Hun (N. Y.), 234; nor a salesman's contract which was to last eight months, but could be extended by mutual consent: *Brigham v. Carlisle*, 78 Ala. 243, 56 Am. Rep. 28; nor a verbal contract between two parties, made in November, whereby one of them agrees to procure consignments of goods to the other for one year from the first day of December, and the other agrees to pay a commission on such consignments, but such contract permits either party to terminate it in the following June: *Blake v. Voigt*, 134 N. Y. 69, 30 Am. St. Rep. 622, 31 N. E. 256; nor an agreement by which the defendant agreed to buy certain shares of stock and sell them to the plaintiff at a certain price, the plaintiff to take the same at the end of three years from the date of the agreement, but with the right to take the stock at any time prior to the expiration of the three years: *Seddon v. Rosenbaum*, 85 Va. 928, 9 S. E. 326; nor an agreement by which the defendant was to furnish certain water-power to a gas company for a term of ninety-nine years, but which contained a stipulation permitting the gas company to terminate the contract on three months' notice, provided its business proved unprofitable: *Johnston*

v. Bowersock, 62 Kan. 148, 61 Pac. 740; nor an agreement whereby an oil company agreed to furnish oil to the plaintiff on certain terms for five years, "or so long as he should remain in business" at a certain place: Standard Oil Co. v. Denton, 24 Ky. Law Rep. 906, 70 S. W. 282; nor an agreement "to continue as long as the parties are mutually satisfied": Greene v. Harris, 9 R. I. 401; nor a verbal agreement whereby the plaintiff was to deliver to the defendant, on the line of its road, cross-ties, trestle timber, and wood to be inspected once a month, and, if received, to be paid for at certain prices, which agreement was to continue until the plaintiff was notified to stop: Walker v. Wilmington C. & A. R. Co., 26 S. C. 80, 1 S. E. 366; nor an agreement whereby B is to engage in the business of selling organs manufactured by A and is to introduce them into use in a given territory, the arrangement to continue "so long as either party choose," and till the party desiring to put an end to it shall give to the other reasonable notice of his purpose to terminate the arrangement: Sterling Organ Co. v. House, 25 W. Va. 64; nor an agreement upon the sale of railroad stock to repurchase it, in case the road is not built within a reasonable time, "not exceeding five years": Randall v. Turner, 17 Ohio St. 262. For further illustrations, see Maxwell v. Devalinger, 2 Penn. (Del.) 504, 47 Atl. 381; Scribner v. Flagg Mfg. Co., 175 Mass. 536, 56 N. E. 603; Moore v. Fox, 10 Johns. (N. Y.) 244, 6 Am. Dec. 338; Trustees First Baptist Church v. Brooklyn Fire Ins. Co., 19 N. Y. 305; Ward v. Hasbrouck, 169 N. Y. 407, 62 N. E. 434; Von Kamen v. Roes, 65 Hun, 625, 20 N. Y. Supp. 548; Southwell v. Beasley, 5 Or. 143, 458; New York & T. Land Co. v. Dooley, 33 Tex. Civ. App. 636, 77 S. W. 1030; Aiken v. Nogle, 47 Kan. 96, 27 Pac. 825.

**f. Agreements Determinable by Contingency.**—If an agreement cannot, according to its terms, be completely performed within a year, the fact that it may be terminated, or further performance excused or rendered impossible, by the happening of some contingency within a year, is not sufficient to take it out of the statute of frauds: Patten v. Hicks, 43 Cal. 509; Harris v. Porter, 2 Harr. (Del.) 27; Wilson v. Ray, 13 Ind. 1; Mallett v. Lewis, 61 Miss. 105; Packet Co. v. Sickles, 72 U. S. (5 Wall.) 580, 18 L. ed. 550.

In Browne on the Statute of Frauds, section 282, the rule is stated as follows: "Thus a contract of hiring for more than a year is within the statute, although it be stipulated that either party may withdraw from the contract before the expiration of the year." Then, after quoting a number of cases, the learned author proceeds: "In such cases as those just cited, it cannot be said that the agreement would be fully performed when one party withdrew from the contract of hiring. . . . We should rather say, that in such event, the performance of the agreement according to its terms would be frustrated." And in section 273: The statute "means to include any agreement which by a fair and reasonable interpretation of the terms used by the parties, and in view of all the circumstances existing at the time, does not admit of performance according to its language and intention, within a year from the time of its making."

In Wagniere v. Dunnell, 29 R. I. 580, 73 Atl. 309, 17 Ann. Cas. 205, an agreement was held to be within the statute, under which the plaintiff was employed for a period of three years from its date, "or for so much of such three years as your results show the ability that you now claim to be able to give." This was plainly an agreement

which was not to be performed within a year from the making of it, said the court. "It is established by the great weight of authority that a contract for a definite term longer than a year is not excluded from the operation of the statute of frauds because it contains a provision enabling either party to put an end to the contract within a year; the reasoning of the courts being that the rescission of a contract is not the performance of it. . . . It is clear that the parties intended that this agreement should run for three years, and that it could be terminated before the end of that time only upon breach by one party or the other. It could not be performed in accordance with its terms in less than three years, and if brought to an end sooner, it must be an untimely end by breach and not by performance, or by the exercise of an implied option reserved to the defendant in case results should not 'show the ability that you now claim to be able to give.'"

So in *Lapham v. Whipple*, 49 Mass. (8 Met.) 59, 41 Am. Dec. 487, an agreement of a vendor, upon the sale of a patent right, to repay the consideration, if the vendee did not, within three years, realize a certain amount out of the profits of such patent right, was held to be one not to be performed within a year from the time it was made, and therefore within the provisions of the statute of frauds requiring such agreements to be in writing.

In *Keller v. Mayer Fertilizer Co.* (Mo. App.), 132 S. W. 314, the undertaking of the plaintiff was to deliver to the defendant at certain prices all of the fat and refuse which he might accumulate or have until a period extending more than a year from the time the contract was made. It was contended on behalf of the plaintiff that as he might not accumulate or have refuse matter during the latter part of this period, the contract was susceptible of full performance within less than a year, and for this reason should be declared one falling without the influence of the statute. It was held, however, that the contract imposed reciprocal obligations, and that while it was possible for the plaintiff to perform the undertaking in less than a year from its date because of his inability to accumulate or have the material for delivery, the contract was nevertheless one within the statute of frauds, for the reason that it purported an obligation which required the defendant to accept a delivery made on the very last day, and required the plaintiff as well to make the delivery if he either accumulated or had any of the material referred to.

**g. Liability Accruing Within Year on Ultra-year Contracts.**—Verbal contracts of insurance and guaranty extending over a period in excess of a year from the time of their making come within the ruling in the principal case, *Okin v. Selidor*, 78 N. J. L. 54, ante, p. 588, 78 Atl. 770. While these contracts in terms may cover a period of several years, yet, since the liability thereunder may accrue within a year, and the obligor thus be called upon to perform his contract within that time, the contracts are not within the statute of frauds. In the principal case, the court seems to place an unnecessary limitation upon its decision. The breach upon which the action was brought in that case occurred during the first year covered by the guaranty. The court places some emphasis on that fact, even if it does not, indeed, rest the entire case upon it. The court seems to assume that an action for breaches occurring after the first year



would be barred by the statute, thereby, as it seems to us, confusing the cause of action—the breach of the contract—with the subject of the action—the contract itself. Of course, any consideration of possible breaches occurring after the first year was unnecessary to the decision of the case, but as the court's statement as to the effect of the statute upon actions that might be brought for such breaches seems to be at variance with the holding in similar and analogous cases, such a statement should not go unchallenged. A contract, so far as this clause of the statute of frauds is concerned, is either valid or void (unenforceable) at the time it is made; the application of the statute can in no way be affected by what takes place afterward.

In *American Central Ins. Co. v. Leake*, 31 Ky. Law Rep. 1016, 104 S. W. 373, in which the action was based upon a verbal insurance contract for more than a year, the court placed its decision holding the contract valid on the established doctrine that "if the time of performance depends, by the contract, on a contingency which may happen within a year, the case is not within the statute, although the contingency may not happen within the year; yet as it may happen in that period, in which case the contract is to be then performed, the agreement cannot be said to be one which is not to be performed within the year." And further: "If the performance of a contract depends upon a contingency which may happen within a year, then it is not within the statute, although that contingency may not in fact happen until after the expiration of the year, and although the parties may not have expected that it would occur within that period. It is sufficient if the possibility of performance existed": See, also, *Wiebeler v. Milwaukee Mechanics' Mut. Ins. Co.*, 30 Minn. 464, 16 N. W. 363.

#### IV. Part Performance of Agreements.

a. *In General.*—The courts in some instances seem to have confused the fourth section of the statute of frauds with the seventeenth. The latter section affords an equivalent for the writing or memorandum in a delivery and receipt of a part of the goods sold—in other words, a part performance of the contract. No such equivalent is provided for in the fourth section. And in the clause of that section that we are now considering the validity or enforceableness of the contract, aside from the writing or memorandum, is to be sought in the terms of the contract itself, and not in what the parties may subsequently do in the performance of it. True, a party who has partly performed such a contract, or parted with a valuable consideration on the strength of it, is not to be left without relief. He may sue at law on a quantum meruit or quantum valebat, or he may go to the court of equity for other relief. But in the former case the suit would not be upon the contract, and in the latter, as equity follows the law, there would be no recognition of any contractual rights. The contract itself, not being in writing, and being one not, by its terms, to be performed within a year, would be a nudum pactum, and, as such, unenforceable: See *Vose v. Strong*, 45 Ill. App. 98; *Berry v. Graddy*, 58 Ky. (1 Met.) 553; *Warner v. Texas P. R. Co.*, 54 Fed. 922, 4 C. C. A. 673; *Union Pac. R. Co. v. McAlpine*, 129 U. S. 305, 9 Sup. Ct. Rep. 286, 32 L. ed. 673; *Browne on*

the Statute of Frauds, sec. 451; 2 Story's Equity Jurisprudence, secs. 759, 1522, note 3.

**b. Ultra-year Contracts.**—It is but an application of the rule heretofore stated to place within the statute of frauds all such verbal agreements which by their terms extend beyond the year, although there has been a part performance of their provisions within one year from their making: *Curtis v. Sage*, 35 Ill. 22; *Lowman v. Sheets*, 124 Ind. 416, 24 N. E. 351, 7 L. R. A. 784; *Herrin v. Butters*, 20 Me. 119; *Marcy v. Marcy*, 91 Mass. (9 Allen) 8; *Schultz v. Tatum*, 35 Mo. App. 136; *Buckley v. Buckley*, 9 Nev. 373; *Broadwell v. Getman*, 2 Denio, 87; *Kellogg v. Clark*, 23 Hun, 393; *Drummond v. Burrell*, 13 Wend. 307; *Moore v. Vosburgh*, 66 App. Div. 223, 72 N. Y. Supp. 696; *Gordon v. Niemann*, 118 N. Y. 152, 23 N. E. 454; *Foote v. Emerson*, 10 Vt. 338, 33 Am. Dec. 205; *Parks v. Francis*, 50 Vt. 626, 28 Am. Rep. 517; *Sheldon v. Preva*, 57 Vt. 263; *Jackson Iron Co. v. Negaunee Concentrating Co.*, 65 Fed. 298, 12 C. C. A. 636.

On the other hand, where there has been part performance only within a year of a contract susceptible of full performance within the year, such contract is not within the statute: *Johnson v. Watson*, 1 Ga. (1 Kelly) 348; *Deguan v. Nowlin*, 5 Ind. Ter. 312, 82 S. W. 758; *Ayotte v. Nadeau*, 32 Mont. 498, 81 Pac. 145; *Dupignac v. Bernstrom*, 76 App. Div. 105, 78 N. Y. Supp. 705; *Randall v. Turner*, 17 Ohio St. 262; *McGinnis v. Cook*, 57 Vt. 36, 52 Am. Rep. 115; *Birdsall v. Birdsall*, 52 Wis. 208, 8 N. W. 822.

**c. Possibility of Performance by One Party.**—There is some conflict in the authorities as to whether the statute of frauds applies to verbal agreements that are, by their terms, susceptible of full performance within the year by one of the parties, but not by the other. That the statute does not apply in such cases is held in *Haugh v. Blythe*, 20 Ind. 24; *Mackey v. Thialer*, 7 Kan. App. 276, 53 Pac. 767; *Langan v. Iverson*, 78 Minn. 299, 80 N. W. 1051; *Kendall v. Garneau*, 55 Neb. 403, 75 N. W. 852; *Blanding v. Sargent*, 33 N. H. 239, 66 Am. Dec. 720; *Gee v. Hicks*, 1 Rich. Eq. Cas. (S. C.) 5; *Weatherford etc. Ry. Co. v. Wood* (Tex. Civ. App.), 29 S. W. 411; *McDonnell v. Home Bitters Co.*, 1 White & Wills. Civ. Cas. Ct. App., sec. 1159; *McClellan v. Sanford*, 26 Wis. 595; *Donellan v. Read*, 3 Barn. & Adol. 899, 23 Eng. Com. L. 391, 110 Eng. Reprint, 330; *Sheehy v. Adarene*, 41 Vt. 541, 98 Am. Dec. 623.

The statute is held applicable in such cases—and logically so, as it seems to us—in *Wilson v. Ray*, 13 Ind. 1; *Whipple v. Parker*, 29 Mich. 369; *Broadwell v. Getman*, 2 Denio, 87; *Pierce v. Paine*, 28 Vt. 34. In *Broadwell v. Getman*, 2 Denio, 87, *Beardsley, J.*, remarking upon the case of *Donellan v. Read*, 3 Barn. & Adol. 899, 23 Eng. Com. L. 391, 110 Eng. Reprint, 330, said: "But I would not be understood as yielding my assent to the principle stated. It seems to me in plain violation of the statute. Every verbal contract which is not to be performed within a year from the making thereof is declared to be void. Although the terms of the agreement may require full performance on one side within a year, I do not see how this can exclude it from the statute, the other side being incapable of execution until after the year has elapsed. The agreement is entire, and if it cannot be executed fully, on both sides, within the year, I think it is void. What difference does it make that one party can, while the other cannot, complete the contract within a

year? Such an agreement is not, in terms, excepted from the statute, and the reason for the enactment applies to it with full force."

And in *Whipple v. Parker*, 29 Mich. 369, the court said: "It has sometimes been said that if the unwritten contract was to be performed on one side within the year, especially if it were even in fact so performed, this takes the contract out of the statute as to both, though the other party was not to perform his part until after that period: *Donellan v. Read*, 3 Barn. & Adol. 899; and this has been followed by several cases, both in England and some of the United States, in which it seems to have been intimated that, if the consideration was actually paid by one party, he might maintain an action on the verbal contract or undertaking of the other party, though that was not to be performed till after the expiration of the year. But I confess my inability to see how the fact of the consideration being paid down, or within the year, or yet to be paid, affects at all the question whether the defendant's undertaking, contract or promise sued upon was to be performed within or after the year; or if only to be performed after the expiration of the year, how the action can be maintained against the 'party charged thereby'; or, under our statute, how the contract could be valid and the defendant be 'charged therewith,' unless that portion of the contract, at least, upon which his obligation arises, is in writing. To hold otherwise would, it seems to me, be a direct and palpable violation of both the letter and purpose of the statute, and a clear disregard of the considerations and policy which led to its enactment. Nor can I see what bearing the question of consideration has upon this particular point, whether the action can be maintained upon the special contract itself. But if the contract has been executed by the other party, and he has received the consideration, and accepted its benefit, an action may be maintained against him for the benefit thus conferred, the money, property or value thus accepted and appropriated by him; not, however, upon the contract, but upon the appropriate common counts in assumpsit, and upon the duty, promise or obligation springing from the property, money or benefit thus conferred by the plaintiff and received and appropriated by the defendant."

#### V. Computation of Period of Performance.

In computing the year period within which the contract must be performed, the time begins to run from the day the contract is made, and not from the time that the performance of it is entered upon. In determining, therefore, whether or not agreements fall within this clause of the statute of frauds it often becomes important to determine the exact date upon which they were entered into. For in computing the time, the statute is, of necessity, strictly construed. The maxim "*De minimis*" is put aside, and if by the terms of the agreement the time of performance exceeds the year by a single day, the statute applies and renders the agreement unenforceable.

Thus an oral agreement made on the 31st of December, for services to be rendered for a period of one year, which is to terminate on the 31st of December of the following year, is within the statute: *Levison v. Stix*, 10 Daly, 229. So a contract of hiring for the term of one year, to commence the day after the contract is made, was

held in *Billington v. Cahill*, 51 Hun, 132, 4 N. Y. Supp. 660, to be a contract not to be performed within a year from its making.

In direct conflict with this case seems to be the case of *Dickson v. Frisbee*, 52 Ala. 165, 23 Am. Rep. 565, where it was held that a verbal agreement made on the twenty-first day of December, 1870, for a year's service, commencing on the day following and ending December 22, 1871, was not within the statute. The word "year" as used in the statute, said the court in this case, means a calendar year, and an agreement for the performance of a year's service means a year to commence on the next day. "This construction," said the court further, "is in accordance with the ordinary rule for the computation of time; which excludes fractions of a day; and it is in harmony, too, with section 14 of the Revised Code, which provides that in computing the time within which any act is required to be done, there must be an exclusion of the first day and an inclusion of the last."

An oral agreement for one year commencing on the day the agreement is made is not within the statute, for it will not be presumed that the time will extend to a period that will invalidate the agreement, and the year, therefore, will be considered as expiring on the day previous to the date corresponding to the date of the agreement: *Sanborn v. Fireman's Ins. Co.*, 82 Mass. (16 Gray) 448, 77 Am. Dec. 419; *Cox v. Albany Brewing Co.*, 53 Hun, 634, 6 N. Y. Supp. 841. And see, also, *Ryan v. Kirchberg*, 17 Ill. App. 132.

As has already been stated, the year begins to run from the date of the contract, and not from the date that its performance begins, if performance is postponed. Thus where the plaintiff brought suit upon an alleged oral agreement made between herself and the board of trustees of a college on June 6, 1907, for one year, the word "year" was held to mean a college year, and not a calendar year, and to end with "commencement" day, and as "commencement" took place on June 11, 1908, five days in excess of a year from the date of the alleged agreement, the contract was held to be within the statute, although the services were performed within the school year from September, 1907, until the end of the school year in the following June: *Brookfield v. Drury College*, 139 Mo. App. 339, 123 S. W. 86. So where the agreement was in January to pay for the improvements made on land one year from the next following March, the agreement was held to be within the statute: *Lower v. Winters*, 7 Cow. (N. Y.) 263. See, also, *Sharp v. Rhiehl*, 55 Mo. 97; *Blanch v. Littell*, 9 Daly, 268.

The case of *De Land v. Hall*, 134 Mich. 381, 96 N. W. 449, admits of an interpretation that will bring it in conflict with the above-cited cases on the point of postponement of performance. In this case it seems that the contract for the hire of the plaintiff as master of a tug for "the ensuing season" was made on November 14th, the season for the current year having closed the day previous. The "season of navigation," however, as stipulated by counsel, defined a period commencing April 1st and ending December 5th. This agreement was held not to be within the statute of frauds. Now, if the performance of this agreement is considered as commencing on November 14th, immediately after the previous season had expired, and as ending on November 13th next thereafter, the case is clear—the statutory year for performance is not exceeded. But if the performance is considered as beginning on April

1st next thereafter, and ending December 5th, covering the "season of navigation," as agreed upon in the case, then the statutory year for performance is exceeded by the time between November 14th, the date of the agreement, and December 5th. We have been unable to determine from a reading of the opinion upon which "period of performance" the court bases its decision. It seems, however, to be upon that of the "season of navigation," from April 1st to December 5th, which brings the case in conflict with all the cases we have examined on the point we are considering.

The time consumed in negotiations between the parties prior to the time of the actual meeting of their minds upon the terms of the agreement is not considered in determining the period of performance: *Franklin Sugar Co. v. Taylor*, 37 Kan. 435, 15 Pac. 586; *East v. Cayuga Lake Ice Line*, 66 Hun. 636, 21 N. Y. Supp. 887; *Lajos v. Eden Musee Am. Co.*, 10 Misc. Rep. 148, 30 N. Y. Supp. 916. Similarly, a contract between the promoters of a corporation and the plaintiff by which he was to serve the corporation for the period of one year after its organization, which contract the corporation subsequently adopts, is not within the statute, if to be performed within a year from the date of the adoption, though not to be performed within a year from the making of it with the promoter; for the act of adopting by the corporation was not a ratification which related back to the date of the contract with the promoter, but was the making of a contract as of the date of the adoption: *McArthur v. Times Printing Co.*, 48 Minn. 319, 31 Am. St. Rep. 653, 51 N. W. 216.

Where a party has the right to enter upon immediate performance of the contract, the postponement for a few days of actual performance will have no effect upon the contract; as in *Sprague v. Foster*, 48 Ill. 140, where a person agreed with another to take and break a pair of mules, for which he was to have the use of them for a year, and when he was about to take them away, it was thought they would not lead behind his buggy, so he left them and came back for them several days later. It was held that the year commenced presently and not at the later day.

Where the contract is for a year, but something remains to be done after the expiration of the year before there can be a right of action on it, the contract is within the statute; as in *Shipley v. Patton*, 21 Ind. 169, where the defendant sold a horse to the plaintiff and warranted that it should be sound for one year thereafter, and agreed that if, after the expiration of one year, the horse proved unsound, he would take it back and pay the plaintiff one hundred dollars. Here the plaintiff had something to do in order to entitle himself to recover, viz., he had to return the horse; and this was not to be done until after the expiration of the year.

The last cited case is easily distinguished from the principal case, *Okin v. Selidor*, 78 N. J. L. 54, ante, p. 588, 78 Atl. 770, for in the latter case the obligor could be called upon to make his guaranty good within a year, whereas in the former case the obligation could not accrue until after a year had elapsed.

## CHESTER v. CAPE MAY REAL ESTATE COMPANY.

[78 N. J. L. 131, 73 Atl. 836.]

**NEGLIGENCE—Injury Occasioned by One of Two Causes—Evidence.**—In an action to recover damages for the death of the plaintiff's intestate, where the fact is that the injury resulting in death was occasioned by one of two causes, for one of which the defendant is responsible, and for the other not, the plaintiff must fail if his evidence does not show that the injury was produced by the former, or if it is just as probable that it was caused by one as by the other. (pp. 614, 615.)

(Syllabus by the court.)

John W. Wescott, for the plaintiff in error.

J. Spicer Leaming and Gaskill &amp; Gaskill, for the defendant in error.

<sup>131</sup> TRENCHARD, J. This action was brought by the administratrix of Arthur S. Chester against the Cape May Real Estate Company to recover damages for his death, caused by asphyxiation while working in a sewer.

The plaintiff's intestate was working for the Etter Erecting Company. This company was constructing a sewer for Cape May City along Beach avenue, in that city. On August 13, 1906, the day of the accident, the sewer was still unfinished and had not been turned over to the city. The work consisted of a large trunk sewer from twenty-four to thirty inches in diameter, which began at a manhole at Baltimore avenue and extended westward two thousand five hundred or three thousand feet, at a depth of from fourteen to sixteen feet below the surface of the ground. The land through which the sewer extended was meadow or marsh land, which had been <sup>132</sup> filled over to a depth of four feet by sand pumped from the inlet or harbor. Three days before the accident the defendant company began the construction of a lateral house sewer, which opened into the manhole of the trunk sewer at Baltimore avenue. For this purpose an opening eight inches in diameter was cut in the manhole about five or six feet below the surface of the ground into which the lateral pipe was inserted, and ditching for this lateral sewer was carried back toward the house, but the connection with the house had not been made at the time of the accident. On the day of the accident the plaintiff's intestate attempted to plug this lateral sewer from the inside of the manhole, so as to prevent water flowing into the trunk sewer through this connection. Almost immediately upon entering the manhole for that purpose the plaintiff's intestate was asphyxiated with gas, and this action was brought to recover for his death.

The trial at the Cape May circuit resulted in a verdict for the plaintiff, and the defendant obtained this rule to show cause why the verdict should not be set aside.

Among the reasons assigned for a new trial are the refusal of the trial judge to grant the defendant's motions to nonsuit the plaintiff and to direct a verdict for the defendant.

These motions were grounded upon the reason that the evidence failed to show that the injury resulting in the death was occasioned by negligence upon the part of the defendant.

We think the motions should have been granted.

The evidence taken at the trial tended to show that the meadows adjacent to the sewers generated hydrogen sulphite gas, and that the presence of such deadly gas in the manhole caused the death of plaintiff's intestate.

It was the contention of the plaintiff that the gas was introduced into the manhole through the inlet cut by the defendant company, which inlet, it was further contended, was made unlawfully.

• Assuming, but not deciding, that the evidence showed that the opening was made in the manhole without authority, we are unable to find from the evidence that the opening was responsible for the presence of the gas.

<sup>123</sup> It must be conceded that the plaintiff was bound to show something more than that the defendant was possibly responsible for the decedent's death in order to entitle him to a verdict. It was incumbent upon the plaintiff, in the absence of direct evidence of the fact, to show not only the existence of such possible responsibility, but the existence of such circumstances as would justify the inference that the death was caused by the wrongful act of the defendant, and would exclude the idea that it was due to a cause with which the defendant was unconnected: *Suburban Electric Co. v. Nugent*, 58 N. J. L. 658, 34 Atl. 1069, 32 L. R. A. 700; *Stumpf v. Delaware etc. R. R. Co.*, 76 N. J. L. 153, 69 Atl. 207; *Houston v. Traphagen*, 47 N. J. L. 23. And this, it seems to us, the plaintiff has not done.

The verdict for the plaintiff necessarily rests upon the theory that the gas found its way into the sewer through the lateral pipe introduced into the manhole by the defendant, through which some muddy water was flowing at the time of the accident. But we think, as the defendant contended, that the evidence demonstrated that it was at least equally probable that the gas came from the open "working end" of the main trunk sewer, which rested in a ditch sixteen feet deep, which ditch was at the time or shortly before the accident filled with water by reason of rainfall and temporary stoppage of pumping. It was made to appear at the trial that an effort was made to keep what is known as the "working end" of both sewers closed when not laying pipe, but the

evidence indicates that the closing was so imperfect in both cases that both gas and water, if present, would not be prevented from entering the sewers. The evidence also shows that the gas in question is heavier than air, and was always present in the ditch at the "working end" of the main sewer, and sometimes in the sewer itself; that the gas does not rise, but moves along the level under pressure from wind, water or the like. As we have pointed out, the main sewer was from twenty-four to thirty inches in diameter, and its "working end" was at the bottom of a long ditch sixteen feet deep, and by reason of the water the gas there is certainly shown to have been under heavy pressure, while, on the other hand, <sup>134</sup> the lateral sewer was but eight inches in diameter and its "working end" was at the bottom of a ditch only from three to five feet deep. When it is remembered that the meadow proper, which is said to have generated the gas, was four feet beneath the surface of the ground, it will be seen that it is at least equally probable that the gas in question came from the ditch at the "working end" of the main sewer as that it came from the "working end" of the lateral sewer.

We think, therefore, that the jury could have attributed the presence of the gas which killed the plaintiff's intestate to other causes with quite as much reason as they have attributed it to the act of the defendant. The circumstances would warrant the former inference quite as clearly as the latter. The case is one, we think, where it appears that the primary cause of the injury proceeded from one of two sources, or was produced by one of two agencies, for one of which the defendant might be responsible, but not for the latter. The plaintiff must fail because the evidence does not show that the injury was the result of some cause for which the defendant was responsible: *Stumpf v. Delaware etc. R. R. Co.*, 76 N. J. L. 153, 89 Atl. 207; *Searles v. Manhattan Ry. Co.*, 101 N. Y. 661, 5 N. E. 66; *Ruppert v. Brooklyn Heights R. R. Co.*, 154 N. Y. 90, 47 N. E. 971.

The rule to show cause will be made absolute.

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*For Authorities Bearing upon the Decision in the Principal Case,* see *Edgar v. Rio Grande Western Ry. Co.*, 32 Utah, 330, 125 Am. St. Rep. 867; *Seith v. Commonwealth Electric Co.*, 241 Ill. 252, 132 Am. St. Rep. 204.



## LEVINE v. D. WOLFF &amp; COMPANY.

[78 N. J. L. 306, 73 Atl. 73.]

**WAREHOUSEMAN—Loss of Goods by Fire Before Storage.**

Where a warehouseman takes goods to store and keeps them on a wagon in his stable for two days and nights until they are destroyed by fire, it is a question of fact whether he has used the care required by law. (p. 618.)

Riker & Riker, for the appellant.

Philip J. Schotland, for the appellee.

307 MINTURN, J. The result of the trial of this action before the district court was that the court found as facts that the plaintiff contracted with defendant company "to store" his household goods for a monthly consideration to be paid to the defendant, and that in pursuance of this contract the defendant company carried the goods upon their truck to the defendant's stable, where the wagon was taken in and allowed to stand, with the goods loaded thereon, for two days and nights, and while thus situated a fire occurred in the stable upon the second night, and the goods were thereby destroyed. The building was used not only as a stable and a place for keeping defendant's wagons, but also as a place to keep what is called "pulled goods," viz., chattels sold by defendant upon conditional sales, and retaken by the vendor for noncompliance with the conditions of sale. These "pulled goods" were stored in wooden compartments in the stable; some were injured by the fire and some damaged by water, but none was destroyed, and all were subsequently sold as second-hand goods.

The court found the value of plaintiff's goods to be three hundred dollars, and rendered judgment in his favor for that amount.

The case presents a question resolvable under the law of bailment, and the liability of the defendant thereon is to be determined by the conclusion reached upon the facts as to whether as bailee he performed the duty imposed upon him by law as a warehouseman.

At common law, since *Coggs v. Bernard*, 2 Ld. Raym. 909, this duty was defined to be, to take reasonable care of the goods entrusted to his charge: *Story on Bailments*, 444; *Mechanics' & T. Ins. Co. v. Kiger*, 103 U. S. 352, 26 L. ed. 433.

Section 21 of chapter 133 of the Laws of 1907, entitled "An act concerning warehouse receipts and to make uniform the law relating thereto," makes no change in this respect in the common-law doctrine, and is merely declaratory thereof.

It has been held that within the purview of this duty is the requirement to use reasonable care to provide a building

reasonably fit and safe for storage: *Moulton v. Phillips*, 10 308 R. I. 218, 14 Am. Rep. 663; *Hickey v. Morrell*, 102 N. Y. 454, 55 Am. Rep. 824, 7 N. E. 321; *Walden v. Finch*, 70 Pa. 460.

It is to be noted, also, that the reasonable care contracted for was that ordinarily exercised by a warehouseman "to store" the plaintiff's goods, and it has been held that this duty imposed upon the warehouseman such care and diligence as good and capable warehousemen are accustomed to show under similar circumstances: *Lancaster Mills v. Merchants' Cotton Press Co.*, 89 Tenn. 1, 24 Am. St. Rep. 586, 14 S. W. 317.

The defendant insists that because its own goods were stored in another portion of this stable, the reasonable care required of it by law was furnished by storing the plaintiff's goods in the same place.

Without referring to the implication that may fairly arise upon the facts of the case, that the plaintiff when he contracted with a warehouseman "to store" his goods had reason to assume that a stable would not be their destination, the adjudicated cases are to the contrary of defendant's contention.

Lord Holt, in *Coggs v. Bernard*, 2 Ld. Raym. 909, by way of obiter afforded a basis for such a construction of the law regarding reasonable care, but this notion has been exploded. and the true rule is now declared to be that if the bailee uses the same care in regard to the property bailed that he bestows upon his own, it is but evidence tending to show that he is not guilty of gross negligence, or, as was stated in one case. it is merely "an argument for his honesty": *Giplin v. McMullen*, L. R. 2 P. C. 317.

Apropos of this contention, Chief Justice Tindal once observed that to fix a standard of liability coextensive with the individual judgment would make it as variable as the foot of each individual: *Vaughan v. Menlove*, 3 Bing., N. S., 468; *Doorman v. Jenkins*, 2 Ad. & E. 256.

When, therefore, the plaintiff proved the delivery of the chattels in good condition to defendant, and their destruction thereafter by fire upon defendant's premises, the law presumes the negligence of the bailee to be the cause of the loss, 309 and this presumption could be rebutted only by affirmative proof of reasonable care upon defendant's part: *Jackson v. McDonald*, 70 N. J. L. 594, 57 Atl. 126.

Therefore, it was a question entirely of fact whether the storing of these goods in defendant's stable upon a wagon for two days and nights, under a contract with defendant as a warehouseman, to use such reasonable care in storing them as men in that line of business usually take of goods committed to their care, was a compliance with the duty thus imposed

upon this defendant by law, and the court having found as a fact that it was not, we cannot disturb that finding.

The judgment is affirmed.

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*The Duty of Warehousemen in the Care of Property* is the subject of a note to *Carley v. Offutt & Blackburn*, 136 Am. St. Rep. 212.

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## ALCOTT v. PUBLIC SERVICE CORPORATION.

[78 N. J. L. 482, 74 Atl. 499.]

**EVIDENCE of Prior or Subsequent Condition at Place of Accident.**—In an action for damages for an injury claimed to have been sustained because of negligence of defendant in permitting a dangerous and defective condition of a crossing switch between street-car tracks, which alleged condition should, by proper inspection, have been discovered, and, by proper diligence, have been remedied, evidence of the same condition existing within a reasonable time, both before and after the injury sued for, is admissible in corroboration of evidence that such condition existed at the time of such injury; and such evidence as to its previous existence is also available to show its persistence for such a length of time that defendant, with due diligence, should have discovered and rectified it. (pp. 620, 623.)

(Syllabus by the court.)

John W. Wescott, for the plaintiff in error.

Edward Ambler Armstrong, for the defendant in error.

<sup>482</sup> **PARKER, J.** Judgment in favor of the plaintiff in error was reversed in the supreme court on the ground that the proof showed, without contradiction, that the switching device in which plaintiff's wagon-wheel seems to have caught was of standard pattern, in common use, and had been properly laid and inspected. The propriety of that determination is now before us for review. The circumstances of the accident are set forth in the opinion of the supreme court and need not be here repeated in detail.

<sup>483</sup> We think that court erred in holding that the evidence showed proper inspection of the switch so conclusively as to remove that element of the case from the consideration of the jury. A legitimate theory of the causation of the accident is that when plaintiff turned his horses off the street-car track and the front wheels of the heavy omnibus skidded along the track without leaving it, the tire of the right wheel, which was eleven-sixteenths of an inch thick and projected outward from the felloe one-eighth of an inch, caught under the "butt," or end of the piece known as the mate. Manifestly, this could not have happened unless the mate either was or

was capable of being raised above the main rail at least the thickness of the tire. That this fact would indicate that the appliance was in bad order is inferable from the evidence of one of the witnesses for the defendant company, who testified that the mate was constructed to fit closely into the side of the rail lapping both above and below the tram or horizontal tread, with a play of one-eighth of an inch both above and below, so that if pressed up closely against the under side of the rail, the tongue would be a quarter of an inch above the rail, but no more. If, then, it was raised about three-quarters of an inch, as the jury might have found on the evidence, an inference that it was in bad order was clearly permissible. There was other evidence to the same effect. The plaintiff, for example, testified that the "iron and all was raised"; that one end had settled and the other end had raised; that the pavement next to the rail was in bad order.

There was also evidence tending to show that the switch was out of order some days prior to the accident in question. This evidence was objected to by defendant, and an exception that was taken to its admission will be dealt with presently. Taken with the other evidence, a jury question was presented whether the switch was out of order and had been allowed to become so by negligence of the defendant, notwithstanding testimony on the part of the defendant that inspections were regularly made and that it was found in good condition.

The judgment of the supreme court, reversing the trial court, should therefore be reversed unless justified by some <sup>484</sup> error at the trial that would vitiate the judgment in the trial court. Two points are urged by defendant in error: that the trial court admitted testimony of other accidents at this same switch shortly before and shortly after the accident to plaintiff; and that the court charged in effect that this testimony might be considered as throwing light on the question whether the switch was out of order at the time of the plaintiff's accident. It is claimed, on the authority of *Bobink v. Erie R. R.*, 75 N. J. L. 913, 69 Atl. 204, decided by this court, that the testimony was improper, and that the court should not have alluded to it in the charge. We think that the weight of later authority and the better reasoning favor the view that the action of the trial court was proper. One witness testified that his wagon was stopped in a similar manner, by the wheel catching in the switch, some thirteen days before plaintiff had that experience. Another witness testified that three days after the accident, as a result of his own wagon catching in the switch, he examined it, and his description of it at that time corresponded closely with plaintiff's description of it at the time of the accident in question.

Professor Wigmore, in the sixteenth edition of 1 Greenleaf on Evidence, 81, lays down the doctrine that "where the mat-

ter in issue is the existence of a condition, quality, capacity, tendency, or the like, of an inanimate object—dangerousness, . . . etc.—there are three chief modes of evidencing this circumstantially. One consists in showing the prior or subsequent existence of the condition, and thence inferring its existence at the time in question. . . . Still another consists in showing particular instances on other occasions in which the quality, tendency, etc., of the thing in question has been exhibited and thence inferring the general existence of that quality, etc. . . . The natural limitation of this sort of evidence is that the prior or subsequent time must be so near that nothing may be supposed to have occurred to cause a change; and the distance of time will depend entirely on the thing whose existence is in question.”

He adds that “in evidencing a quality, tendency, capacity, etc., by instances of its effects or exhibitions or operations on <sup>485</sup> other occasions, the natural and logical limitation is that the evidential instances should have occurred under substantially the same circumstances or conditions as at the time in question, because otherwise they might well be attributed to the influence of some other element introduced by the differing circumstances.” He concedes that the logical objection to this sort of evidence is the tendency to unfair surprise and confusion of issues; that in addition, the tendency of the courts has been to exclude this class of evidence in cases of deliberate experiment to test the particular quality, and in cases where it has been sought to show in defense, that the place, or appliance, or what not, had long been in use without accident, and ergo must be safe. Experimental evidence was excluded in *Libby, McNeill & Libby v. Scherman*, 146 Ill. 540, 37 Am. St. Rep. 191, 34 N. E. 801; and the plan of showing safety by previous absence of accident was condemned by our supreme court in *Temperance Hall Assn. v. Giles*, 33 N. J. L. 260, and outside of this state in such cases as *Baltimore etc. Turnpike v. Leonhardt*, 66 Md. 70, 59 Am. Rep. 156, 5 Atl. 346, *Hodges v. Bearse*, 129 Ill. 87, 21 N. E. 613, *Lewis v. Smith*, 107 Mass. 334, and *Peverly v. Boston*, 136 Mass. 366, 49 Am. Rep. 37; although countenance is given to it in *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1.

The learned author continues (at page 87): “The use that has come most into controversy is that of other injuries at a highway, track or machine, as evidence of its dangerous character, . . . the doctrines of unfair surprise and confusion of issues . . . have been thought to have an especial bearing here; and for some time . . . much distrust of this sort of evidence was shown. The almost universal attitude of the courts at the present time, however, apart from minor peculiarities, is to admit such evidence, subject to the limitations already described. . . . The other instances of injuries thus

offered in evidence may concern defects in highways or defects in railroad tracks, machines, premises, and the like."

In *Collins v. Dorchester*, 6 Cush. 396, decided in 1850, it was held that the existence of a defect in a highway claimed to have caused injury to plaintiff could not be shown by evidence <sup>486</sup> of a similar injury to another person at the same place. The doctrine of this case is said by Professor Wigmore to be in effect repudiated in Massachusetts, and the remarks of the court in *Bemis v. Temple*, 162 Mass. 342, 38 N. E. 970, 26 L. R. A. 254, seem to point that way. At all events, the admission of evidence of this class is supported by such cases as *District of Columbia v. Armes*, 107 U. S. 519, 2 Sup. Ct. Rep. 840, 27 L. ed. 618, decided in 1883, a suit for injury resulting from a defective sidewalk, in which evidence of other accidents at the same place was held proper as showing both the danger of the place and notice thereof to the defendant; *Louisville etc. R. R. Co. v. Wright*, 115 Ind. 378, 7 Am. St. Rep. 432, 16 N. E. 145, 17 N. E. 584, involving injuries to a freight brakeman from being struck by an overhead bridge, in which evidence of similar injuries previously occurring was permitted to show notice to the company of the danger; *Salem Stone etc. Co. v. Griffin*, 139 Ind. 141, 38 N. E. 411, involving a similar ruling, and *City of Bloomington v. Legg*, 151 Ill. 9, 42 Am. St. Rep. 216, 37 N. E. 696, a highway case, in which evidence of similar accidents was permitted both as to notice and to show the dangerous character of the place in question. In *Baird v. Daly*, 68 N. Y. 547, plaintiff's scow was partly swamped while in tow of defendant's tug, and the question was whether it was the fault of the scow or the tug. Plaintiff testified that the scow had been towed before safely with heavier loads, and it was held error to overrule questions on cross-examination tending to show that the scow had previously been sunk by accident. In *Hoyt v. New York etc. R. R.*, 118 N. Y. 399, 23 N. E. 565, plaintiff claimed that he had been thrown from his wagon on account of its being partially tipped over, owing to a hole negligently allowed to remain at one of the railroad crossings of defendant. Offer to prove that the very next day plaintiff's wagon had a similar accident at another place where there was no hole, and that as an inference from this the trouble was not with the crossing but with the wagon, was overruled. This was held error, and the judgment reversed, the court advisedly putting the decision "in line with that numerous class of cases that where a defect is shown to exist, that fact may be strengthened by proof of other and similar <sup>487</sup> effects both before and after the effects were produced, which form the subject of the trial"; citing a number of cases.

The case of *Darling v. Westmoreland*, 52 N. H. 401, 13 Am. Rep. 55, is cited by Professor Wigmore as a leading case. It was a suit against the municipality for defect in the highway. The defect alleged was a pile of lumber that was likely to frighten horses, and plaintiff's claim was that his horse was frightened by the lumber and backed off a bridge in consequence. Evidence that another horse had been similarly frightened by the same lumber was excluded. The court, in a long opinion by Justice Doe, held that the exclusion was erroneous, and reversed the judgment, incidentally criticising the rule in *Collins v. Dorchester*, 6 Cush. 396, as not called for by the facts in that case.

*Temperance Hall Assn. v. Giles*, 33 N. J. L. 260, has been cited in a number of our later decisions, but only twice on the admissibility of evidence as to the occurrence or non-occurrence of other accidents under similar circumstances—first, in *Continental Match Co. v. Swett*, 61 N. J. L. 457, 38 Atl. 969, where it was distinguished and the court noted that there were exceptions to the rule it lays down; the second time in *Bobbink v. Erie R. R. Co.*, 75 N. J. L. 913, 69 Atl. 204, already cited. In the *Continental Match Company* case it was held in the supreme court that the discharge of a workman for incompetency as a defense to an action for breach of contract of employment might be supported by proof that his work in another factory, with similar materials and under similar circumstances, was unsatisfactory. The precise point decided in *Temperance Hall Assn. v. Giles*, 33 N. J. L. 260, is not now in question, and we are not required to decide whether it was rightly decided in that aspect. *Bobbink v. Erie R. R. Co.*, 75 N. J. L. 913, 69 Atl. 204, is also clearly distinguishable, as there was no claim in that case that there was any defect in the crossing frog, but only that it might be improved upon, and the rejection of the evidence offered to show this was based on the ground that the rule of law under the circumstances required no more than the adoption of an appliance in general use, which the frog in question was conclusively shown to be.

Reverting to the case at bar, we are of opinion that the <sup>488</sup> evidence of a similar accident at the same place some few days before was proper both as supporting the plaintiff's evidence as to the condition of the switch at the time of his accident, and as tending to show that that condition had persisted so long that with proper care and inspection it should have been remedied before the plaintiff sustained his injury, and that as to the evidence of its similar condition two or three days afterward, this was justified as corroborative of the plaintiff's testimony relative to that condition.

The case of Annapolis Gas etc. Co. v. Fredericks, 109 Md. 595, 72 Atl. 534, is cited against the admissibility of evidence as to later conditions. The facts as stated by the court were that a live electric light wire was strung along the side of a bridge over the water and at a distance of nine feet five inches from the floor of the bridge. "The evidence tended to show," says the opinion, "that the wire, as originally constructed, was properly placed and located as to the safety of the public, because it was beyond the reach of those properly using the bridge." Plaintiff was on the bridge at night, and in grabbing for his hat, which blew off, he seized the wire and received a shock. The court said it was incumbent on him to show by competent evidence that the wire sagged at the time of the accident and the place of the injury, and that evidence that he had visited the place the next day and found the wire slack was inadmissible, and that this was no evidence that it was slack at the time of the accident. We cannot agree with the learned court on this point. The fact that a man in reaching for his hat which has blown off reaches an electric wire normally suspended over nine feet up in the air seems to be rather satisfactory proof that the wire in question must have sagged somewhat. This being so, his examination the next day, the earliest time when he could see it, was no more than corroborative of the necessary inference from the occurrence of the accident. So in the case at bar, the evidence of an accident to the witness after the plaintiff's accident simply led up to the investigation made by such witness to discover what caused the accident to himself, and was thus only incidental and not harmful; the material <sup>489</sup> part of his evidence was that he found, on examination as a result of his accident, certain conditions substantially identical with those that plaintiff testified to, and at a period of time so close to the plaintiff's accident, though after it, that an inference was justified, though subject to contradiction and open to explanation, that the same condition obtained at the time plaintiff was injured. There was no error, therefore, in the admission of this testimony, and as it was properly admitted, it follows as of course that comment on it by the court in the aspects we have noted was also proper. The charge of the court on this point was as follows: "It has appeared from the testimony in this case that other accidents have occurred at this place. That testimony was introduced not for the purpose of showing any liability on the part of the company beyond this case, but simply as it might throw light upon the question of whether this track, this mate, was out of order at the time when this accident occurred, because the jury might infer that if an accident occurred just before or just after this occurred, that there must be something wrong with the track."



In view of the propriety of the evidence, this was unexceptionable. There was therefore no error at the trial in any of the aspects we have discussed, and no other point has been brought before us for review. It follows, therefore, that the judgment of the supreme court must be reversed and that of the circuit court affirmed.

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*For Authorities Bearing upon the Decision in the Principal Case, see Nesbit v. Town of Garner, 75 Iowa, 314, 9 Am. St. Rep. 486; Florida etc. R. R. v. Mooney, 45 Fla. 286, 110 Am. St. Rep. 73; Heinmiller v. Winston Bros., 131 Iowa, 32, 117 Am. St. Rep. 405.*

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## JOHNSON v. WEST JERSEY AND SEASHORE RAILROAD COMPANY.

[78 N. J. L. 529, 74 Atl. 496.]

**CARRIER—Stipulation Against Loss by Fire.**—A carrier may, by a stipulation in its bill of lading, except from its general liability loss by fire to goods while in transit. (By the editor.) (p. 626.)

**CARRIER—Loss of Goods by Fire—Evidence.**—Upon the trial, based upon a declaration which alleges only the common-law liability of defendant as a common carrier, by reason of the loss of plaintiff's goods by fire, and where it appeared as part of plaintiff's case that the liability was qualified by the introduction of a bill of lading, by the terms of which loss "by fire or by flood" excused the carrier from performance, held, that it was incumbent upon the plaintiff to show as a basis for recovery, not only a loss by fire, but also that the fire was attributable to some act of negligence upon defendant's part. (pp. 626, 627.)

(Syllabi by the court except when stated to be by the editor.)

Bourgeois & Sooy, for the plaintiff in error.

John J. Crandall, for the defendant in error.

**529 MINTURN, J.** The case presented at the circuit was upon a declaration which alleged that the defendant "undertook for hire, as a common carrier, to transport and carry safely" a certain stock of rags delivered to it by the plaintiff, from Atlantic City to the city of Philadelphia; and that having failed so to do, its common-law liability as a common carrier attached.

Upon the trial, the plaintiff found it necessary to introduce in evidence a bill of lading issued to her by defendant at the time of the delivery of the goods for transportation, which, when admitted, was found to contain the contract of the parties, including a provision which changed the common-law status of the carrier from that of an insurer as presented by

the allegation of the declaration to that of a common carrier of limited liability. The bill of lading provided <sup>530</sup> *inter alia* that "every service to be performed hereunder shall be subject to all the conditions whether printed or written herein contained; and which are agreed to by the shipper, and accepted for himself and assigns, as just and reasonable." Among the conditions referred to was the following: "No carrier, or party in possession of all or any of the property herein described, shall be liable for any loss thereof or damage thereto, by causes beyond its control; or by floods or by fire; or by quarantine; or by riots, strikes or stoppage of labor; or by leakage, breakage, chafing, loss in weight, changes in weather, heat, frost, wet or decay; or from any cause, if it be necessary, or is usual to carry such property upon open cars."

Upon the plaintiff's case, it appeared that the goods in question were lost by fire while in defendant's car at Philadelphia, awaiting delivery to the consignee. The question of variance thus presented between pleadings and proof was not pressed at the trial, but the parties proceeded with the trial upon the issue thus formulated. The defendant at the close of plaintiff's case moved for a nonsuit, which was refused, and the case was submitted to the jury, who returned a verdict for the plaintiff.

We are of the opinion that the nonsuit should have been ordered. Undoubtedly, if the plaintiff had rested upon the allegations of her declaration, without the introduction of the contract, the defendant's common-law liability, as an insurer, would be clear, and a *prima facie* case would have been established: *Mershon v. Hobensack*, 22 N. J. L. 372; *Kinney v. Central R. R.*, 34 N. J. L. 273.

But the introduction of the bill of lading limiting defendant's liability, by excepting therefrom loss sustained in transit by "flood or by fire," changed the issue, by imposing upon the plaintiff the burden of showing that the fire in question was due to the defendant's want of due care. That a common carrier may thus limit its liability has been determined by this court: *Russell v. Erie R. R.*, 70 N. J. L. 808, 59 Atl. 150, 67 L. R. A. 433, 1 Ann. Cas. 672; *Atkinson v. New York Transfer Co.*, 76 N. J. L. 608, 71 Atl. 278.

That it may except from its general liability loss by fire to <sup>531</sup> goods while in transit, and that such exception is not unreasonable, has been determined by the United States supreme court: *New York Central Ry. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627; *Cau v. Texas etc. Ry. Co.*, 194 U. S. 427, 24 Sup. Ct. Rep. 663, 48 L. ed. 1053. As well as by the courts of this country and of England: *Hoadley v. Northern Transp. Co.*, 115 Mass. 304, 15 Am. Rep. 106; *New York Central etc. R. R. Co. v. Standard Oil Co.*, 87 N. Y. 486; *Colton v. Cleveland*

& P. R. R. Co., 67 Pa. 211, 5 Am. Rep. 424; Davis v. Central Vermont R. R., 66 Vt. 290, 44 Am. St. Rep. 852, 29 Atl. 313; Peek v. North Staffordshire Ry., 10 H. L. Cas. 473; Hornthal v. Roanoke etc. S. Co., 107 N. C. 76, 11 S. E. 1049.

The effect of such a limitation has been held by the supreme court of this state, in a case involving substantially the same characteristics as the case at bar, to be that "the mere non-delivery and proof of loss by fire did not make out the case of the plaintiff; which, in view of the contract of carriage, must rest upon the negligence of the carrier with respect to the loss by fire. Such negligence not appearing in the testimony of either party, the defendant was entitled to a judgment": Michaels v. Adams Express Co., 71 N. J. L. 41, 59 Atl. 142. That such is the rule sanctioned by the general trend of authority is abundantly apparent: Coke's Note to Southcote's Case, 4 Coke, 83; Hyde v. Trent. Nav. Co., 5 Term Rep. 389; Davis v. Wabash etc. R. R. Co., 89 Mo. 340, 1 S. W. 327; Porter v. Chicago etc. R. R. Co., 20 Ill. 407, 71 Am. Dec. 286; Moore v. Michigan Central R. R., 3 Mich. 23; Story on Bailment, 549; Hutchinson on Carriers, 354; 6 Cyc. 386, and cases.

For this reason the motion to nonsuit should have been granted, and the judgment below is therefore reversed.

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*The Effect of a Stipulation in a Bill of Lading Against Liability for loss by fire* is discussed in the note to Chicago etc. Ry. Co. v. Calumet etc. Farm, 88 Am. St. Rep. 103.

*In the Absence of a Special Contract Limiting His Liability*, a carrier must affirmatively show that loss of goods shipped was caused by some cause for which he was not responsible, as by the act of God or the public enemy, in order to avoid liability, but where there is a limited liability contract, and the loss falls within one of the excepted causes, the burden of proof is upon the shipper to show negligence on the part of the carrier: Nashville etc. Ry. Co. v. Stone, 112 Tenn. 348, 105 Am. St. Rep. 955. See, in this connection, Lehman, Stern & Co. v. Morgan's etc. Co., 115 La. 1, 112 Am. St. Rep. 259; Greene v. Louisville etc. R. R. Co., 163 Ala. 138, 136 Am. St. Rep. 67.

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## SCHLESSINGER v. FOREST PRODUCTS COMPANY.

[78 N. J. L. 637, 76 Atl. 1024.]

**CORPORATION—Estoppel to Deny Authority of Agent.**—In order that a corporation may be bound by the acts of one as its agent, either upon the ground of an implied authority or of estoppel, it must appear that the corporation is chargeable with notice of the acts or omissions relied upon to establish such implied authority or estoppel. (p. 630.)

**CORPORATION—Implied Authority of Agent—Notice.**—Notice to the person who is alleged to have acted as agent for a cor-

poration is not such notice to the corporation as will suffice to bind it to third persons upon the ground of implied authority to him to act as such agent or upon the ground of estoppel. (p. 630.)

**AGENCY.**—The Doctrine of Ratification is not Applicable to a case where the person who makes the contract was not at the time, and did not profess or assume to be, acting on behalf of a principal. (p. 631.)

**ASSIGNMENT of Contract for Purchase of Goods to be Manufactured.**—Where a contract for the purchase of goods to be manufactured involves "personal confidence," it is not assignable by the vendor. (p. 633.)

(Syllabi by the court.)

Albert C. Wall, for the plaintiff in error.

John W. Queen, for the defendant in error.

**637** **SWAYZE, J.** This is an action to recover commissions upon a sale of staves said to have been made by the defendant company to one Gaffinel, a resident of France. A careful statement of the facts is required to make the case clear. Victor E. Freeman, in 1905, engaged in the business to which the present defendant afterward succeeded. He proposed to organize a corporation to take over his business, and on November 4, 1905, the defendant was incorporated in New York state. The certificate named Freeman, Evans and Griffin, the incorporators, as the directors for the first year, but there was no formal meeting of the corporation or of the directors until April 6, 1906. Meantime there had been <sup>638</sup> negotiations by correspondence between the plaintiff and Freeman. The plaintiff's letters were addressed to the defendant. Freeman's replies were in his own name on stationery bearing the defendant's name as a heading. These negotiations resulted in a contract on January 10, 1906, embodied in a letter, of which the following is a copy:

"Gentlemen: With reference to previous letters touching the question of commissions upon orders for staves for export, which letters have been found to be incorrect, I hereby cancel all those previous letters and conditions of same as relating to this subject, and in lieu thereof I beg to affirm that I am to pay you commission upon the order contracted with Mr. Christian Gaffinel, of Cete, France, of even date, for one million staves, at the rate of one and one-half dollars (\$1.50) upon each one thousand staves, to be paid at the times of, and in proportion to the periodical part shipments, upon each payment by the consignee.

"Very truly yours,

"VICTOR E. FREEMAN."

Upon the same day a contract was made between Freeman and Gaffinel for the sale of staves to be manufactured. This was in form a written proposal by Freeman for himself, his heirs and assigns, to sell through Schlessinger and deliver to Gaffinel one million staves; this proposal was signed by Frece-

man individually and accepted by Gaffinel. On January 11th, Schlessinger wrote the Forest Products Company calling their attention to the fact that the letter of January 10th referred only to the contract for one million staves, and that it was understood that if any further sale to the same party should be made, Schlessinger should be entitled to his commissions on that sale. There was evidence justifying a finding that this was assented to. A subsequent sale was made in June, 1906, which took the form of a written contract between Freeman individually and Gaffinel. Gaffinel afterward refused to recognize anyone but Freeman in the transaction. <sup>639</sup> Only a portion of the staves was ever delivered, and the commissions on the purchase price were paid by Freeman. There was evidence from which it might be found that Freeman was repaid this sum by the defendant.

On April 6, 1906, at a meeting of the company, it was resolved to proceed to carry on the business for which it was incorporated. Freeman offered to transfer his business, including contracts for the delivery of staves, and the directors adopted a resolution which recited that it was the intention of the incorporators to purchase and take over the business now being carried on by Freeman, and proceeded to accept his offer and to authorize the issue of stock for the property to be transferred.

The learned trial judge charged the jury that the questions were (1) whether the contracts for the staves were made between Gaffinel and the company, or between Gaffinel and Freeman; (2) whether the contract for commissions was between Schlessinger and Freeman or between Schlessinger and the defendant company. On this point he added: "The question resolves itself into one of facts as to the intentions of the parties who were involved in this transaction. The question is whether it was the intention of Schlessinger and of Freeman, when these transactions took place, that the company should make the contract, or whether it was the intention of Freeman and Schlessinger that Freeman individually should make the contract. If you shall determine that the intention was that Freeman should be bound, then of course the company cannot be liable and the verdict would have to be for the defendant. It is only when you shall have concluded that the intention of Freeman was to act for the company in performance of the power given to him to act for the company that the plaintiff can recover."

He also charged that if Freeman was acting for himself, the contract would be considered Freeman's contract and not the contract of the defendant, unless the company at some later time adopted or assumed the contract, and that it was for the jury to determine whether the contract was that of the defendant through Freeman as agent, or whether it was

\*\*\* adopted by the defendant subsequently by some unequivocal action.

In short, the plaintiff was allowed to recover either upon the theory of an original agency of Freeman or a subsequent adoption of Freeman's contracts by the company.

First, as to Freeman's original agency. The fair interpretation of the charge under the facts of this case is that the defendant was liable if such was the intention of Schlessinger and Freeman. It is obvious that this leaves out the essential element of authority from the defendant to Freeman, either express or implied, from the defendant's conduct or arising out of estoppel. There is no evidence of express authority. The only evidence from which an implied authority could be inferred is the use of the name of the defendant on stationery and on the office door, and the only evidence to justify a finding that the defendant was estopped to deny Freeman's agency is the failure to call Schlessinger's attention to his error in addressing his communications to the defendant.

In order that the defendant may be bound by these acts and omissions, which were acts and omissions of Freeman alone, it should appear that it was chargeable with notice thereof and failed to object: *Clement v. Young-McShea Amusement Co.*, 70 N. J. Eq. 677, 118 Am. St. Rep. 747, 67 Atl. 82. Notice to Freeman was not notice to the company, although he was the active manager, since his interests in this respect were adverse to the company, for they would amount to an appointment of himself as agent without the knowledge of his associates: *First National Bank of Hightstown v. Christopher*, 40 N. J. L. 435, 29 Am. Rep. 262; *Graham v. Orange County National Bank*, 59 N. J. L. 225, 35 Atl. 1053; *Sudbury v. Merchantville Building etc. Assn.*, 57 N. J. Eq. 342, 45 Atl. 1092. The company was not at the time these letters were written organized or prepared to do business. It had as yet done no business, and necessarily, therefore, had done nothing to hold Freeman out as authorized to contract on its behalf. Freeman did not even hold himself out as agent, but wrote and signed all the letters as an individual, and in the letter of January 10, 1906, canceled in so many words all previous letters which he writes had been found to be incorrect, <sup>641</sup> and in lieu thereof he distinctly says, "I am to pay you commission," and thereupon on the same day entered into the Gaffinel contract in his individual name. It would be difficult to show more clearly an intent to become individually responsible. Clearly, that was his actual intent. for subsequently, on April 6, 1906, he and the company agreed upon a transfer of his contracts for staves to the company in consideration of and payment for the stock issued to him, and the company by formal resolution recognized that the business was up to that time Freeman's business. The evi-

dence fails to prove facts from which an agency can be implied or an estoppel to deny agency can arise.

The question of the adoption of the contract is a different one. No doubt the company did adopt, as far as it could, the contract with Gaffinel, and it is urged that it could not receive the benefit of the sale without at the same time incurring the burden of the contract for commissions. This does not follow. The two contracts were distinct, with different parties, and with different objects. If the company adopted the contract between Freeman and Schlessinger, it took the decidedly unusual course of adopting a contract which could only impose a burden upon it—the obligation to pay the commissions—and could be of no benefit, since it was already executed on Schlessinger's part and the customer had already been secured. It is not likely that a precedent of that kind can be found. The contract between Freeman and Gaffinel is different, and the company might well seek the advantage to be derived therefrom. The difficulty is that the doctrine of ratification is not applicable to a case where the person who makes the contract was not at the time, and did not profess or assume to be, acting on behalf of a principal. This subject has been recently discussed with thoroughness in the English courts, and the unanimous conclusion of the house of lords establishes the rule above stated with most forcible arguments, to which we have nothing to add: *Durant v. Roberts* (1900), 1 Q. B. 629; *Keighley v. Durant*, [1901] App. Cas. 240. The necessary result is that even if there had been a contract for commissions between Schlessinger and <sup>642</sup> the defendant, those commissions were never earned, since no contract of sale enforceable by the defendant was ever procured by the plaintiff.

The contract he procured was a contract with Freeman. Whether it could be assigned by Freeman to the defendant, so as to enable the defendant to enforce it as against Gaffinel, depends on whether the contract involved personal confidence between the vendor and vendee. Our supreme court has held that a contract for the sale of trees to be grown is assignable, and the assignee may perform as the representative of the assignor: *Parsons v. Woodward*, 22 N. J. L. 196. The queen's bench in England has applied the same rule to an executory contract to repair wagons: *British Wagon Co. v. Lea*, 5 Q. B. D. 149, 49 L. J. Q. B. 321. The decision in the latter case is expressly put upon the ground that the repairs were of such a character that anyone might make them, and probably the court in the former case had in mind the fact that trees to be grown depended more upon the operation of natural forces than the skill of man. The courts have reached a different result where a personal element is involved: *Robson v. Drummond*, 2 Barn. & Adol. 303; *Humble v. Hunter*,

12 Q. B. 310; *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9; *Arkansas Valley Smelting Co. v. Belden Min. Co.*, 127 U. S. 379, 8 Sup. Ct. Rep. 1308, 32 L. ed. 246; *Delaware County v. Diebold Safe Co.*, 133 U. S. 473, 10 Sup. Ct. Rep. 399, 33 L. ed. 674. The rule has recently been applied in our own court of chancery to a contract to publish school books: *Wooster v. Crane & Co.*, 73 N. J. Eq. 22; 66 Atl. 1093. The case is an especially strong one, since the assignee was an Arizona corporation succeeding to the rights of the assignor, a New Jersey corporation with the same stockholders. The learned vice-chancellor relied upon the fact that the complainant had the right to rely upon the safeguards provided by our corporation act, and could not be compelled to accept in lieu of her contract rights a claim against a corporation under the laws of another jurisdiction which might not provide the same safeguards.

The same rule has been applied by our supreme court to a case which manifestly involved personal confidence: *People's Bank etc. Co. v. Weidinger*, 73 N. J. L. 433, 64 Atl. 179. In *Tolhurst v. Associated Portland Cement Manufacturers*, [1903] App. Cas. 414, a contract for the supply of chalk for the manufacture of cement was held to be assignable by one corporation to another, but Lord Halsbury doubted, and only yielded his assent because of the length of duration of the contract, the persons engaged in it and the nature of the contract itself, while Lord Robertson dissented. The decision was afterward explained upon the ground that the contract for the supply of chalk for fifty years was to be treated as a contract for the supply to a given cement-making place, and not a personal contract: *Kemp v. Baerselman* (1906), 2 K. B. 604. In the last case the defendant had agreed to sell eggs to Kemp, a cake manufacturer. Kemp turned over his business to a corporation, of whose twenty thousand shares he owned all but seven. The court of appeal held that the defendant was thereby discharged from his obligation. In *New York Bank Note Co. v. Hamilton Bank Note etc. Co.*, 180 N. Y. 280, 73 N. E. 48, a contract for the sale of printing-presses with a New Jersey corporation was held not assignable to a West Virginia corporation organized to take over the business and contracts of the former.

Recently the question has been reviewed by the supreme court of North Carolina in an able opinion by Mr. Justice Hoke, in which the general rule was accepted, but held not to be applicable to a contract between a railroad company and an individual for the cutting from the company's timber lands and the delivery on its right of way of a definite quantity of cord-wood, which contract was not to be performed by the contractor personally and did not require or import any special reliance on his skill or business qualifications: *Atlan-*



tic etc. R. R. Co. v. Atlantic etc. Co., 147 N. C. 368, 125 Am. St. Rep. 550, 61 S. E. 185, 23 L. R. A., N. S., 223, 15 Ann. Cas. 363. The notes to this case and to *Simmons v. Zimmerman*, 1 Ann. Cas. 850, collect the authorities. The injustice of permitting an assignment of a contract for personal services, for the painting of a picture, for a partnership, is obvious. A contract for the sale <sup>644</sup> of goods to be manufactured stands on similar grounds where the vendee relies upon the skill and experience of the manufacturer, as well as upon the implied warranty of quality. No man who has employed a tailor to make a suit of clothes ought to be compelled to accept a suit made by the tailor's assignee. As Lord Denman said (12 Q. B. 317): "You have a right to the benefit you contemplate from the character, credit and substance of the party with whom you contract."

"In principle," says Pollock, "however, the intention of a contracting party is to create an obligation between himself and another certain person, and if that intention fails to take its proper effect, it cannot be allowed to take the different effect of involving him without his consent in a contract with someone else": Pollock on Contracts, 7th Eng. ed., 467, 468. He adds (page 471) that rights arising out of a contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided. In the present case Gaffinel relied in fact upon Freeman's personal performance of the contract, and was careful to stipulate that the staves should be hand-finished by European workmen. We think he was not compelled to accept performance from a corporation to whom it had been assigned. The fact that Freeman agreed for himself, his heirs and assigns, does not make the contract assignable so as to bind Gaffinel. Its object was to bind Freeman's heirs to liability in case of breach, and so far as concerns assigns is applicable only to the extent to which the contract might legally be assignable by Freeman; for example, an assignment by him of the money due for staves that might be actually sold and delivered. To hold that these words made the contract assignable in the wider sense would necessitate the conclusion that it might be performed by his heirs at law. A somewhat similar case arose in *Wooster v. Crane & Co.*, 73 N. J. Eq. 22, 66 Atl. 1093.

It cannot be inferred that the corporation, by taking an assignment of the Gaffinel contract, thereby assumed the liability of Freeman on the Schlessinger contract. The Gaffinel <sup>645</sup> contract was treated by the defendant and Freeman as a valuable asset of Freeman for which stock might properly be issued. The cost of procuring that contract was properly

an expense for Freeman to pay; he had his reward in the stock issued to him.

There should have been a nonsuit, and the judgment is reversed in order that a venire de novo may issue.

*Assignment.—A Contract Which Calls for the Performance of a Demand* purely personal in its nature cannot ordinarily be assigned without the consent of the party benefited: *Montgomery v. De Picot*, 153 Cal. 509, 126 Am. St. Rep. 84. But executory contracts are assignable except such as call for the performance of personal services or involve personal credit or trust; and this exception may be waived by the party for whose benefit it exists, and it does not apply when the contract is entirely objective in its nature and gives clear indication that the personality of the other party was in no way considered. A contract to furnish wood to a railway company for use in its engines is assignable by that company to its lessee: *Atlantic etc. R. Co. v. Atlantic etc. Co.*, 147 N. C. 368, 125 Am. St. Rep. 550. But a contract to erect a canning factory for persons inexperienced in the business who subscribe the cost of the enterprise involves a relation of personal confidence between them and the contractor, and is not assignable by him without their consent: *Johnson v. Vickers*, 139 Wis. 145, 131 Am. St. Rep. 1046.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**NORTH CAROLINA.**

**ROBERTSON v. CONKLIN & PLYMOUTH LUMBER  
COMPANY.**

[153 N. C. 1, 68 S. E. 899.]

**DAMAGES.**—Evidence of the Pecuniary Condition of the plaintiff is usually not admissible in cases of tort, and never so for the purpose of securing vindictive damages. (p. 636.)

**MALICIOUS PROSECUTION.**—Evidence of the Poverty of the Plaintiff is not admissible in an action for malicious prosecution, where there is no evidence that his actual damage was increased by his poverty. (p. 636.)

Action to recover damages for an alleged malicious injury to the person and character of the plaintiff. Three distinct counts or causes of action were set out in the complaint, namely, malicious prosecution, abuse of process with false arrest, and slander. Seven issues were submitted. The sixth one and its answer were: "What actual damage, if any, is the plaintiff entitled to recover? A. One thousand dollars." The court, by plaintiff's consent, reduced the verdict to five hundred dollars, and gave judgment for the plaintiff. The defendant appealed.

Wm. M. Bond and Wm. M. Bond, Jr., for the plaintiff.

Asa O. Gaylord, for the defendant.

\* **BROWN, J.** The evidence tended to show that the plaintiff was employed by the Plymouth Lumber Company as night watchman at the time of the alleged wrongs committed against him, and that E. J. Conklin was secretary and treasurer of the lumber company; that on a Saturday night forty dollars and eighty cents was left in a desk drawer in the office of the lumber company, in the mill grounds which the plaintiff was employed to watch; that the money was taken and defendant charged plaintiff with the larceny, and also had him arrested under a search-warrant, or without warrant, and had his home searched by an officer.

Over the objection of the defendant plaintiff was permitted to testify that he had no property at the time, and was entirely dependent on "his two hands" for a living.

The rule that, in cases of malicious torts, where punitive damages are claimed and may be awarded, evidence of the defendant's pecuniary condition is admissible, is very generally recognized by the authorities, but evidence of the pecuniary condition of the plaintiff, as a general rule, is inadmissible. It is admitted only on the ground that the pecuniary circumstances of the plaintiff are directly involved in estimating the actual damages caused by the tortious act, the poverty of the plaintiff making the injury the greater. Such evidence is never admitted for the purpose of securing vindictive damages: \* *Rowe v. Moss*, 67 Am. Dec. 566, and cases cited. It is generally allowed in actions for the wrongful infliction of personal injuries by an assault, upon the theory that the consequences of a severe personal injury are more disastrous to a person destitute of pecuniary resources and dependent wholly upon his manual exertions for the support of himself and family than to one of ample means.

We think this is the rule recognized by this court in *Reeves v. Winn*, 97 N. C. 246, 2 Am. St. Rep. 287, 1 S. E. 448.

There is nothing in this case which justifies a consideration of the plaintiff's pecuniary condition in assessing the damages. There is no foundation for the claim that whatever actual damages he suffered was increased by plaintiff's poverty.

The evidence shows that he did not suffer the pangs of hunger or listen to the cry of his children for bread by reason of defendant's conduct. In fact, he was not even discharged from defendant's service, but transferred to the day force at no decrease in pay so far as the records disclose, and continued in defendant's service for some time after the occurrence, and only discharged after the commencement of this action.

It is evident from reading the evidence as to actual damage that the jury undertook to allow punitive damages under the sixth issue, which probably induced his honor to reduce the verdict and plaintiff to accept it.

Upon the next trial we think it better to follow the usual practice and submit only one issue as to damage, and under it the judge should carefully instruct the jury as to actual damage and also upon punitive damage, and when the latter may or may not be allowed.

New trial.

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*The Malicious Prosecutions of Criminal Actions* is discussed in the note to *Ross v. Hixon*, 26 Am. St. Rep. 127; and the malicious prosecution of civil actions is discussed in the note to *McCormick Harvesting etc. Co. v. Willan*, 93 Am. St. Rep. 454. The plaintiff, in as

action for the malicious prosecution of a criminal action should not be permitted, for the purpose of enhancing his damages, to prove that his wife was dead and that he had four children to support and care for: Note to *Ross v. Hixon*, 26 Am. St. Rep. 163.

*That Evidence of the Financial Condition of the defendant is admissible in cases founded in tort, where exemplary damages are claimed, see Cosgriff v. Miller*, 10 Wyo. 190, 98 Am. St. Rep. 977; and that evidence of financial condition of the plaintiff is admissible in an action for personal injuries, when the evidence will justify exemplary damages, see *Beck v. Dowell*, 111 Mo. 506, 33 Am. St. Rep. 547.

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## WILLIAMS v. BRANNING MANUFACTURING COMPANY.

[153 N. C. 7, 68 S. E. 902.]

**ARBITRATION—Conclusiveness of Award.**—A valid award operates as a final and conclusive judgment, as between the parties to the submission, or within the jurisdiction of the arbitrators, respecting all matters determined and disposed of by it. (p. 638.)

**ARBITRATION—Revocation of Submission Without Notice.**—While a submission to arbitration may be revoked by any party thereto at any time before the award is made, an express revocation of the submission is not complete until notice is given to the arbitrators. (p. 638.)

**ARBITRATION—Revocation by Bringing Suit.**—If matters in dispute have been submitted to arbitration, and suit is brought for the subject matter thereof, the defendant has no legal notice of the cause of action until a complaint is filed. The mere issuance of a summons before award does not invalidate an award made before the filing of the complaint or the giving of a bill of particulars. (p. 639.)

Action for damages for breach of contract. The plaintiffs had contracted to operate the defendant company's lumber plant, to cut defendant's standing timber into logs, and to manufacture the logs into lumber. This contract was made on March 1, 1901, but on October 1, 1904, the parties entered into another contract, modifying and changing some of the provisions of that of 1901. The contract of 1904 contained a provision that in the event of any future misunderstanding or disagreement between the parties as to the contract of March 1, 1901, "or as to any modifications of the same herein contained, that the matter shall be settled by arbitrators," etc., "whose award shall be accepted as final between the parties and faithfully performed by each." Disagreements did arise, and the matters in controversy were submitted to arbitrators, on February 20, 1906, in accordance with the agreements. On January 1, 1907, before the arbitrators had rendered their award, this action, as shown by the summons, was commenced to recover damages for breach of the original contract. There was an agreed statement of facts

presented to the trial court for its judgment. The arbitrators, as expressly admitted in the case agreed, rendered their award on January 25, 1907, passing on the matters submitted to them, but the award was ignored by the plaintiffs. It was also admitted in the facts agreed upon that the several matters of difference submitted to arbitration were those set out in the complaint in this action, but the complaint was not filed until January 18, 1908. The court below was of the opinion that the provision in the contract agreeing to submit all matters of difference to arbitration was no bar to this action; the defendant's pleas in bar were therefore overruled, and the case was referred to a referee. The defendant appealed.

Winborne & Winborne, for the plaintiffs.

Pruden & Pruden, Wm. M. Bond and S. B. Shepherd, for the defendant.

<sup>10</sup> BROWN, J. It is unnecessary to review the conclusions of the superior court that the provision in the contract agreeing to submit all matters of difference to arbitration is no bar to this action, for the reason that the plaintiffs and defendant did voluntarily submit such matters to arbitration in manner and form as provided in the contract, and the arbitrators in due time rendered their award. It is common learning that a valid award operates as a final and conclusive judgment, as between the parties to the submission, or within the jurisdiction of the arbitrators, respecting all matters determined and disposed of by it.

But it is contended that the fact that a summons in this action was issued some days before the rendering of the award revoked the submission, and deprived the arbitrators of the right to make an award.

No other form of revocation is contended for.

At common law a submission might be revoked by any party thereto at any time before the award was rendered: Bacon's Abridgment, Arb. B.; Comyn's Digest, Arb. D., 5; Vinyor's Case, 8 Coke, 82.

Some courts of this country have held to the contrary (Berry v. Carter, 19 Kan. 135, and cases cited), but this court has followed the doctrine of the common law: Tyson v. Robinson, 25 N. C. 333; Carpenter v. Tucker, 98 N. C. 316, 3 S. E. 831.

The revocation to be effective must be express, unless there is a revocation by implication of law, and in case of express revocation, in order to make it complete, notice must be given to the arbitrators. It is ineffective until this has been done: Allen v. Watson, 16 Johns. 205; Brown v. Leavitt, 26 Me. 251; Morse on Arbitration and Award, p. 231; Viner's Abridg-

ment, Authority E., 3, 4; Vinyor's Case, 8 Coke, 82; 2 Am. & Eng. Ency. of Law, 600.

<sup>11</sup> It is contended that commencing an action is a revocation by legal implication. Such revocations arise from the legal effect of some intervening happening after submission, either by act of God or caused by the party and which necessarily puts an end to the business.

The death of a party, or arbitrator, marriage of a feme sole, lunacy of a party, or the utter destruction and final end of the subject matter, are of this description. But whether the bringing of an action for the subject matter of an arbitration after submission and before award in an implied revocation, is a matter about which the courts differ.

In New York it is held that it is no revocation in law: New York Lumber & W. Co. v. Schneider, 15 Daly, 15, 1 N. Y. Supp. 441; Smith v. Compton, 20 Barb. 262. To same effect are the decisions in New Jersey and Vermont: Knaus v. Jenkins, 40 N. J. L. 288, 29 Am. Rep. 237; Sutton v. Tyrrell, 10 Vt. 87. The courts of Kentucky, Illinois, Georgia and New Hampshire hold the contrary: Peter's Admr. v. Craig, 6 Dana, 307; Paulsen v. Maske, 24 Ill. App. 95; Leonard v. House, 15 Ga. 473; Kimball v. Gilman, 60 N. H. 54. The conclusion of Judge Collamer in the Vermont case is that "The entry and continuance of an action was, obviously, not an express revocation, nor was it such an act as put an end to the subject matter of the submission, nor did it prevent the arbitration from proceeding with effect. It occasioned the defendant no cost, and, indeed, it was no more than an ordinary act of caution to keep the action in existence should the opposite party revoke or decline to attend. This, then, was not revocation in law." Nevertheless, it is plainly deducible from all the cases that the action when commenced must cover the subject matter submitted to arbitration; otherwise, it cannot be construed as a revocation or notice to the party or to the arbitrators.

In the case at bar the summons was issued some days before the award was made, but the complaint was not filed until a year after. The summons gave no indication as to the character of the action except that it was a civil action.

Until a complaint is filed the defendant has no legal notice of the cause of action, and the arbitrators had a right to proceed with the pending arbitration and to render their award. Assuming <sup>12</sup> that the bill of particulars furnished upon defendant's demand is notice of the character of the action, that was not furnished until after August 1, 1908, several months after the award had been rendered.

It is further contended that the award is not warranted by the terms of submission. According to the written contract and the terms of the submission, the purpose of the

award was to ascertain the damages accruing by reason of: "1. The percentage of miscuts and stained lumber. 2. As to excess cost of railroading. 3. As to excess cost of handling lumber on the yard. 4. Are J. T. Williams & Bro. responsible for fire which occurred last fall, supposedly originating from sparks from locomotive No. 7? The above items cover all disputes and contentions under said contract to date."

In their written award the arbitrators appear to have carefully confined themselves to the questions submitted and to have confined their findings to the four matters in dispute. But it is unnecessary to discuss that contention further, as it is expressly admitted in the case agreed that the arbitrators, on January 25, 1907, rendered their award, "passing on the matters submitted to them."

In view of this admission in the record, it is not now open to plaintiff to attack the award.

The judgment of the superior court upon the "case agreed" is reversed.

#### REVOCATION OF AGREEMENTS TO ARBITRATE

##### I. Right of Revocation Before Award is Made.

- a. General Rule, 640.
- b. Modification of Rule, 642.
- c. Effect of Agreement not to Revoke, 643.

##### II. Right of Revocation After Award or Pending the Proceedings.

- a. After Award is Made, 643.
- b. After Submission but Before Award, 644.

##### III. Right of Revocation in Case of Submission by Rule of Court, 645.

##### IV. Authority of Officer of Corporation to Revoke, 645.

##### V. What Constitutes Revocation.

- a. In General, 646.
- b. Express Revocation, 646.
- c. Implied Revocation—Operation of Law.
  - 1. In General, 646.
  - 2. Death of Party, 646.
  - 3. Death or Refusal of Arbitrators to Act, 647.
  - 4. Marriage of Feme Sole, 647.
  - 5. Institution of Suit, 648.

##### VI. Effect of Revocation, 648.

##### VII. Waiver of Revocation, 649.

##### I. Right of Revocation Before Award is Made.

a. General Rule.—"It is the rule," the court says in *Memphis Trust Co. v. Brown-Ketchum Iron Works*, 166 Fed. 398, 402, "that a naked executory agreement (not under authority of statute or rule of court), made after the arising of a dispute, to submit the same to arbitration, is revocable at will by either party, in advance of the actual carrying out of the agreement by arbitration and award thereon." It must be confessed, however, that no entirely satisfactory reasons have been put forth to sustain this doctrine. Said Justice Allen in *President etc. Delaware & Hudson Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250, 258: "An agreement of this character induced by fraud or overreaching, or entered into unadvisedly through ignorance, folly or



undue pressure, might well be refused a specific performance, or disregarded when set up as a defense to an action. But when the parties stand upon an equal footing, and intelligently and deliberately, in making their executory contracts, provide for an amicable adjustment of any difference that may arise, either by arbitration or otherwise, it is not easy to assign at this day any good reason why the contract should not stand, and the parties made to abide by it and the judgment of the tribunal of their choice. Were the question *res nova*, I apprehend that a party would not now be permitted, in the absence of fraud or some peculiar circumstances entitling him to relief, to repudiate his agreement to submit to arbitration, and seek a remedy at law, when his adversary had not refused to arbitrate, or in any way obstructed or hindered the arbitration agreed upon. But the rule that a general covenant to submit any differences that may arise in the performance of a contract, or under an executory agreement, is a nullity, is too well established to be now questioned."

The authorities are numerous which recognize the rule that an agreement or stipulation to submit matters in controversy to arbitration may be revoked by either party thereto at any time before the award is made, except when the matters are referred to arbitrators by a rule of court, or the statute prohibits a revocation: *California Academy of Sciences v. Fletcher*, 99 Cal. 207, 33 Pac. 855; *Fooks v. Lawson*, 1 Marv. (Del.) 115, 40 Atl. 661; *Leonard v. House*, 15 Ga. 473; *Davis v. Maxwell*, 27 Ga. 368; *Cherry v. Smith*, 51 Ga. 558; *Parsons v. Ambos*, 121 Ga. 98, 48 S. E. 696; *Poppers v. Knight*, 69 Ill. App. 578; *Bash v. Christian*, 77 Ind. 290; *Harrison v. Hartford Fire Ins. Co.*, 112 Iowa, 77, 83 N. W. 820; *Peters v. Craig*, 36 Ky. 307; *Brown v. Leavitt*, 26 Me. 251; *Call v. Hagar*, 69 Me. 521; *Gregory v. Pike*, 94 Me. 27, 46 Atl. 793; *Pond v. Harris*, 113 Mass. 114; *Reed v. Washington F. & M. Ins. Co.*, 138 Mass. 572; *Boston etc. R. Corp. v. Nashua etc. R. Corp.*, 139 Mass. 463, 31 N. E. 751; *Coon v. Allen*, 156 Mass. 113, 30 N. E. 83; *Chippewa Lumber Co. v. Phoenix Ins. Co.*, 80 Mich. 116, 44 N. W. 1055; *Minneapolis & St. L. Ry. Co. v. Cooper*, 59 Minn. 290, 61 N. W. 143; *Jones v. Harris*, 59 Miss. 214; *Donnell v. Lee*, 58 Mo. App. 288; *Home Fire Ins. Co. v. Kennedy*, 47 Neb. 138, 53 Am. St. Rep. 521, 66 N. W. 278; *Butler v. Greene*, 49 Neb. 280, 68 N. W. 496; *Hunt v. Wilson*, 6 N. H. 36; *Rochester v. Whitehouse*, 15 N. H. 468; *Dexter v. Young*, 40 N. H. 130; *Paulson v. Halsey*, 38 N. J. L. 488; *Heath v. President Gold Exchange*, 7 Abb. Pr., N. S., 251, 38 How. Pr. 168; *Wood v. Lafayette*, 46 N. Y. 484; *Tyson v. Robinson*, 25 N. C. 333; *Williams v. Branning Mfg. Co. (N. C.)*, 68 S. E. 902; *Coleman v. Grubb*, 23 Pa. 393; *Mentz v. Armenia Fire Ins. Co.*, 79 Pa. 78, 21 Am. Rep. 80; *Sherman v. Cobb*, 15 R. I. 570, 10 Atl. 591; *Hawley v. Hodge*, 7 Vt. 237; *Sartwell v. Sowles*, 72 Vt. 270, 48 Atl. 11, 82 Am. St. Rep. 943; *Rison v. Moon*, 91 Va. 384, 22 S. E. 165; *Corbin v. Adams*, 76 Va. 58; *Stringer v. Toy*, 33 W. Va. 86, 10 S. E. 26; *Tobey v. Bristol County*, 3 Story (U. S.), 800, Fed. Case No. 14,065; *Dickson Mfg. Co. v. American Locomotive Co.*, 119 Fed. 488; *Mitchell v. Harris*, 2 Ves. 129, 30 Eng. Reprint, 557; *Street v. Rigby*, 6 Ves. 815, 31 Eng. Reprint, 1323; *Fraser v. Ehrensperger*, 12 Q. B. D. 310.

Said the court in *Parsons v. Ambos*, 121 Ga. 98, 48 S. E. 696: "Courts favor the submission of controversies to speedy and inex-

pensive tribunals of the parties' own selection, and generally, in the absence of fraud or palpable mistake, will not interfere with their findings, even though a verdict of a jury to the same effect might be set aside as contrary to law. But the underlying reason for the recognition of the award is found in the fact that the parties not only agreed to submit their differences, but voluntarily permitted the agreement to be executed, and consented for the award to be actually made by judges of their own selection. The mere executory agreement to submit is generally revocable, otherwise nothing would be easier than for the more astute party to oust the courts of jurisdiction. By first making the contract, and then declaring who should construe it, the strong could oppress the weak, and in effect so nullify the law as to secure the enforcement of contracts usurious, illegal, immoral, or contrary to public policy. A common-law agreement, therefore, to submit the validity and effect of a contract, or to submit all matters in dispute, to arbitration, may be revoked by either party at any time before the award: For statutory awards, see Civ. Code 1895, sec. 4486. Some of the early cases put this rule upon the ground that a provision whereby the courts may be ousted of their jurisdiction is repugnant to that other provision, implied in every contract, that its validity and effect shall be determined by the courts and the law of the land. But whether predicated on the idea that the agreement is repugnant to the contract or to public policy, the principle is universally recognized that such general submissions are revocable. But this does not mean that nothing can be submitted, nor that the parties may not stipulate that certain facts must be determined by those of their own choosing. For example, in building contracts, it is manifest that there must be someone other than a court or jury to pass on the question as to whether there has been a compliance with the specifications as the building proceeds, or to determine whether the work shall be accepted or rejected as completed. Hence there may be a lawful and irrevocable stipulation for the certificate of the architect or engineer. In contracts of insurance the assessment of the amount of damages may be made a condition precedent to a suit by the insured on the policy. So, too, in contracts of sale, the parties may stipulate for the opinion of an attorney as to the validity of a title, or that the value of the property shall be ascertained by appraisers before either has the right to sue. This fixing of values, however, is a mere incident, and not of the substance of the contract. It rather serves the office of evidence, than of a finding which construes the contract or determines rights. The jurisdiction of the courts over these substantial matters may be retained by revocation, though the incidental stipulation for a valuation is not revocable by the act of the parties, each of whom is bound to do all that is reasonably in his power to procure the appraisal, and must continue to act until he puts the opposite party in the wrong, or makes it manifest that no suitable person can be obtained to do the service within a reasonable time: *Hood v. Harts-horn*, 100 Mass. 121, 1 Am. Rep. 89."

**b. Modification of Rule.**—It has been established as a rule of law by the courts of Pennsylvania that where an agreement to submit to arbitration partakes of the nature of a contract, whereby important rights are gained and lost reciprocally, and the submission is the moving consideration to these acts, a different rule prevails; that is to

say, such an agreement is irrevocable by either party without the consent of the other, even though the terms thereof deprive the courts of jurisdiction: *McGhee v. Duffield*, 5 Pa. 497; *Paist v. Caldwell*, 75 Pa. 161; *Lewis' Appeal*, 91 Pa. 359; *Williams v. Tracey*, 95 Pa. 308; *White's Appeal*, 108 Pa. 473; *McKenna v. Lyle*, 155 Pa. 599, 35 Am. St. Rep. 910, 26 Atl. 777; *Zehner v. Lehigh Coal etc. Co.*, 187 Pa. 487, 67 Am. St. Rep. 586, 41 Atl. 464; *McCune v. Lyttle*, 197 Pa. 404, 47 Atl. 190; *Frederick v. Margworth*, 221 Pa. 418, 70 Atl. 797, 18 L. B. A., N. S., 1246.

And in *Kansas* it has been decided that, while a mere naked arbitration is revocable at the pleasure of either party at any time before an award is made, still if there is an agreement for a valid consideration for the purchase and sale of lands or chattels to be appraised by third persons, and if such appraisement is rather an incident of the contract than a single subject of agreement between the parties, one of them cannot retain an advantage gained by the contract and revoke the authority of the appraisers: *Guild v. Atchison etc. R. R. Co.*, 57 Kan. 70, 57 Am. St. Rep. 312, 45 Pac. 82, 33 L. B. A. 77.

But in *Jones v. Harris*, 59 Miss. 214, it is held that a written agreement to submit to arbitration is, before an award is made and published, revocable by a party who, for a valuable consideration, signed it with a surety, the court taking the view that the fact that there was a valuable consideration for the agreement of one of the parties to submit to arbitration does not affect his right to revoke.

**c. Effect of Agreement not to Revoke.**—In *People v. Nash*, 111 N. Y. 310, 7 Am. St. Rep. 747, 18 N. E. 630, 2 L. B. A. 180, it is declared that submissions to arbitration are revocable in their nature, and the parties cannot make that irrevocable which is of its own nature revocable; and that an agreement not to revoke a submission to arbitration will not deprive either of the parties of the power given him by section 2383 of the Code of Civil Procedure to revoke such submission at any time before the closing of the proofs and the final submission of the cause for decision. And in *Sartwell v. Sowles*, 72 Vt. 270, 82 Am. St. Rep. 943, 48 Atl. 11, it is affirmed that a submission to arbitration may be revoked by either party at any time before an award is made and published, notwithstanding an agreement not to revoke, and that when the submission is revoked, it is no bar to a subsequent action. So in *Heritage v. State*, 43 Ind. App. 595, 88 N. E. 114, it is held that a common-law submission may be revoked at any time before the award is made, even though the agreement provides that the submission cannot be revoked.

## **II. Right of Revocation After Award or Pending the Proceedings.**

**a. After Award is Made.**—After an award by arbitrators has been made and published or notice given, neither party can, as a rule, revoke the submission to arbitration, unless the other party consents thereto: *Coon v. Allen*, 156 Mass. 113, 30 N. E. 83; *Hunt v. Wilson*, 6 N. H. 36; *Clement v. Hadlock*, 13 N. H. 185; *Merritt v. Thompson*, 27 N. Y. 225; *Williams v. Branning Mfg. Co.*, 153 N. C. 637, ante, p. 637, 68 S. E. 902; *Paist v. Caldwell*, 75 Pa. 161; *McKenna v. Lyle*, 155 Pa. 599, 35 Am. St. Rep. 910, 26 Atl. 779; *Levy v. Scottish Union & National Ins. Co.*, 58 W. Va. 546, 52 S. E. 449. An award by arbitrators is in the nature of a judgment, and ordinarily conclusive upon the parties: *Hynes v. Wright*, 62 Conn. 323, 36 Am. St. Rep. 344, 26

Atl. 642; *French v. Raymond*, 82 Vt. 156, 137 Am. St. Rep. 994, 72 Atl. 324. It may, of course, be set aside for fraud, mistake, or misconduct on the part of the arbitrators, in a proper case, but it is set aside reluctantly: *Roberts v. Consumers' Can Co.*, 102 Md. 362, 111 Am. St. Rep. 377, 62 Atl. 585; *Brush v. Fisher*, 70 Mich. 469, 14 Am. St. Rep. 510, 38 N. W. 446; *Hewitt v. Reed City*, 124 Mich. 6, 83 Am. St. Rep. 309, 82 N. W. 616, 50 L. R. A. 128; *Sweet v. Morrison*, 116 N. Y. 19, 15 Am. St. Rep. 376, 22 N. E. 276; *Waisner v. Waisner*, 15 Wyo. 420, 123 Am. St. Rep. 1081, 89 Pac. 580. In the recent case of *French v. Raymond*, 82 Vt. 156, 137 Am. St. Rep. 994, 72 Atl. 324, it is decided that equity will not set aside an award by arbitrators on the ground of perjury in procuring it.

In *Boston & L. R. Corp. v. Nashua & L. R. Corp.*, 139 Mass. 463, 31 N. E. 751, it is held that an award must cover all the claims submitted and presented to the arbitrators, and must be mutual, certain and final. Hence, where several claims are submitted to arbitrators, and the award includes only a part of them, it is not a final determination, but an interlocutory one; and an interlocutory award does not prevent either party from revoking the submission.

b. *After Submission but Before Award.*—In *Shroyer v. Braash*, 57 Ind. 349, it is held that under the statute of Indiana, neither party can revoke his submission to arbitrators after the latter have commenced their hearing of the cause submitted to them. The courts of New York, construing the meaning of the code providing for arbitration, hold to the same effect, namely, that a submission to arbitration cannot be revoked after the cause has been submitted to the arbitrators: *Bank of Monroe v. Widner*, 11 Paige, 529, 43 Am. Dec. 768; *People v. Nash*, 111 N. Y. 310, 7 Am. St. Rep. 747, 18 N. E. 630, 2 L. R. A. 180; *New York Lumber etc. Co. v. Schnieder*, 119 N. Y. 475, 24 N. E. 4.

In *Carey v. Montgomery County Commrs.*, 19 Ohio, 245, it is held that under a statutory submission to arbitration, a party cannot revoke the submission after the arbitrators have been sworn and proceeded with the cause for a considerable length of time. "When the legislature enacted this law upon the subject of arbitrations, gave powers so ample, and at the same time guarded them so carefully, they never could have meant to allow an interference like this right of revocation. They could not have intended that the arbitrators should be sworn to the faithful performance of their duty, should proceed, by the examination of witnesses and otherwise, throughout the hearing of the case, and at last, when about to make up their award, be exposed at the mere will of one of the parties to be suddenly deprived of their authority."

In *Shelby Iron Co. v. Cobb & Lewis*, 55 Ala. 636, it appeared that while the case was pending, the parties agreed to submit to arbitration under the code of Alabama, section 3148, which reads as follows: "It is the duty of all courts to encourage the settlement of controversies pending before them, by a reference thereof to arbitrators chosen by the parties, or their attorneys; and on motion of the parties, must make such order, and continue the cause for a award; but such continuance must not extend beyond one term, unless for good cause shown, or by consent." It is held that when a pending suit is submitted to arbitration, and the submission is made an order of court under the statute, the court has the power to set the sub-

mission aside at a subsequent term on the showing of either party that the arbitrators failed to act.

It is generally held that either party may move to set aside a submission to arbitration, made by rule of court, upon proper showing: *Cowley v. Dobbins*, 131 Mass. 327; *Dexter v. Young*, 40 N. H. 130; *Tyson v. Robinson*, 25 N. C. 333; *Pendleton v. Barton*, 4 W. Va. 496.

In order that a submission to arbitration may be made a rule of court, the parties must consent thereto; and the consent must appear in the submission itself: *O'Bryan v. Reed*, 2 Fla. 448; *Coxetter v. Huertas*, 14 Fla. 270; *Smith v. Douglass*, 16 Ill. 34; *Estep v. Larsh*, 16 Ind. 82; *Minneapolis etc. R. R. Co. v. Cooper*, 59 Minn. 290, 61 N. W. 143; *Weare v. Putnam*, 56 N. H. 49; *Craig v. Craig*, 9 N. J. L. 198; *Hazen v. Addis*, 14 N. J. L. 333.

### III. Right of Revocation in Case of Submission by Rule of Court.

There are statutory provisions in many states which permit persons capable of contracting to submit to arbitration subjects in controversy between them, and make the submission a rule of court by filing the submission with the clerk thereof. The revocability of such submissions will depend somewhat on the terms of the statutes, but the general rule is that a submission made a rule of court cannot be revoked at the pleasure of one of the parties: *California Academy of Sciences v. Fletcher*, 99 Cal. 207, 33 Pac. 855; *Bray v. English*, 1 Conn. 498; *Poppers v. Knight*, 69 Ill. App. 578; *Shroyer v. Bash*, 57 Ind. 349; *Wilkinson v. Pritchard* (Iowa), 123 N. W. 964; *Inhabitants of Cumberland v. Inhabitants of North Yarmouth*, 4 Me. 459; *Gregory v. Pike*, 94 Me. 27, 46 Atl. 793; *Haskell v. Whitney*, 12 Mass. 47; *Dexter v. Young*, 40 N. H. 130; *Freeborn v. Denman*, 8 N. J. L. 116; *Ferris v. Munn*, 22 N. J. L. 161; *Frets v. Frets*, 1 Cow. (N. Y.) 335; *Tyson v. Robinson*, 3 Ired. (N. C.) 333; *Montgomery County v. Carey*, 1 Ohio St. 463; *White's Appeal*, 108 Pa. 473; *Zehner v. Lehigh Coal etc. Co.*, 187 Pa. 487, 67 Am. St. Rep. 586, 41 Atl. 464; *Masterson v. Kidwell*, 2 Cranch (C. C.), 669, 16 Fed. Cas. No. 9269.

### IV. Authority of Officer of Corporation to Revoke.

In *Madison Ins. Co. v. Griffin*, 3 Ind. 277, the authority of the president and secretary of a corporation to revoke a submission to arbitration which the corporation, by its directors, had agreed to make, was denied; and the court, in the course of its opinion, said: "We do not think there was a valid revocation of that submission. The agreement to submit was made by the corporation itself—at least, by its directors—and not by the secretary or president, or both. The secretary, to carry into effect that agreement, executed under, as we have held, a special authority from the company, the submission bond. He was not specially authorized to do more. He was not empowered to revoke the submission which the corporation, by its directors, had agreed to make. Indeed, the secretary did not undertake, of his own authority, to do it. The attempted revocation was by him, under the sanction of the president, without, however, any authority from the directors. There was no by-law conferring the power to act upon the president and secretary . . . had the board not assumed to act at all in the matter in question, but left it to . . . the president and secretary, perhaps these officers might . . . have revoked their own submission. But the board of direc-

tors is paramount in authority to the president and secretary; and it seems to us, as that board had, in fact made the submission, it was not competent for the president and secretary . . . to revoke that submission. . . . A submission should be revoked by an authority equal to that which makes it."

#### V. What Constitutes Revocation.

a. **In General.**—A most admirable decision as to what constitutes a revocation of, and the manner of revoking, a submission to arbitration is found in the case of *Sutton v. Tyrrell*, 10 Vt. 91. The court says: "Revocations are express, or in fact; or implied, or in law. In relation to the first, they are made by the party, and are to be in the same form or manner in which the submission is made. If the submission be by deed, then the revocation must be under seal; if by writing, then so must be the revocation; and if simply, by parol, then it may be so revoked. Implied revocations, or revocations in law, arise from the legal effect and necessary consequence of some intervening event, either providential or caused by the party, necessarily putting an end to the business. The death of the party or umpire, the marriage of a party feme sole, the lunacy of a party, or the utter destruction or final end of the subject matter, are of this description."

b. **Express Revocation.**—So long as the intention to revoke the submission to arbitration is clearly expressed, and the revocation is of the same dignity as the submission, and the arbitrators have been notified of the revocation, and it is plain in its intent, the revocation will be upheld, but not otherwise: *Steere v. Brownell*, 113 Ill. 415; *Goodwine v. Miller*, 32 Ind. 419; *Shroyer v. Bash*, 57 Ind. 349; *Wallis v. Carpenter*, 95 Mass. 19; *Dexter v. Young*, 40 N. H. 130; *Frets v. Frets*, 1 Cow. (N. Y.) 335; *Howard v. Cooper*, 1 Hill (N. Y.), 44; *Van Antwerp v. Stewart*, 8 Johns. (N. Y.) 125; *Belyea v. Ramsay*, 2 Wend. (N. Y.) 602; *Williams v. Branning Mfg. Co.*, 153 N. C. 7, 68 S. E. 902; *Dickerson v. Rorke*, 30 Pa. 390; *Shisler v. Keavy*, 75 Pa. 79; *Buckwalter v. Russell*, 119 Pa. 502, 13 Atl. 310; *Mullins v. Arnold*, 36 Tenn. 261; *Sutton v. Tyrrell*, 10 Vt. 91; *McFarlane v. Cushman*, 21 Wis. 406. A submission by deed can be revoked by deed only, and a submission in writing cannot be revoked orally: *Brown v. Leavitt*, 26 Me. 251; *Sutton v. Tyrrell*, 10 Vt. 91.

#### c. Implied Revocation—Operation of Law.

1. **In General.**—An agreement to submit a controversy to arbitration may be revoked by operation of law, as where one of the parties dies, or where an arbitrator dies or refuses to act, or where the arbitrators fail to agree: "The general rule is to the effect that failure to agree, refusal to act, or death of a party, arbitrator or umpire, operates to revoke a common-law submission, and, under such circumstances, the court possesses no power to compel the parties to select other arbitrators, though, if the revocation is brought about by death or the act of the law, neither of the parties can be made to suffer therefor": *Parsons v. Ambos*, 121 Ga. 98, 48 S. E. 696.

2. **Death of Party.**—The general rule is that the death of a party to the submission before an award is made operates as a revocation, unless there is a provision to the contrary in the submission: *Parsons v. Ambos*, 121 Ga. 98, 48 S. E. 696; *Moors v. Allen*, 35 Me. 276, 58

Am. Dec. 700; *Manning v. Pratt*, 18 Abb. Pr. 344; *Tyson v. Robinson*, 25 N. C. 333; *Whitfield v. Whitfield*, 30 N. C. 163, 47 Am. Dec. 350; *Bailey v. Stewart*, 3 Watts & S. (Pa.) 560, 39 Am. Dec. 50; *Power v. Power*, 7 Watts (Pa.), 205; *Marseilles v. Kenton*, 17 Pa. 238; *Farmer v. Frey*, 4 McCord (S. C.), 160; *Gregory v. Boston Safe Deposit etc. Co.*, 36 Fed. 408.

In *Citizens' Ins. Co. v. Coit*, 12 Ind. App. 161, 39 N. E. 766, the court holds that while the general rule is well settled that after a submission to arbitration, and before award, the death of one of the parties revokes the submission, yet the rule does not apply in the case of the death of a trustee of an express trust.

In *Bash v. Christian*, 77 Ind. 290, it is affirmed that the death of a party after an award has been made, but not yet confirmed by the court, should not revoke the submission. And in *Moore v. Webb*, 53 Tenn. 301, it is decided that a submission to arbitration of a cause pending in a court of record, made by rule of court, is not revoked by the death of one of the parties, but the cause may be revived against the administrator, the award entered, and judgment rendered thereon.

Under the Maryland statute of 1785, the courts have power to enter judgment on awards returned under the statute, notwithstanding the death of either of the parties to the cause referred: *Turner v. Maddox*, 3 Gill (Md.), 141 191.

According to *Freeborn v. Denman*, 8 N. J. L. 116, the death of one of several plaintiffs in a cause referred by rule of court to referees does not operate as a revocation of the authority of the referees. So according to *Bacon v. Crandon*, 32 Mass. 79, the authority of a referee, appointed under a rule of court, is not revoked by the death of one of the parties, in an action which survives.

While an attorney may be regarded, under his general employment, as endowed with authority to submit his client's cause to arbitration, it is doubtful whether that authority is sufficient to justify a stipulation that, in case of death of either party before award made, the award, when made, shall bind the legal representative: *Gregory v. Pike*, 94 Me. 27, 46 Atl. 793.

**3. Death or Refusal of Arbitrators to Act.**—Some statutes provide that the death of arbitrators or their refusal to act shall not operate as a revocation of the submission, but that others shall be appointed in their stead. And the parties themselves may provide in their agreement that the death, or refusal to act, of arbitrators shall not operate as a revocation of the submission, but that others shall be appointed to act. If, however, neither the statute nor the parties themselves provide for such contingencies, then either the death, or the refusal to act, of arbitrators, before an award is made and published, revokes the submission: *Parson v. Ambros*, 121 Ga. 98, 48 S. E. 696; *Michigan Ave. M. E. Church v. Hearson*, 41 Ill. App. 89; *Chapman v. Seccomb*, 36 Me. 102; *Cavanagh v. Dooley*, 88 Mass. 66; *Donnell v. Lee*, 58 Mo. App. 288; *Kimball v. Gilman*, 60 N. H. 54; *Binsse v. Wood*, 47 Barb. (N. Y.) 624; *Crofoot v. Allen*, 2 Wend. (N. Y.) 494; *Relyea v. Ramsey*, 2 Wend. (N. Y.) 602; *Wilson v. Cross*, 7 Watts (Pa.), 495; *Johnson v. Cheney*, 17 Tex. 336; *Sutton v. Tyrrell*, 10 Vt. 91; *McFarlane v. Cushman*, 21 Wis. 401.

**4. Marriage of Feme Sole.**—There are early decisions to the effect that the marriage of a feme sole operates as a revocation of her sub-

mission to arbitration: *Quimby v. Melvin*, 35 N. H. 198; *Marseilles v. Kenton*, 17 Pa. 238; *Sutton v. Tyrrell*, 10 Vt. 91; *Abbott v. Keith*, 11 Vt. 525. It may well be doubted whether this doctrine would be followed under the statutes of the present day enlarging the legal capacity of married women.

5. **Institution of Suit.**—It is generally held that the institution of a suit by one of the parties to a submission to arbitration operates as a revocation of the submission by implication of law; provided the suit is instituted before an award is made and published, and embraces the subject matter in controversy specified in the submission: *Leonard v. House*, 15 Ga. 473; *Davis v. Maxwell*, 27 Ga. 368; *Parsons v. Ambos*, 121 Ga. 98, 48 S. E. 696; *Paulsen v. Manske*, 126 Ill. 72, 9 Am. St. Rep. 532, 18 N. E. 275; *Harrison v. Hartford Fire Ins. Co.*, 112 Iowa, 77, 83 N. W. 820; *Peters v. Craig*, 36 Ky. 307; *Nurney v. Firemen's Fund Ins. Co.*, 63 Mich. 633, 6 Am. St. Rep. 338, 30 N. W. 350; *Kimball v. Gilman*, 60 N. H. 54; *Williams v. Branning Mfg. Co.*, 153 N. C. 7, 68 S. E. 902; *Snodgrass v. Gavit*, 28 Pa. 221; *Commercial Union Ins. Co. v. Hocking*, 115 Pa. 407, 2 Am. St. Rep. 562, 8 Atl. 589.

The contrary is held by some authorities; but it appears clearly from the decisions that the party who instituted suit either proceeded without good faith (*Sutton v. Tyrrell*, 10 Vt. 91), or too late during the arbitration proceedings (*Knaus v. Jenkins*, 40 N. J. L. 288, 29 Am. Rep. 237); or the statute provides that the institution of a suit shall not operate as a revocation of a submission to arbitration: *New York Lumber etc. Co. v. Schneider*, 15 Daly, 15, 1 N. Y. Supp. 441.

In *Hunt v. Guilford*, 4 Ohio, 310, it is held that the question whether the submission to arbitration, and the authority by it vested in the arbitrators to make an award, were revoked before the award was completed, is for the jury to determine, being matter of fact.

## VI. Effect of Revocation.

The effect of a revocation of a submission to arbitration is to restore the parties to their respective rights against each other as they existed before the agreement to submit to arbitration; in other words, the law regards the status of the parties as if they had never agreed to submit to arbitration. And if the revocation conforms to the statute, any proceedings by the arbitrators subsequent to the revocation are null and void: *Wolff v. Shelton*, 51 Ala. 425; *Paulson v. Manske*, 126 Ill. 72, 9 Am. St. Rep. 532, 18 N. E. 275; *Schepp v. Manley*, 59 Hun, 440, 13 N. Y. Supp. 728; *Haggart v. Morgan*, 5 N. Y. 422, 55 Am. Dec. 350; *Sartwell v. Sowles*, 72 Vt. 270, 82 Am. St. Rep. 943, 48 Atl. 11; *Sangster v. Quantrill*, 1 Hayw. & H. 18, Fed. Cas. No. 12,321.

In *Sartwell v. Sowles*, 72 Vt. 270, 82 Am. St. Rep. 943, 48 Atl. 11, the arbitrators made and published an award after the submission to arbitration was revoked by the plaintiff, and the court says: "Defendants contend that by reason of the submission to arbitrators, the plaintiff is barred from maintaining this action, and that his only remedy is upon the bond given by the defendant Sowles to abide and perform the award. This contention is untenable. Notwithstanding the agreement not to revoke the submission, either party had the right so to do at any time before an award was made and published: *Aspin-*



wall v. Tousey, 2 Tyler (Vt.), 328; People v. Nash, 111 N. Y. 310, 7 Am. St. Rep. 747, 18 N. E. 630, 2 L. E. A. 180. And when the submission was revoked, it was no bar to this action."

#### VII. Waiver of Revocation.

In McKenna v. Lyle, 155 Pa. 599, 35 Am. St. Rep. 910, 26 Atl. 777, it is held that if, after the submission to arbitration, one of the parties undertakes to revoke it, his adversary loses his right to insist upon the arbitration, though the revocation may be inoperative, if he proceeds without objection to a trial of the cause in the court, and has it submitted to a master for trial on the merits. "It is impossible to regard this action of the parties as anything else than a waiver of the submission of the award."

In Seely v. Pelton, 63 Ill. 101, it decided that a revocation of a submission to arbitration will be considered waived when it appears that the revoking party, with his attorney, appeared before the arbitrators and entered into the trial of the case.

In Hathaway v. Strong, 2 Tyler (Vt.), 105, the parties agreed to submit to arbitration, but one of them revoked such submission before the award was published. Notwithstanding the revocation, however, the arbitrators rendered an award to the effect that the party who revoked the submission should pay a certain sum of money to the other party, and that both should execute releases on a certain day. The party who revoked the submission paid the money, but the releases were not executed. It was held that the payment of the money by the revoking party was not a waiver of his revocation.

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### HUGHES v. PRITCHARD.

[153 N. C. 135, 69 S. E. 3.]

**INFANTS—Guardian Ad Litem—Service of Summons.**—When an infant defendant, in a civil action or special proceeding, has no general or testamentary guardian, a summons must be served upon such infant and a copy of the complaint also be served or filed according to law, before a guardian ad litem can be appointed. (p. 653.)

**INFANTS—Defective Service of Process in Partition.**—A judgment setting aside a final decree in partition, as to infant defendants under fourteen years of age who were not personally served with summons in the manner prescribed by statute, will be affirmed, though a guardian ad litem had been appointed for the infants, and had accepted service of summons. (pp. 650, 655.)

**INFANTS—Manner of Service of Summons—Province of Court.**—It is not the province of the court to say why the legislature has seen proper to prescribe a different manner of service of process upon infants over fourteen years of age and under fourteen—why a reading to one and a delivery of a copy to the other is required. It is enough that "Ita lex est scripta." (p. 655.)

**INFANTS—Vacation of Partition Judgment.**—A judgment setting aside a final decree in partition, as to infant defendants under fourteen years of age, will be affirmed upon facts showing that the summons was irregularly served upon them; that the action is between the original parties, and that no rights of third persons have

intervened; that part, and probably all, of the defendants are still minors; that they had a meritorious defense, having an equitable estate in one-third undivided interest in the land sought to be partitioned; that no real defense was made for them by the guardian ad litem; and that it would be a plain violation of right to leave the judgment standing so as to operate as an estoppel upon them. (p. 658.)

Motion to vacate a judgment against infants and others. In 1896, the plaintiffs, M. E. Hughes, Sr., and M. E. Hughes, Jr., commenced an action against D. T. Pritchard to recover an undivided two-thirds of five hundred acres of land, known as the D. T. Pritchard home place. This action ended in a final judgment establishing their equitable title to a two-thirds interest in the land: See *Hughes v. Pritchard*, 122 N. C. 59, 29 S. E. 93. D. T. Pritchard was the owner of the legal title, but the plaintiffs in that action, who are the plaintiffs in this action, attached to it a parol trust in their favor for a two-thirds interest. D. T. Pritchard was the sole defendant to that action. They also recovered a judgment against him for something over one thousand dollars for rents received by him and held for the plaintiffs.

Subsequently, in June, 1898, the same plaintiffs commenced a special proceeding before the clerk of the superior court for the partition of said land, in which proceeding D. T. Pritchard and all of his children were made parties defendant. It was alleged in the plaintiffs' petition that the plaintiffs and defendant, D. T. Pritchard, were tenants in common of the land described therein, the plaintiffs owning two undivided thirds and the said D. T. Pritchard owning one undivided third; that the land was capable of actual partition; that the plaintiffs desired to have their portions set apart to them in severalty; that Mary E. Hughes, Sr., owned a life estate in two-thirds of the land, and Mary E. Hughes, Jr., owned the remainder of the two-thirds in fee; that the defendant, Alice, was the wife of D. T. Pritchard; that the other defendants, eleven in number, were the children and heirs at law of D. T. Pritchard; that four of these children, whose names were given, were over twenty-one years of age; three of them under twenty-one, but over fourteen; and four of them under fourteen years of age. The sheriff served the summons on each defendant personally, by reading it to each of them and by leaving a copy thereof with D. T. Pritchard, with whom the defendant children resided.

The court appointed a guardian ad litem for William, John Franklin, George, Judson, Sanborne, Iva, and Florine Pritchard. Summons was issued for such guardian, and he accepted service thereof. He filed an answer in which it was alleged that there was no copy of the summons left with either of the infant defendants. Commissioners appointed made division of the land, and filed their report, upon which a hear-

ing was had on November 21, 1898. Notice was served on each of the defendants personally, but no copy was left with any of the infant defendants. Defendants appeared and filed exceptions to the confirmation of the report, but they were overruled. The defendants, other than D. T. Pritchard, moved before the clerk of the superior court to set aside and vacate the order for partition, the report of the commissioners, and the final decree of partition. It seems that this motion was denied, an appeal was taken to the superior court at term, the infant defendants claiming that their father was the holder of the legal title in trust for them, and that the plaintiffs were fixed with notice of their equitable title, because in the very action in which they established their equitable title, the witnesses of the plaintiffs testified to the terms of the trust upon which D. T. Pritchard held the legal title, to wit, two-thirds for the plaintiffs and one-third for the children of D. T. Pritchard.

The court found the ages of the infant defendants as set out in the petition for partition, and was of the opinion that the infant defendants under fourteen years were not properly served and were not bound by the judgment; and that the interests of D. T. Pritchard and of the infant defendants were adverse. It was therefore ordered and adjudged by the court that the judgment be vacated as to the infant defendants who at the time of the alleged service, to wit, on June 11, 1898, were under fourteen years of age; that the motion to vacate be denied as to the other defendants; and that plaintiffs pay the cost of the proceedings. The plaintiffs appealed.

Pruden & Pruden, J. C. B. Ehringhaus and E. F. Aydlett, for the plaintiffs.

W. A. Worth and H. S. Ward, for the defendants.

139 MANNING, J. In the consideration of the question presented by this appeal, neither the rights of a stranger to the proceeding nor the rights of a purchaser for value without notice are involved; the only parties interested are the original parties to the special proceedings. After the final judgment in the special proceeding was entered, the plaintiffs had execution to issue on their money judgment recovered in the previous action against D. T. Pritchard, and, after having his homestead allotted in the part allotted to him in the special proceedings, purchased the excess at a nominal sum at execution sale and took deed therefor. They claim now under that deed. The record of the special proceedings presents some unusual features. While D. T. Pritchard, his wife and all his children are made parties defendant, infants and adults, it is distinctly alleged that the only tenants in com-

mon of the land described in the petition are the plaintiffs owning a two-thirds interest, and the defendant, D. T. Pritchard, owning a one-third interest. The only ground even suggested in the petition why the children of D. T. Pritchard are proper parties is that they are the "heirs at law" of their living father. No relief is asked as to them; no estate, legal or equitable, in fee or for life, present or contingent, is alleged to be theirs, but it is particularly stated in the petition that the defendant, D. T. Pritchard, is the owner of the other one-third <sup>140</sup> interest. There are other irregularities in the proceedings. The summons for the guardian ad litem was issued on June 23, 1898, returnable June 28th; service accepted June 24, 1898, the answer filed by him is verified June 20, 1898; the order of the court directing partition in the proportions stated in the petition is made June 28th. Having received notice of the equitable estate of the infants in the action brought by the plaintiffs to establish their own equitable title, it is not difficult to discover the purpose that prompted them to make these infants party defendants, and to now insist that, having been parties, though with no allegation of any interest in the subject matter of the litigation, they are concluded by the judgment because they were parties to the record. Within ten days after the final order confirming the petition, the plaintiffs caused execution to be issued on their money judgment against D. T. Pritchard, and purchased, for a small sum, the excess over the homestead at the execution sale, as before stated, and assert title thereto under the deed made to them by the sheriff. Unless constrained to do so by well-settled principles of law, approved by the decisions of this court, we are unwilling to sanction the method pursued and to consummate, by our decision, the apparent wrong to these infants, for to do so would be, first, to bind them, and then to take from them their estate. Proceeding, now, to consider the grounds upon which the learned counsel of the plaintiffs seek to sustain the finality of the judgment in the special proceedings for partition, and the freedom from impeachment by these infants of those proceedings, it is contended that as some of the defendants to that proceeding, adults as well as infants over fourteen years of age, having the same interest in the litigation as the infants under fourteen years of age, were properly served with summons, the court had jurisdiction to appoint, and did appoint, a guardian ad litem for all the infant defendants, and, he having answered, the infants under fourteen years of age are concluded by the judgment of the court as effectually as if they had been personally served; and this contention is rested upon the provisions of section 406, Revisal; Code, section 181; Bat. Rev., section 59, chapter 17; Acts of 1871-72, chapter 95, section 2. This result, it is contended, would follow

notwithstanding there was a failure to serve the summons upon these infants <sup>141</sup> in the manner prescribed by section 440 (2), Revisal. In its final analysis, this contention means that no service of summons on infants under fourteen years of age need be made where there are other persons defendant upon whom proper service has been made; and that the court may appoint a guardian ad litem for them and render judgment which will effectually conclude them. This contention, if sound, would require the prescribed service upon infants under fourteen years of age to be made only in those civil actions or special proceedings where such infants are the sole defendants. Such a construction of the statute we do not find supported by any decision of this court, nor is it in accord with the adjudications of other courts. On the contrary, in *Moore v. Gidney*, 75 N. C. 34, Bynum, J., in speaking for the court, said: "When infant defendants, in a civil action or special proceeding, have no general or testamentary guardian, before a guardian ad litem can be appointed, a summons must be served upon such infant and a copy of the complaint also be served or filed according to law." Then, after discussing the procedure prescribed by section 406, Revisal, he continues in these forceful words: "So careful is the law to guard the rights of infants and protect them against hasty, irregular and indiscreet judicial action. Infants are, in many cases, the wards of the courts, and these forms, enacted as safeguards thrown around the helpless, who are often the victims of the crafty, are enforced as being mandatory, and not directory only. Those who venture to act in defiance of them must take the risk of their action being declared void or set aside": *Nicholson v. Cox*, 83 N. C. 44, 35 Am. Rep. 556; *Matthews v. Joyce*, 85 N. C. 258; *Young v. Young*, 91 N. C. 359; *Ward v. Lowndes*, 96 N. C. 367, 2 S. E. 591; *Carraway v. Lassiter*, 139 N. C. 145, 51 S. E. 968; *White v. Morris*, 107 N. C. 92, 12 S. E. 80; *Stancil v. Gay*, 92 N. C. 462; *Gulley v. Macy*, 81 N. C. 356. In *Carraway v. Lassiter*, 139 N. C. 145, 51 S. E. 968, Connor, J., speaking for this court, said: "The only serious question of law presented by the exceptions is whether the court acquired jurisdiction of the person of Inez Carraway. The petition was filed on or about the twelfth day of October, 1896, and the clerk, on the fifteenth day of the same month, and before any summons was issued, made an order appointing a guardian ad litem. This was certainly irregular, and <sup>142</sup> if not cured would have been fatal to any further proceeding: Clark's Code, sec. 181, and cases cited. The clerk on the same day issued summons which was duly served on the infant defendant and her husband and the guardian ad litem. This certainly brought her into court, as it did the guardian prematurely appointed. He filed his answer, and the court, upon the return day, pro-

ceeded to judgment." In the proceedings considered in that case, there were other defendants than the infant. The learned judge then proceeded: "We have carefully examined the cases relied upon by petitioners, and find that the court has, in cases wherein the proceedings were instituted since the adoption of the code, set aside judgments, etc., when no service of process was made upon the infants and refused to do so when the infant was in court, notwithstanding irregularities in the proceeding. In *Moore v. Gidney*, 75 N. C. 34; *Gulley v. Macy*, 81 N. C. 356; *Young v. Young*, 91 N. C. 359; *Stancil v. Gay*, 92 N. C. 462, no summons was served on the infant defendant, guardians ad litem were appointed without personal service on the infants, and filed answers. This court has, in such cases, invariably held that the court acquired no jurisdiction. When, however, personal service was made on the infants, a contrary ruling has been made." In *Gulley v. Macy*, 81 N. C. 356, *Young v. Young*, 91 N. C. 359, *Ward v. Lowndes*, 96 N. C. 367, 2 S. E. 591, and *Stancil v. Gay*, 92 N. C. 462, there were defendants other than infants, upon whom there had been proper service of summons. In *Ward v. Lowndes*, 96 N. C. 367, 2 S. E. 591, *Merrimon, J.*, speaking for this court, said, and this is quoted with approval in *Carraway v. Lassiter*, 139 N. C. 145, 51 S. E. 968: "This statute (Code, sec. 181) should be strictly observed, but mere irregularities in observing its provisions, not affecting the substance of its purpose, do not necessarily vitiate the action or special proceedings or proceedings in them. The substantial purpose of this statute is to have infants in proper cases made parties defendant, have them make proper and just defense, and to have their rights protected, and to this end have guardians make their defense for them." The present statute, in its present wording, has been the law of this state for nearly forty years, and questions involving the property and rights of infant defendants, upon whom process has not been regularly served, have been, in many cases, presented <sup>143</sup> to this court, and in none of these numerous cases can there be found a suggestion of this court that supports the construction of the statute now contended for by the plaintiffs, although according to its letter, the statute may admit of such construction. If such construction had been adopted, the decision of the many cases presented would have been rendered easy. In addition to the influence of these decisions, the legislature of the state, following the construction of this statute, as declared in *Moore v. Gidney*, 75 N. C. 34, *Allen v. Shields*, 72 N. C. 504, *Bass v. Bass*, 78 N. C. 374 (as is suggested by this court in *Cates v. Pickett*, 97 N. C. 21, 1 S. E. 763), enacted at its session in 1879, the curative act, now section 441, validating the decrees and judgments in civil actions and special proceedings, in which there was no personal ser-

vice of summons on the infant defendants; and the irregularity which that act was intended to cure was the omission to make personal service on the infant, "but it did not embrace cases where no service was made upon the infant or any other person in his behalf, as the statute requires to be done": *Perry v. Adams*, 98 N. C. 167, 2 Am. St. Rep. 326, 3 S. E. 729; *Cates v. Pickett*, 97 N. C. 21, 1 S. E. 763; *Hare v. Holloman*, 94 N. C. 14; *Stancil v. Gay*, 92 N. C. 462. It is further contended that no protection can come to the estate of an infant under fourteen years of age by requiring summons to be delivered to him. That is a legislative question, and its wisdom or lack of wisdom should be properly addressed to the legislative branch of the state government. It has never been held as a fault in the law-making power of the state that it has required an excess of service of judicial process, but only has the deficiency of its method of service been called in question before the court. Why the legislature has seen proper to prescribe a different manner of service upon infants over fourteen years of age and under fourteen, why reading to one and a delivery of a copy to the other, it is not for us to say; the conclusive answer is, "Ita lex est scripta." The decisions of other courts are in accord with the decisions of this court, as cited above: *Wells v. American Mortgage Co.*, 109 Ala. 430, 20 South. 136; *Hearing v. Ricketts*, 101 Ala. 340, 13 South. 502; *Bondurant v. Sibley's Heirs*, 37 Ala. 565; *Cheat-ham v. Whitman*, 86 Ky. 614, 6 S. W. 595; *Chambers v. Jones*, 72 Ill. 275; *Whitney v. Porter*, 23 Ill. 445; *Helms v. Chadbourne*, 45 Wis. 60; *Price v. Winter*, <sup>144</sup> 15 Fla. 6; *McMantry v. Fairley*, 194 Mo. 502, 91 S. W. 902; *Wright v. Hink*, 193 Mo. 130, 91 S. W. 933; 10 Cyc. 678. Construing the two sections together, we hold that section 440 (2), Revisal, prescribes the manner of service upon infants under fourteen years of age, and that section 406, Revisal, authorizes the appointment of guardians ad litem and prescribes the procedure to be observed after their appointment; so that, as has been uniformly held in this state, where a defective or incomplete service upon such infants has been made, but a guardian ad litem has been appointed in substantial compliance with the requirements of section 406, Revisal, and the court has proceeded to judgment in the action or proceedings, such defective or incomplete service upon the infants constitutes but an irregularity, which renders the judgment not void, but voidable only, which cannot be collaterally impeached, and which will not be vacated or set aside solely for such irregularity, when the rights of bona fide purchasers for value without notice have intervened. The reasons which induced the holding that such defects rendered the judgment merely irregular are stated with great force and clearness by Ruffin, J., in speaking for this court in *Sutton*

v. Schonwald, 86 N. C. 198, 41 Am. Rep. 455, which case has since been many times cited with approval.

It is further contended by the plaintiffs that the interests of the infants under fourteen years of age were identical with the other children of D. T. Pritchard, some of whom were adults and others infants over fourteen, who were brought into court by proper service of summons, and there being this identity of interest, the principle of class representation would apply, and the alleged irregularity in the proceedings would be cured. This is an extension of the doctrine of class representation beyond the limitation which we think this court has placed upon it. In *Card v. Finch*, 142 N. C. 140, 54 S. E. 1009, this court said: "The defendants suggest that the widow, life tenant, being a party, those in succession are bound by the judgment, upon the doctrine of representation. It is true that the courts have uniformly held that where there are contingent limitations, or bare possibilities, and all the persons who may, upon possible contingencies, become entitled, are not in esse, they may be bound by decrees made when the owners of the land are parties. This doctrine has well-defined <sup>145</sup> limitations which exclude its application to the plaintiffs. It originated in necessity—to prevent titles being encumbered for unreasonable periods, and the sacrifice of the interests of one or more generations. It is also sustained upon the ground that a bare possibility is not a vested right. It has never been applied to the divesting of a vested remainder, or in any case where those who would be entitled in remainder are in esse and may be brought before the court in propria persona. In such cases, there is no necessity for resorting to the doctrine of representation. *Cessante ratione legis cessat et ipsa lex*: *Springs v. Scott*, 132 N. C. 548, 44 S. E. 116. See, also, *Lawrence v. Hardy*, 151 N. C. 123, 134 Am. St. Rep. 976, 65 S. E. 766, wherein is considered the effect of a judgment in partition upon "parties unknown." It is further suggested that the decision of this court in *Roseman v. Roseman*, 127 N. C. 494, 37 S. E. 518, is in conflict with the conclusion we have reached in this case. We do not think there is necessarily such conflict. In that case, being an action brought to substitute a trustee for one named in a will, who declined to accept his testamentary appointment and perform the trusts declared by the will, there were, among the defendants, infants under fourteen years of age. The summons was served upon them by delivering a copy, but no copy was delivered "to the father, mother or guardian, etc.," as prescribed by the statute. A guardian ad litem was regularly appointed, summons regularly served upon him, and he filed answer. The mother of the infants was a party defendant and served with summons. The court appointed a trustee, who entered upon the discharge of the



trusts and performed important services thereunder. Subsequently the infants moved to set aside the judgment, solely upon the ground of defective service upon them. The motion was denied, and upon appeal to this court the judgment was affirmed. It does not appear in the case, as reported, that any injury was done the infants by the appointment of a trustee or the judgment of the court. That the judgment was irregular and not void, under the decisions of this court as applied to the facts of the case, is clear; but we are constrained to repeat again the doctrine so clearly stated in *Sutton v. Schonwald*, 86 N. C. 198, 41 Am. Rep. 455, that "whatever formalities are prescribed must be punctually<sup>146</sup> fulfilled as the courts have no power to dispense with the requirements of a statute, and most especially is this principle rigidly adhered to in the case of judicial and probate sales." While the neglect to observe the statutory requirements to serve process in the prescribed way is a menace inter partes, and except as to purchasers for value in good faith and without notice, to the integrity of a judgment rendered in a civil action or special proceeding, yet it does not follow that for such irregularity the court will vacate its judgment upon motion in every case, and this condition, as it should be, is largely due to the view that the courts are the guardians and protectors of the rights and property of infants. The principles which should govern the courts in the exercise of this remedial power are clearly stated by this court in *Williamson v. Hartman*, 92 N. C. 236 (quoted with approval in 1 Black on Judgments, section 326, and many times approved by this court): "This, however, does not imply that every judgment affected in any decree, directly or indirectly, by some, or any irregularity in the course of the action leading to it, will be set aside. Some irregularities are unimportant, and do not affect the substance of the action or the proceedings in it; there are others of more or less importance that may be waived or cured by what may take place or be done in the action after they happen; and there are yet others so serious in their nature as to destroy the efficacy of the action and render the judgment in it inoperative and void. Whether the court will or will not grant such a motion in any case, must depend upon a variety of circumstances and largely upon their peculiar application to the case in which the motion shall be made. Generally, a judgment will be set aside only when the irregularity has not been waived or cured, and has been or may be such as has worked, or may yet work, serious injury or prejudice to the party complaining interested in it, or when the judgment is void. The court will always, upon motion, strike from its record a judgment void for irregularity." Speaking to the facts of the particular case, the court further said: "Granting that the method by which

the appellant was made a party to the proceeding was not strictly regular, still he has not shown that he was reasonably diligent in looking after his interests in it after he became <sup>147</sup> of age, nor has he shown that he has suffered serious wrong or prejudice by reason of the irregularity of which he complains, or that he may yet probably so suffer. Indeed, it appears the judgments complained of were just and proper."

Our conclusion is that the judgment of his honor in setting aside the judgment complained of in behalf of these infants should be affirmed upon the facts of the case as presented, because (1) the summons was irregularly served upon them; (2) according to the ages given in the petition filed in the special proceedings, three, certainly, and probably all of them, are still minors; (3) they had a meritorious defense in that, for the purposes of this motion, it sufficiently appears that they had an equitable estate in one-third undivided interest in the land sought to be partitioned; (4) that no real defense was made for them by the guardian ad litem; (5) under the doctrine of estoppel, which applies to proceedings in partition, as held by this court in *Buchanan v. Harrington*, 152 N. C. 333, 136 Am. St. Rep. 828, 67 S. E. 747, and the authorities therein cited, and which it is contended would conclude these infants in the present case, it would be, as is said in *Larkins v. Bullard*, 88 N. C. 35, "a plain violation of right to leave the judgment standing so as to operate as an estoppel upon these infants, when the court can see no real defense was ever made for them," though we leave open the interesting question whether parties made defendant to an action or special proceedings, against whom, in the one case, no cause of action is stated, and in whom, in the other case, no interest or estate in the subject matter of the litigation is alleged to exist, are estopped and concluded by the judgment because they were parties to the action or special proceedings. Finding no error, the judgment is affirmed.

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*Defects in the Service of Process* are considered in the note to *Sanford v. Edwards*, 61 Am. St. Rep. 485. This note at pages 492, 493, treats of defects in the service of process on infants and lunatics, and shows the effect of personal service on the defendants, though not made in the mode prescribed. Jurisdictional defects in summonses and like process is the subject of a note to *Choate v. Spencer*, 40 Am. St. Rep. 430.

*For Authorities on the Sufficiency of Service of Process on an Infant and his parents or guardian*, see *Kalb v. German Sav. & L. Soc.*, 25 Wash. 349, 87 Am. St. Rep. 757; *Knut v. Nutt*, 83 Miss. 365, 102 Am. St. Rep. 452; *Manternach v. Studt*, 230 Ill. 356, 120 Am. St. Rep. 310.

*Concerning the Validity of Judgments Against Infants*, see *Cohes v. Baer*, 134 Ind. 375, 39 Am. St. Rep. 270.

*The Vacating of Judgments Against Infants on Motion* is discussed in the note to *Furman v. Furman*, 60 Am. St. Rep. 656.

## HERRING v. WILLIAMS.

[153 N. C. 231, 69 S. E. 140.]

**WILLS—Construction—Consideration of Entire Instrument.**—When a will is presented for construction, the entire instrument must be considered and the intention of the testator ascertained from the language used by him. (p. 660.)

**WILLS—Construction—Matters for Consideration.**—In construing a will it is competent to consider the condition of the testator's family, how he was circumstanced, and his relationship to the objects of his testamentary disposition, so as to get, as nearly as possible, his viewpoint at the time the will was executed. (p. 660.)

**WILLS—Power of Disposition in Life Tenant.**—If a testator, having no children of his own, devises all of his property to his wife, to have and to hold during the term of her natural life, and at her death the property, or as much thereof as may then be in her possession, to go to his adopted daughter, her heirs and assigns forever, the wife takes a life estate with power to dispose of any part or all of the property during her life, and the adopted daughter, as the devisee of the remainder in fee, is entitled only to such of the real estate as has not been disposed of by the wife. (p. 664.)

Action for waste committed and for the forfeiture of a life estate. In August, 1902, William R. Williams died testate. He left surviving him his widow, the defendant, Carrie Williams. He had no children of his own, but he had adopted the plaintiff, Bettie Herring, whose maiden name was Bettie Melton, when she was a child only ten weeks old, and who was living with the testator and his wife at the time of his death. A few months prior to the death of the testator, he disposed of and devised his property as follows, to wit: "I give and bequeath unto my beloved wife, Carrie Williams, all my property—real, personal, and mixed—of what nature or kind soever, and wherever the same may be situate at the time of my death, to have and to hold during the term of her natural life; and at the death of my wife, the said Carrie Williams, the said property or so much thereof as may be in her possession at the time of her death, is to go to Bessie Melton, her heirs and assigns, forever."

The widow and life tenant, Carrie Williams, went into possession of the testator's estate, but, in 1903, she conveyed the real estate in fee to the defendant, John H. Green, in exchange for land conveyed by him to her. Green cut all the standing timber on the land conveyed to him, and sold it. The plaintiff Bettie Herring, demanded judgment for the waste and for the forfeiture of the life estate. The defendants Carrie Williams and Green contended that, under the provision of the will above quoted, Carrie Williams had the full right and power to dispose of any and all of the real estate devised by her husband; that the plaintiff, Bettie Herring, was entitled to only such of his property as remained undisposed of at his wife's death; and that the

plaintiff, therefore, had no cause of action against them. The defendants moved for judgment as of nonsuit, but the motion was denied. The lower court adjudged that, under the will of the testator, the defendant, Carrie Williams, became and was entitled to an estate for life, and that the plaintiff, Bettie, was the owner of a vested remainder in fee in all the lands of which the testator died seised, after the death of his wife and the falling in of the life estate; and that the deeds from Mrs. Williams to Green, conveyed only the life estate of Mrs. Williams. The jury found that there was waste and assessed the damages. Judgment was rendered declaring the estate of the plaintiff, under the will, to be in fee. Judgment was also rendered for the amount of the damages; and it was further adjudged that if the money judgment was not paid by a day named, the estate of the defendants in the land upon which the waste was committed should be forfeited to the plaintiff. The defendants appealed.

Bunn & Spruill, for the plaintiffs.

T. T. Thorne and J. C. L. Harris, for the defendants.

**233** MANNING, J. The primary purpose of the courts, when a will is presented for construction, is to ascertain the intention of the testator from the language used by him. In ascertaining **234** such intention, the entire will must be considered, and it is competent to consider the condition of the testator's family, how he was circumstanced, and his relationship to the objects of his testamentary disposition, so as nearly as possible to get his viewpoint at the time the will is executed. In the present case, the testator's family was composed of his wife, the defendant Carrie Williams, and his foster-daughter, the plaintiff Mrs. Bettie Herring. He had no children of his own, and he and his wife had raised the feme plaintiff from an infant ten weeks old. She was living with the testator and his wife at the time of his death. The testator's estate consisted of a few articles of personal property of small value; a tract of land of about one hundred acres, of which the arable land was sufficient for a one-horse farm; the buildings and the arable land were only in fair condition, and the remainder of the land was timber land; also a house and a lot in the town of Rocky Mount and an unimproved lot in the same town. The tract of farm land was worth, at his death, about twelve hundred and fifty dollars or fifteen hundred dollars; the evidence does not disclose the value of the house and lot or the unimproved lot, but the inference from the evidence is that they were not of large value, probably not exceeding one thousand dollars or twelve hundred dollars. At the time of his death, the testator was employed as an overseer of another farm, and his own farm was rented, and his income from his work must

have constituted the principal source of support for his wife and foster child. The will itself furnishes sufficient proof of the affection of the testator for his wife, and we will assume that he entertained feelings of affection for his foster daughter. It is clear, from the language of the will, that a life estate is vested in the wife, and a remainder in fee in the feme plaintiff. It is equally clear that the life estate vested in the wife covered the testator's entire estate—"all my property, real, personal and mixed, of what nature or kind soever, and wheresoever the same shall be at the time of my death." But the remainder in fee to his foster daughter, the feme plaintiff, is limited to the "said property or as much thereof as may be in her [his wife's] possession at the time of her death." So the precise question is, Do the words "as much thereof as may be in her possession at the time of her death" annex as appurtenant to the life estate a power <sup>235</sup> of disposition in the life tenant? If the power of disposition is appurtenant to, or incident to, the life estate, then under the decision of this court in *Parks v. Robinson*, 138 N. C. 269, 50 S. E. 649, the life tenant could convey in fee in the exercise of that power. In that case Connor, J., speaking for this court, said: "To restrict the power of disposal of her life estate would be to nullify its effect. She had such power incident to her life estate. To confine the power of disposal to such life estate would do violence to the rule of construction that every word used by the testator should be given force." The language of the will, construed in that case, was as follows: "I give, etc., to my beloved wife, Ann Parks, during her natural life and at her disposal, all the rest, residue and remainder of my real and personal estate." There was in that will, differing from the one now being considered, no limitation over. But in the case of *Troy v. Troy*, 60 N. C. 624, a will was presented to this court with a remainder in fee to the son, limited upon the life estate of the wife, and Pearson, C. J., speaking for the court said: "This is a power appurtenant to her life estate, and the estate which may be created by its exercise will take effect out of the life estate given to her, as well as out of the remainder. A power of this description is construed more favorably than a naked power given to a stranger, or a power appendant, because, as its exercise will be in derogation of the estate of the person to whom it is given, it is less apt to be resorted to injudiciously than one given to a stranger, or one which does not effect the estate of the person to whom it is given": *Stroud v. Morrow*, 52 N. C. 463; *Burleigh v. Clough*, 52 N. H. 267, 13 Am. Rep. 23; *Herring v. Barrow*, L. R. 13 Ch. D. 144; *Stuart v. Walker*, 72 Me. 145; *Ayer v. Ayer*, 128 Mass. 575; *Fairman v. Beal*, 14 Ill. 244; *Jackson v. Robins*, 16 Johns. 537; *Underwood v. Cave*, 176 Mo. 1, 75 S. W. 451; *Mc-*

Cullough's Admr. v. Anderson, 90 Ky. 126, 13 S. W. 353, 7 L. R. A. 836; 2 Underhill on Wills, sec. 687.

Do the words of this will confer upon the life tenant a power of disposal of the property devised? Unless such effect is given to them, we must reject as meaningless the words, "or as much thereof as may be in her possession at the time of her death." The contention of the feme plaintiff is that the remainder in <sup>286</sup> fee, vested in her by the will, extends to and embraces all the property of which the testator was seised and possessed at his death and in which he devised a life estate to his wife, except possibly such as ipso usu consumuntur, and so completely is the wife deprived of any power of disposition, the plaintiff can maintain an action to recover damages for voluntary waste. As we have said, to accept the contention of the plaintiff would be to strike from the will the words we have quoted. But we understand the rules of construction to require us to give effect to all the words used by the testator, unless they are in themselves meaningless, or so vaguely express a purpose that no definite intention can be inferred, or are plainly inconsistent with an otherwise clearly expressed intention, or are repugnant to some established rule of law: Redfield on Wills, 431-433. It will be noted that the testator does not use the word "dispose" or "sell" or any of their derivatives, but that it is not necessary to use these words or either of them to confer a power of disposal, has been held in numerous cases where the words used imply such power: Clark v. Middlesworth, 82 Ind. 240; Henderson v. Blackburn, 104 Ill. 227, 44 Am. Rep. 780; Bamforth v. Bamforth, 123 Mass. 280; Johnson v. Battelle, 125 Mass. 453; Leggett v. Firth, 132 N. Y. 7, 29 N. E. 950; Silvers v. Canary, 109 Ind. 267, 9 N. E. 904; Farish v. Wayman, 91 Va. 430, 21 S. E. 810; Underwood v. Cave, 176 Mo. 1, 75 S. W. 451. It is also settled by the weight of authority that when the power of disposal is given for specific purposes, as for support and maintenance of the devisee of the life estate or of such and others, the power is limited to be exercised for the particular purposes declared: Chase v. Ladd, 153 Mass. 126, 25 Am. St. Rep. 614, 26 N. E. 429; Morford v. Dieffenbacker, 54 Mich. 593, 20 N. W. 600; Swarthout v. Ranier, 143 N. Y. 499, 38 N. E. 726; Steuart v. Walker, 72 Me. 145, 39 Am. Rep. 311; Henderson v. Blackburn, 104 Ill. 227, 44 Am. Rep. 780; Griffin v. Griffin, 141 Ill. 373, 31 N. E. 131; Wood v. Robertson, 113 Ind. 323, 15 N. E. 457; Jenkins v. Compton, 123 Ind. 117, 23 N. E. 1091. In the case of Clark v. Middlesworth, 82 Ind. 240, the court, in construing a will containing the following devise: "I hereby will, etc., all my property, real and personal, to my wife Mary A. Clark, during her life, and at her death, should anything remain, the same to be divided among my heirs at law,"

said: "We think it quite clear that the will of A. B. Clark gave to his widow, <sup>237</sup> Mary A. Clark, a life estate in said lot, and that it also gave her, by the clearest implication, a power to dispose of the same. The words, 'and at her death, should anything remain,' are senseless and without meaning, unless the testator intended that the tenant for life might, prior to her death, dispose of the property devised to her for life. The words show that he must have contemplated this at the time, and therefore have intended it." In *Paine v. Barnes*, 100 Mass. 470, a testator gave to his wife all his real and personal estate, "for her support and benefit during her natural life," and after his wife's death "if anything of said estate should remain," he gave it over to third persons, and it was held by the court: "The court are of opinion that the language of the devise to the wife can only be construed as giving her an estate for life, with a contingent power of disposition of the remainder only in case of its being needed for her support. The fact that there is a remainder devised over, after the estate for life to her, shows that it could not be intended to give her a fee, and that the purpose for which the estate is given can only, at the most, imply a power of disposal if the exigency should arise. Perhaps, upon the authorities, the use of the phrase, 'if anything should remain,' in connection with the devise of a remainder of real estate after an estate for life, would imply a power to convey, as otherwise there could be no reason for the doubt whether the estate would remain: *Blanchard v. Blanchard*, 1 Allen, 223; *Andrews v. Bank of Cape Ann*, 3 Allen, 313; *Lynde v. Estabrook*, 7 Allen, 68." To the same effect is *Silvers v. Canary*, 109 Ind. 267, 9 N. E. 904, in which case the court held that the words, "what may not be consumed of real and personal estate at my wife's decease," conferred by implication the power or disposal in fee, and that the remainder was limited to so much as remained unconsumed at the death of the tenant for life. In *Leggett v. Firth*, 132 N. Y. 7, 29 N. E. 950, the court said: "But the remainder itself was in turn limited by the words, 'if any,' which show that the testator did not intend that necessarily there would be anything left upon the death of his wife. 'The remainder, if any,' means the same as, 'if there shall be any remainder,' and the gift over is of what may be left. As it all would be left unless there was a right to dispose of it, it follows, by necessary <sup>238</sup> implication, that he intended his wife should have that power. Otherwise the words, 'if any,' must be rejected as having no meaning whatever. In determining the intention of a testator, to grant to a tenant for life the power to dispose of the property devised or bequeathed, much weight has been given to the words by which the limitation over is confined to what estate remains upon the death of

the first taker. Such intention has been held to conclusively appear in case the property devised could only be diminished by a disposition of it by the one to whom the life estate is given. Such declarations are held to be inconsistent with a supposition that the whole property was to remain undiminished in the hands of the first taker": *Bramell v. Cole*, 136 Mo. 201, 58 Am. St. Rep. 619, 37 S. W. 924; *Harris v. Knapp*, 21 Pick. 412. Guided by these well-considered and well-reasoned opinions, we are led to the conclusion that the testator, by the words used by him, to wit, "or as much thereof as may be in her possession at the time of her death," conferred upon his wife—the devisee of the life estate—the power to dispose of any part or all of said property during her life; that such power was not limited to any specific purpose; and that a deed made by her conveyed the fee simple title unless restrictive words were used in the deed, showing that a less estate was conveyed; and that the feme plaintiff was entitled, as the devisee of the remainder in fee, only to such of the real estate as was undisposed of by the wife. As to the status of the land Mrs. Williams received in exchange for the land owned by her husband and devised in the will, we will not now determine, as no question affecting that is presented by this appeal. If she die possessed of that, then its status can be determined, and not before. Having reached this conclusion, there is error in the rulings and judgment of his honor, and the motion of the defendants for judgment as of nonsuit should have been granted. The judgment rendered will be set aside and a judgment as of nonsuit will be entered.

Error and reversed.

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*In Construing a Will* the intention of the testator is to be derived from the will itself: *Platt v. Brannan*, 34 Colo. 125, 114 Am. St. Rep. 147. Effect must be given to every word in a will, if it is possible, without contravening the intention of the testator: *Gannon v. Albright*, 183 Mo. 238, 105 Am. St. Rep. 471. The intention of the testator is to be gathered not from one but all the words of the will: *Stewart v. Jones*, 219 Mo. 614, 131 Am. St. Rep. 595. And to ascertain such intention the court may hear evidence of the circumstances, situation and surroundings of the testator when the will was made, and the state and description of his property: *Pate v. Bushong*, 161 Ind. 533, 100 Am. St. Rep. 287; and the courts are required to do this where the meaning of a word or phrase employed by a testator is not clear: *In re Poppleton's Estate*, 34 Utah, 285, 131 Am. St. Rep. 842.

*Where a Man Devises All His Property to His Wife for Life*, with power to convey, and in the clause following devises, upon her death, the estate that may be remaining to his heirs living at the time of his decease, the will creates a life estate in the wife with a vested remainder over to such heirs: *Farlin v. Sanborn*, 161 Mich. 615, 137 Am. St. Rep. 525. But a devise of all property by the testator to his son, with a provision that what remains at the latter's death shall go to other specified persons, does not cut down the son's interest to an estate for life pure and simple, nor a life estate with power of



disposal: Galligan v. McDonald, 200 Mass. 299, 128 Am. St. Rep. 421. See, also, Jackson v. Lippell, 213 Mo. 589, 127 Am. St. Rep. 620; Allen v. Hirlinger, 219 Pa. 56, 123 Am. St. Rep. 617.

*Wills.*—A Power of Sale of Both Real and Personal Property is Created where a husband by will devises and bequeaths all his estate, both real and personal, for the use of his wife during her life, "whatever remains of said estates" at the death of his wife to his daughter, and, if the wife exercises such power, it devests the title of the remainderman: Young v. Hillier, 103 Me. 17, 125 Am. St. Rep. 283.

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## LANCASTER v. SOUTHERN INSURANCE COMPANY. [153 N. C. 285, 69 S. E. 214.]

### **FIRE INSURANCE—When Effected—Absence of Application.**

If a person of mature years and sound mind, who can read and write, accepts a policy of insurance containing stipulations material to the risk and on breach of which the policy is to be avoided, and there is nothing confusing or ambiguous in them and no representations made, calculated or intended to deceive as to their import, the policy with the stipulations becomes the contract between the parties, to be enforced, while it stands, according to its terms, and the principle should not be affected because in a given case there has been no previous application or no express representation made. (p. 667.)

**FIRE INSURANCE.—Effect will be Given to a "Rider"** attached to a policy of fire insurance on a steam cotton-gin, where the rider is inserted in and made a part of the entire policy for the purpose of adapting its provisions to this particular kind of property, especially with reference to the method and conditions of its operation; where there is nothing uncertain or restrictive in its terms, and it contains the provision, "attached to and made a part of this policy"; and where there is, at the end of the entire policy, a stipulation that it is "made and accepted under the foregoing stipulations and conditions, together with such other provisions, agreements, and conditions as may be indorsed hereto." (pp. 667, 668.)

**CONDITIONAL SALE—Loss of Property by Fire.**—If a vendor sells a steam cotton-gin, takes notes for the purchase price, retains title as security for the purchase money, and delivers possession, the obligation to pay the notes is absolute, and, if the gin outfit is destroyed by fire, the loss must fall on the vendee. (p. 668.)

**FIRE INSURANCE—Conditional Sale—Ownership.**—A vendee in possession of a steam cotton-gin, under a binding contract of purchase, having given his notes for the purchase money, is to be considered as the "unconditional and sole owner" of the gin outfit, within the meaning of these words in a contract of insurance, though all of the purchase price has not been paid. (pp. 666, 669.)

**CONDITIONAL SALE—Property Retains Its Character as Personalty.**—If a vendor sells personal property, such as a steam cotton-gin, takes notes for the purchase money, delivers possession, retains title as security, and has the contract properly registered according to the statute, the property retains its character as personalty both as between the parties and others claiming adversely to the lien. (p. 669.)

**FIRE INSURANCE—Conditional Sale—Encumbrances.**—In the case of a purchase of personal property, such as a steam cotton-gin,

where notes have been given for the purchase money, and the purchaser obtains insurance on the property before it is all paid for, a recorded vendor's lien for the amount unpaid is, in effect, an encumbrance in the nature of a chattel mortgage, and violates a stipulation in the policy against encumbrances. (pp. 666, 670.)

G. M. Fountain & Son, for the plaintiff.

J. R. Gaskill and W. O. Howard, for the defendant.

<sup>287</sup> HOKE, J. It was shown that feme plaintiff, owner of a farm, "had erected a building and therein established a steam gin, the engine and boiler inclosed in brick, and same was being used for farm ginning." That said plaintiff took out a policy of insurance on the gin, engine and boiler in the sum of one thousand dollars, the contract being the ordinary standard form, with a rider attached to the face of the policy, on which was a heading, "For Gin Systems Only," and which contained certain specifications adapting the policy more fittingly, in certain features, to the kind of property insured and the operation of the same, and concluding with the statement, "Attached to and forms part of Policy No. 48,599," the number of the policy sued on. Plaintiff "admitted that notes reserving the title to the gin outfit were given and recorded, and all of purchase price had not been paid at the time the policy was issued, and defendant admitted that the policy was issued and sent plaintiff through the mail in lieu of a policy in a company that had failed, and that no representations were made by plaintiff to get the policy." The property was destroyed by fire, proof of loss properly made and present action instituted to recover on the policy. Recovery was resisted, chiefly by reason of breach of certain stipulations contained in the body of the policy, to the effect "That this entire policy shall be void . . . if the interest of the insured be other than the unconditional and sole ownership, and, second, if the subject of the insurance be personal property and be or become encumbered by a chattel mortgage." There was the further general stipulation in the body of the policy that the entire policy should be void "if the interest of the insured in the property be not truly stated therein." Plaintiff contended that the stipulations should not be allowed to defeat a recovery: 1. Because at the time of taking out the policy no inquiry was made as to the title or condition of the property, and that no representations were made by plaintiff concerning the same, and that her rights are unaffected therefore by the stipulations relied upon.

2. That the contract of insurance, by the nature of it, is confined to that portion of it contained in the "rider," and as the stipulations in question do not appear therein, but only in the body of the policy, they are not relevant to the inquiry.

<sup>288</sup> 3. That on the facts the property insured had become realty, and in that event there had been no breach shown, etc.

The jury, having ascertained the value of the property destroyed by the fire, the question of defendant's responsibility was referred to the court on the facts, and the court being of opinion that the policy was avoided by reason of the existence of an encumbrance for the unpaid purchase money, in the form of a mortgage or conditional sale, duly recorded, gave judgment for defendant, and plaintiff excepted and appealed.

Our decisions are to the effect, and they are in accord with the generally prevailing doctrine, that when a person of mature years and sound mind, who can read and write, accepts a policy of insurance, containing stipulations material to the risk and on breach of which the policy is to be avoided, and there is nothing confusing or ambiguous in them, and no representations made which are calculated or intended to deceive as to their import, the policy with the stipulations becomes the contract between the parties, to be enforced, while it stands, according to its terms, and the principle should not be affected because in a given case there has been no previous application or no express representation made: *Floars v. Aetna L. Ins. Co.*, 144 N. C. 232, 56 S. E. 915, 11 L. R. A., N. S., 232; *Hayes v. United States F. Ins. Co.*, 132 N. C. 702, 44 S. E. 404; *Lasher v. St. Joseph F. & M. Ins. Co.*, 86 N. Y. 423; *Brown v. Commercial F. Ins. Co.*, 86 Ala. 189, 5 South. 500; *Crikelair v. Citizens' Ins. Co.*, 168 Ill. 309, 61 Am. St. Rep. 199, 48 N. E. 167. In the present case there is no allegation or suggestion of any ambiguity nor of anything done or said to confuse or mislead the claimant, and the policy with its stipulations must be taken as the contract under which the rights of these parties are to be determined.

And plaintiff's second position cannot be maintained. The "rider," while headed "For Gin Systems Only," contains the express provision, "Attached to and forming part of Policy No. 48,599, Southern Insurance Company, of New Orleans." And further, at the end of the entire policy, is the stipulation, "This <sup>289</sup> policy is made and accepted under the foregoing stipulations and conditions, together with such other provisions, agreements and conditions as may be indorsed hereto." The rider was inserted in and made a part of the entire policy, in order the better to adapt its provisions to this particular kind of property, and more especially in reference to the method and conditions of its operation, and there being nothing uncertain or restrictive in its terms, there is no reason why the plain and express provision, "attached to and made a part of this policy," should not be given effect. Authority also here favors defendant's position.

Speaking to a similar question in *Waters v. Security L. & A. Co.*, 144 N. C. 663, 57 S. E. 437, 13 L. R. A., N. S., 805, the court said: "It is urged upon our attention that some of the entries, by means of which the application was made to accord with the policy and the paster, were made on the margin of the application and written longitudinally, and that such entries, so made, and even the paster itself, are presumptive evidence of a change in the contract after the application had been first signed. But neither the authorities nor the known usage in the making of such contracts are in support of the position to the extent contended for. We know that these policies, as well as the applications, are gotten up on printed forms designed to meet the average and general demand in contracts of this nature, and frequently changes are made to meet special circumstances; that these are ordinarily noted on the margin, and a slip is then pasted on the face of the policy to express the contract as affected by these changes. In the absence, therefore, of some special circumstances tending to cast suspicion on such entries, there should be no presumption of any alteration; but the nature of the entry and its placing are simply circumstances on the general question as to whether there has been a completed contract of insurance": *Pierce v. Charter Oak Ins. Co.*, 138 Mass. 151; *Swinnerton v. Columbian Ins. Co.*, 37 N. Y. 174; 93 Am. Dec. 560; 1 *Cooley's Insurance Briefs*, pp. 640, 641 (1).

The third position must also be resolved against the plaintiff. That is the property had become realty and in that respect there was no breach of stipulations shown avoiding the policy. True, we have held in this state that when one is in possession of <sup>290</sup> land under a binding contract of purchase, having given his notes for the purchase money, he is to be considered as the "sole and undivided owner" within the meaning of this stipulation in a contract of insurance, a position declared and sustained in a forcible opinion by Associate Justice Brown in the recent case of *Jordan v. Jordan F. Ins. Co.*, 151 N. C. 341, 66 S. E. 206. The same principle is discussed by Associate Justice Manning in the learned and valuable opinion of *Modlin v. Atlantic F. Ins. Co.*, 151 N. C. 35, 65 S. E. 605. This ruling is properly placed on the well-recognized principle that equity will treat that as done which the parties are under a binding agreement to do, and in reference to insurance contracts, on the further principle that the loss in such cases, when the property is destroyed by fire, falls on the purchaser. He still owes the amounts due on his notes: *Sutton v. Davis*, 143 N. C. 474, 55 S. E. 844. And while it is usually held that the principle referred to does not prevail in the case of personal property, where the title is withheld on the payment of the purchase money, this distinction as to personality should not prevail in this state on the precise facts

disclosed in the record. It was originally held, in the case of these conditional sales of personal property, that if the property was destroyed by fire or other adventitious cause, that the loss must fall on the vendor who had retained the title in himself, and this position still obtains in many of the states: *Tiffany on Sales*, p. 91. In North Carolina, however, it is established in a case like the present that when a bargainer sells goods, taking notes for the purchase price, retaining the title as security for the purchase money, and delivers possession, that if the goods are destroyed by fire, the obligation to pay the notes is absolute and the loss must fall on the vendee: *Tufts v. Griffin*, 107 N. C. 47, 22 Am. St. Rep. 863, 12 S. E. 68, 10 L. R. A. 526. From this we think it follows that, by analogy to the position obtaining in case of real estate, that the vendee under the fact existent here, is the unconditional and sole owner of the goods, within the meaning of the contract, and there has been no breach of same in this respect. Such a stipulation refers to the "quality of an estate, and that it is not held jointly with others": *Vance on Insurance*, p. 442.

This conclusion, however, cannot avail the plaintiff by reason <sup>291</sup> of another stipulation in the body of the contract, "that the same shall be void if the subject of insurance be personal property and be or become encumbered by a chattel mortgage." Under our decisions, where a vendor, as here, has sold goods, taking notes for the purchase money and delivered possession, retaining title as security, and the contract has been properly registered according to the statute (*Revisal*, 983), the property, the subject matter of the contract retains its character as personalty, both as between the parties and others claiming adversely to the lien: *Cox v. New Bern Lighting etc. Co.*, 151 N. C. 62, 134 Am. St. Rep. 966, 65 S. E. 648, 18 Ann. Cas. 936. The goods, therefore, retained their character as personalty, and in that aspect the claim of the vendor, in this instance, was only an encumbrance in the nature of a chattel mortgage to secure the purchase money, and, on the facts, the stipulation as to the nonexistence of such an encumbrance has been violated: *Hamilton v. Highlands*, 144 N. C. 279, 56 S. E. 9. It is usually held that the stipulation as to sole and unconditional ownership is not violated by the existence of liens and encumbrances: 2 *Cooley's Insurance Briefs*, p. 1378 (1); *Vance on Insurance*, p. 442. From this very fact, and because there may be certain conditions existent which increase the moral hazard of the risk, companies are allowed to, and usually do, insert these provisions as to encumbrances; to be enforced when the contract and the facts so require. We are not inadvertent to the case of *Caplis v. American F. Ins. Co.*, 60 Minn. 376, 51 Am. St. Rep. 535, 62 N. W. 440, and cases of like kind, in

which it was held that a covenant, giving a landlord a lien for unpaid rent, did not come within the term "chattel mortgage" as it appears in these contracts and in which Collins, J., delivering the opinion, said: "That the parties in using this term did not intend to include every kind of instrument which could be enforced in a court of equity, as a lien or mortgage of personalty," but in this same opinion it was also said that this stipulation should be considered "As simply guarding against the common, ordinary chattel mortgage and instruments of the same nature, use and purpose."

Under the facts presented, as heretofore stated, this is, in effect, an encumbrance, in the nature of a chattel mortgage, to secure the purchase money, registered as such under our registration <sup>202</sup> laws, and we concur with his honor in holding, for that reason, that the stipulation in the policy, against encumbrances, has been violated, and no recovery thereon can be had. The judgment below is affirmed.

No error.

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*Conditional Sale—Destruction by Fire.*—The right of a vendor to recover the price of personal property destroyed while in the possession of the vendee and before the full consummation of the sale is the subject of a note to *Harley v. Stanley*, 25 Okl. 89, post, p. 900.

*A Person has an Insurable Interest in Property* that he has purchased under a conditional sale, the title to remain in the vendor until full payment is made, though such interest is not that of an owner: *Tabbut v. American Ins. Co.*, 185 Mass. 419, 102 Am. St. Rep. 353. That the purchaser has the "sole and unconditional ownership" in such a case, see *Insurance Co. of N. A. v. Erickson*, 50 Fla. 419, 111 Am. St. Rep. 121. That he is the equitable owner, and has an insurable interest in the property, although he has not paid all of the consideration, see the note to *Reed v. Lukens*, 84 Am. Dec. 429. See, also, *Phenix Ins. Co. v. Hilliard*, 59 Fla. 590, ante, p. 171.

*A Condition in a Policy of Insurance* that it shall be void if the building "be or become encumbered by a chattel mortgage" must be construed as meaning and guarding against only the common, ordinary chattel mortgage and instruments of that general nature, use and purpose: *Caplis v. American Fire Ins. Co.*, 60 Minn. 376, 51 Am. St. Rep. 535.

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## IN RE HABEAS CORPUS OF JONES.

[153 N. C. 312, 69 S. E. 217.]

### CUSTODY OF CHILD—Right of Parents Living Together.—

On the hearing of a petition for a writ of habeas corpus for the possession of an infant, the child's parents, who are living together as lawful man and wife, have prima facie the right to its custody and control. (p. 672.)

### CUSTODY OF CHILD—Right of Parents Living Apart.—

Where the parents of children live apart, without being divorced, questions, on a petition for a writ of habeas, concerning the dis-

position of their offspring, must be decided under the provisions of the statute. (p. 672.)

**CUSTODY OF ILLEGITIMATE.**—The Mother of an Illegitimate child has, on a habeas corpus proceeding, the same prima facie right to its custody and control, though perhaps in a lesser degree, as in the case of legitimacy, where she has evinced a capacity and disposition properly to care for it. (p. 672.)

**CUSTODY OF ILLEGITIMATE.**—The Mother of a Nine Year Old illegitimate child has the paramount right to its custody on habeas corpus brought by her against her uncle and his wife for its custody, although it is being properly cared for and has become greatly attached to them, where it appears that she has lived with the respondents as one of their family until about five years previous, that she then married, that both she and her husband desire the custody of the child, and they are "respectable, colored people, capable of rearing and providing for the child," and that she has never abandoned the child. (pp. 673, 674.)

**CUSTODY OF CHILD—Habeas Corpus—Welfare of Infant.**—A court, on habeas corpus, will consider and determine the rightful custody and proper placing of infant children, recognizing the welfare of the child as the cardinal influence, which should not infrequently be allowed as controlling. (pp. 672, 675.)

T. J. Hicks, for the appellant.

A. C. Zollicoffer, for the respondent.

313 **HOKE, J.** The petition was filed by Nannie Green, mother of the child, who was and has been for some time in the care and custody of respondents, Prince Jones, uncle of petitioner, and his wife Laura.

On the hearing the court found as facts, among other things, that the child was an illegitimate child of the petitioner, Nancy Green, and would be nine years of age in May, 1901; that she was being properly and well cared for by respondents, who are reputable colored people; Prince Jones, being a minister, having a church under his charge, owning about fifty acres of land which he has bought, but not fully paid for; that Laura Jones, his wife, is a reputable colored woman, and that she and her husband are capable of raising and properly providing for the child, and are greatly attached to it; that the child has been and is being well and properly cared for and maintained, and she has become greatly attached to the said Prince Jones and his wife, and says she does not wish to leave them. It appears from examination of the child that she has been sent to school and to Sunday-school, and is now well advanced in her studies for one of her age and condition in life; that Nannie Jones, the mother, with her children, had been living for some time as a member of the family with Prince Jones and his wife, paying no board, but working as a member of the family until about five years ago, when she married Simon Green and went to live with him; "that Simon Green and his wife are respectable colored people and are capable of rearing and providing for

the child; that they have from the date of their marriage, from time to time and repeatedly, applied to respondents to let them have the child, but they declined to do so. Upon one occasion they attempted to take the child away from them by force, and when they had the child in the buggy the child screamed, and the wife of Prince Jones took her out of the buggy."

Upon these the controlling facts revelant to the inquiry, the court entered judgment as follows: (a) That the child is not illegally restrained of its liberty; (b) That the welfare and interests of the child would best be promoted by permitting her to remain with respondents; (c) And the court doth adjudge and decree that the said <sup>314</sup> Prince Jones and his wife, Laura Jones, are entitled to the care and custody of said Mary Jane Jones until she attains the age of fifteen years, at which time she may select between the petitioner and the respondents; but the court doth further adjudge that petitioner and her husband shall have the right at all proper hours to visit the child, and that the child shall be permitted to visit them whenever she should so desire.

Petitioner excepted and appealed.

In hearings of this character on habeas corpus, the parents of a child who are living together as lawful man and wife have prima facie the right to the control and custody of their infant children.

When divorced, the right to the children and their placing is more usually dealt with in the decree, and where they live apart, without being divorced, questions concerning the disposition of their offspring must be decided under the provisions of the Revisal of 1905, section 1853, to the effect: "The court or judge, on the return of such writ, may award the charge or custody of the child or children so brought before it either to the husband or to the wife, for such time, under such regulations, and with such provisions and directions as will, in the opinion of such court or judge, best promote the interest and welfare of the children. At any time after the making of such orders the court or judge may, on good cause shown, annul, vary or modify the same." In the case of illegitimate children, this same prima facie right exists, perhaps to a lesser degree, in the mother, and has been recognized in several decisions of the court where she has evinced a capacity and disposition to properly care for her children: *Ashby v. Page*, 106 N. C. 328, 11 S. E. 283; *Mitchell v. Mitchell*, 67 N. C. 307. True, we have held, and the ruling is in accord with enlightened and well-considered cases in other jurisdictions, that the welfare of the child is the cardinal influence and should not infrequently be allowed as controlling. Speaking to this question in a concurring opinion in *Re Parker*, 144 N. C. 170, 56 S. E. 878, the writer said: "The best



interest of the <sup>315</sup> child is being given more and more prominence in cases of this character, and on especial facts has been made the paramount and controlling feature in well-considered decisions"; citing *Bryan v. Lyon*, 104 Ind. 227, 54 Am. Rep. 309, 3 N. E. 880; *In re Welsh*, 74 N. Y. 299; *Kelsey v. Greene*, 69 Conn. 291, 37 Atl. 679, 38 L. R. A. 471; but while this principle may be taken as accepted, it should be applied in reference to the paramount right of a child's parents to have the control and custody of their children, whenever, being of good character, they have the capacity and disposition to care for and rear them properly in the walk of life in which they are placed. A right growing out of the parents' duty to provide for their helpless offspring, not only enforceable as a police regulation, but grounded in the strongest and most enduring affections of the human heart. A substantial right, therefore, not to be forfeited or ignored except in some way or for some reason, established or recognized by the law of the land. A most impressive illustration of the principle and its proper application is afforded in the recent case of *Newsome v. Bunch*, 144 N. C. 15, 56 S. E. 509. In that case the child, on the death of its mother, and at the age of five months, had been left by the father with its grandparents, and had remained with them for seven years. It had been well treated and was most advantageously placed, and the tenderest affection existed between the child and its grandparents. The father, too, was shown to be worthy, and there had been no abandonment. The child was awarded to the father, and Associate Justice Walker, delivering the opinion, said: "But as a general rule, and at the common law, the father has the paramount right to the control and custody of his children, as against the world; this right springing necessarily from and being incident to the father's duty to provide for their protection, maintenance and education: 21 Am. & Eng. Ency. of Law, 1036; 1 Blackstone (Sharswood), 452, and note 10, where the authorities are collected." And further: "It appears in this case that the child is under ten years of age, and that the petitioner and the respondents are equally qualified in every respect as fit and proper persons with whom to entrust the care and custody of the child, and further it is found as a fact that the father has in no way surrendered his natural and preferred right to such custody. Under these circumstances we <sup>316</sup> are unable to see why the petitioner is not entitled to have the custody of the child awarded to him, as was done by order of the court below. It would seem that the case comes directly and clearly within the decision of this court in *Latham v. Ellis*, 116 N. C. 30, 20 S. E. 1012, if it is not also substantially covered by the provisions of Revisal, sections 180 and 181. See, also, *Musgrove v. Kornegay*, 52 N. C. 71, *Harris v. Harris*, 115 N.

C. 587, 44 Am. St. Rep. 471, 20 S. E. 187, *Ashby v. Page*, 106 N. C. 328, 11 S. E. 283, *In re Lewis*, 88 N. C. 31, and *Thompson v. Taylor*, 72 N. C. 32, where the law in regard to the father's right of custody in respect to his child is discussed by the court in its different phases as presented by the facts of those cases. There is no legal duty or obligation resting upon the grandfather to support and educate his grandchild, whereas the father does rest under such an obligation. This fact should have some weight with the court in deciding a controversy between them as to the child's custody, apart from the natural claim the father has to the first consideration, as the death of the grandparent or his refusal longer to care for the child might leave the latter without any natural guardian or protector and result in his becoming a charge upon the community. While the court, in the exercise of a sound discretion, may order the child into the custody of some person other than the father, when the facts and circumstances justify such a disposition of the child, we do not think that any such case is presented in this record as should induce us to adopt that course and except this case from the general rule. The father has done nothing by which he has incurred a forfeiture of his right to the custody of his offspring."

In the present case, the court finds that Simon Green and his wife, the petitioner and mother of the child "are respectable colored people and are capable of rearing and providing for the child."

There has been no abandonment of the child by the mother, such as would forfeit her rights under the Revisal, section 180, nor are there any facts found from which such abandonment could be inferred.

On this finding, therefore, the authorities cited and the reason upon which they are properly made to rest are decisive, and require <sup>317</sup> that the judgment of the court below be reversed and the child awarded to the petitioner.

We were referred by counsel for the respondents to the case of *In re Parker*, 144 N. C. 170, 56 S. E. 878, as an authority for the position that a court will not determine the right to a child on habeas corpus proceedings. But there is nothing in the decision rendered in that case which supports such a position when the child is of such tender years that it has not the discretion or sufficient intelligence to determine for itself the question of its proper placing. In *Parker's* case the parents of the child were both dead, and the question was between a guardian recently appointed and its aunt, who had reared and maintained the child from its birth, and it clearly appeared that the best interest of the child required that it should remain with the aunt. In that case, too, it was shown that the child was eleven years of age, and of

sufficient intelligence for its wishes to be given some weight in the matter. The decisions are numerous with us, and they are in accord with accepted doctrine that the court in habeas corpus will consider and determine the rightful custody and proper placing of infant children: *Stokes v. Cogdell*, 153 N. C. 181, 69 S. E. 65; *Newsome v. Bunch*, 144 N. C. 15, 56 S. E. 509; *In re Hugh D'Anna*, 117 N. C. 462, 23 S. E. 431; *Latham v. Ellis*, 116 N. C. 30, 20 S. E. 1012; *Thompson v. Taylor*, 72 N. C. 32.

On the authorities referred to, and for the reasons given, the judgment of the lower court is reversed, and this will be certified to the end that the child be awarded to the mother.

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*The Custody of a Legitimate Child on Habeas Corpus* is discussed in the note to *State v. Smith*, 20 Am. Dec. 330. A mother will be awarded the custody of her child, on habeas corpus, notwithstanding the return shows that the child is in the care of another person, who, having no children, regards it with the same affection as he would a child of his own, and is able to rear it more indulgently, educate it more highly, and provide for its future more abundantly than its mother: *State v. Reuff*, 6 Am. St. Rep. 676.

*The Mother has the Superior Legal Right to the Custody and Control of Her Minor Illegitimate Child*, but not absolutely beyond the control of other attendant circumstances: *Marshall v. Beams*, 32 Fla. 499, 37 Am. St. Rep. 118. Her right to the custody of her illegitimate child is discussed in the note to *Brooke v. Logan*, 2 Am. St. Rep. 185. As to the right of the putative father, see *Aycock v. Hampton*, 84 Miss. 204, 105 Am. St. Rep. 424.

*The Writ of Habeas Corpus is the Proper Remedy to Ascertain and Enforce the Proper Custody of an Infant*: *Green v. Campbell*, 35 W. Va. 696, 29 Am. St. Rep. 843; and, in awarding custody, the welfare of the child is the controlling element with the court: *Cunningham v. Barnes*, 37 W. Va. 746, 38 Am. St. Rep. 57; *Hernandez v. Thomas*, 50 Fla. 522, 111 Am. St. Rep. 137, and cases cited in the cross-reference note thereto.

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## MOORE v. HORNE.

[153 N. C. 413, 69 S. E. 409.]

**LUNATICS—Liability for Tort—Damages.**—A lunatic is liable for his torts, the proper measure of damages being compensation for the injuries sustained. (p. 676.)

**LUNATICS.—Punitive Damages** are not recoverable against a lunatic. (p. 676.)

**LUNATICS—Action Against for Damages.—Evidence** by the plaintiff, in an action against a lunatic, for assaulting and injuring the plaintiff, that defendant was sane when he committed the act, is not admissible where the plaintiff claims only compensatory, not punitive, damages. (p. 676.)

**LUNATICS—Action Against for Damages.—Evidence.**—In an action to recover damages for an assault made by a lunatic, evidence

that defendant was arrested on a criminal warrant charging him with the very assault which is made the foundation of the civil action, and was drunk, disorderly, and resisted arrest, should not be admitted. It is no evidence that defendant committed the assault as alleged in the complaint, and its admission is not harmless error, because such evidence is calculated to prejudice the minds and judgment of the jurors. (p. 677.)

Civil action for damages for an assault made by a lunatic. The jury found, in the first issue submitted, that the plaintiff was injured as alleged in the complaint; and, in the second issue submitted, that the plaintiff was entitled to recover two thousand five hundred dollars damages. A motion for a new trial was overruled, and judgment rendered for the plaintiff, from which the defendant appealed.

Robinson & Caudle, for the plaintiff.

James A. Lockhart and McLendon & Thomas, for the defendant.

<sup>414</sup> BROWN, J. The evidence tends to prove that the defendant is insane, and has been so adjudged by proper proceedings and was duly confined in jail, and application made for admission in an asylum of the state. There is evidence offered tending to prove that prior thereto the defendant assaulted the plaintiff with a pistol and injured him.

The plaintiff does not claim punitive damages, but actual or compensatory damages only. A lunatic is liable in a civil action for any tort which he may commit. The proper measure of damages in an action against a lunatic for tort committed by him is compensation for the injuries sustained. It cannot include punitive damages: McIntyre v. Sholty, 121 Ill. 660, 2 Am. St. Rep. 140, 13 N. E. 239.

In the foregoing case the lunatic shot and killed the deceased, and his estate was held liable in damages. The court excluded the evidence of insanity in the case and the ruling of the trial <sup>415</sup> court was affirmed. An insane person is just as responsible for his torts as a sane person: Williams v. Hayes, 143 N. Y. 442, 42 Am. St. Rep. 743, 38 N. E. 449, 26 L. R. A. 153; Cooley on Torts, 3d ed., 171; Shearman & Redfield on Negligence, sec. 122. Upon the same principle infants are held liable for their torts: Crump v. McKay, 53 N. C. 32; Smith v. Kron, 96 N. C. 392, 2 S. E. 533.

It was therefore erroneous to admit evidence upon part of plaintiff that defendant was sane when he committed the act, unless plaintiff sought to have the jury impose smart-money or punitive damages, which is not the case.

This error may have been cured by the charge of the court in directing the jury not to allow punitive damages, but we call attention to it so as to guide the court below on another trial, to the end that all such evidence be eliminated.

His honor, however, permitted plaintiff to prove that the defendant was arrested in a criminal proceeding for this alleged assault upon plaintiff, and further permitted the following question and answer:

"Q. Mr. Redfearn, did you help to arrest Horne for the shooting of Fairley Moore? A. Yes, sir.

"Q. What did he do—what was his condition on that occasion? A. Well, I was outside the store and I heard scuffling, and Horne was cursing and trying to get loose, and the officer that had him had his handcuffs out and asked me to put them on him, and I did. I can't recall his language very well, but he was cursing and abusing people, and was drunk. To all of which defendant in apt time objected and noted exceptions."

The admission of such evidence was entirely irrelevant to the matters at issue in this case, and was well calculated to harm the defendant, who denies in the pleadings that he committed any assault upon the plaintiff.

The fact that he was arrested on a criminal warrant charging defendant with the very assault which is made the foundation of this action is incompetent here. It is no evidence that the defendant committed the assault as alleged in the complaint.

The conduct of the defendant in resisting arrest under the warrant is wholly foreign to the matters at issue in this civil action. The introduction of such incompetent evidence was well <sup>416</sup> calculated to inflame and prejudice the minds of the jurors against the defendant so as to possibly influence their judgment upon both issues submitted to them.

As the case is to be tried again, it is needless to discuss the other assignments of error.

New trial.

**Clark, C. J., Dissenting.** The defendant, in an ex parte proceeding, was adjudged a lunatic. The plaintiff necessarily moved to have a guardian ad litem appointed. This was no estoppel on the plaintiff.

The evidence left no doubt that the defendant shot the plaintiff. Certainly there was ample evidence which justified the jury in so finding.

The only proposition of law involved was, that in this action, if the defendant did the shooting, he was liable for compensatory but not for punitive damages, and the judge so told the jury. The defendant on cross-examination brought out much evidence tending to show that the defendant was insane at the time of the killing, which was not controverted, and the plaintiff on re-examination went into the same matters—for what purpose, on either side, does not appear. Among other questions asked was one as to the conduct of the defendant when arrested on the criminal charge. This question was asked not to show that the defendant was arrested, but to show his conduct on that occasion, and was along the line of the cross-examination by defendant's counsel.

The real question of fact as to the defendant having done the killing and the amount of damages and the proposition of law, which was correctly laid down by the court, as to the measure of damages, were in no wise affected by these matters brought out on the cross-examination and again worked over on the redirect. The evidence on both sides, in this respect, was irrelevant and immaterial. It could not possibly affect the result, and therefore was not ground for a new trial. This has been repeatedly held by this court: *Collins v. Collins*, 125 N. C. 98, 34 S. E. 195; *Spruill v. Columbia*, 153 N. C. 48, 68 S. E. 911; *Tomlinson C. Mfg. Co. v. Townsend*, 153 N. C. 244, 69 S. E. 145; *Freeman v. Brown*, 151 N. C. 111, 65 S. E. 743, and cases there cited.

The wholesome doctrine that harmless error should not be the ground for a new trial, even in a criminal case, has never been better stated probably than in a recent case in Oklahoma—*Byers v. Territory*, 1 Okl. Cr. 677, 100 Pac. 261, 103 Pac. 532—from which it may be well to cite at some length:

"The more we reflect upon the doctrine of harmless error the more clearly we will see that it is in strict harmony with the philosophy of the law, and that its recognition and enforcement by appellate courts is absolutely necessary for the administration of justice.

"Justice demands that in the administration of law its processes should never become a game of skill between contending counsel. There has been entirely too much of this in the past. It has resulted in the miscarriage of justice in many cases, and has bred a spirit of disgust for law and contempt for courts in the public mind. Reduced to its last analysis, the doctrines contended for by counsel, if recognized, would require this court to hold that, where evidence is admitted during a trial, and upon appeal it is held that such evidence was improperly admitted, a reversal of the conviction must follow, regardless of the character of the evidence in the record, upon the ground that, the prosecution having offered its evidence as a part of its case, it is estopped from denying its injurious effect.

"It appears to us that this application of the doctrine of estoppel to the state, in the enforcement of its criminal law, on account of the ignorance or mistaken judgment of one of its servants, is technicality run mad. We decline to be bound by, or to follow, a line of authorities so repugnant to reason, so demoralizing to respect for law, and so destructive to justice. The habit of reversing cases upon technicalities is a very convenient one for appellate courts, for by so doing they can escape much hard labor, and all responsibility for their decisions, for a violation of some technical rule can be found in almost every closely contested case.

"We believe that appellate courts should faithfully and fearlessly do their duty, and decide every question presented with reference to the substantial merits of the case in which it arises. In this way only can justice be administered. Ignoring justice, there is not only lost to the courts the confidence and respect of the people, but it has also greatly alarmed the profession of law itself.

"No one can say the members of the American Bar Association are sensationalists or wanting in learning or ability. It is eminently a conservative body. Yet we find them crying out against and proposing a remedy for this evil. At its last meeting at Seattle, Washington, it recommended to Congress the following amendment to the

Revised Statutes of the United States: 'No judgment shall be set aside or a new trial granted, by any court of the United States, in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of an entire case, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice: 1 U. S. Comp. Stats., p. 715. No writ of error shall be issued in any criminal case unless a justice of a supreme court shall certify that there is probable cause to believe that the defendant was unjustly convicted: 1 U. S. Comp. Stats., p. 575.' The same recommendation was adopted by the New York State Bar Association at Buffalo, January 28 and 29, 1909.

"The enforcement of the doctrine of harmless error will greatly improve the character of our criminal trials. Lawyers will be compelled to try cases upon the actual merits and will cease devoting so much time in attempting to force technical errors into the record. The needless waste of so much valuable time, and the expenditure of a great deal of money, will be saved, and far better results will be reached in the administration of justice, and the courts will gain the confidence and respect of the people, and acts of mob violence will cease to disgrace our state. The reversal of the just convictions of the guilty, upon purely technical questions, is the prime cause of want of confidence in the courts. This want of confidence often results in mob violence on the part of a long-suffering and outraged public."

What is said above by the Oklahoma court, indorsing the resolutions of the two greatest bar associations in this country, is but a statement in a fuller and more complete manner of what this court has repeatedly held in a more succinct form, i. e., that the presumption is that the proceedings below were correct, and that the burden is on the appellant, not only to allege and prove error committed, but it must show that this error was prejudicial.

In this case the shooting of the plaintiff is the ground of a civil, not of a criminal, action, and the damages sought are not punitive, but merely compensatory. The evidence of which the appellant complains was irrelevant and immaterial, and could not possibly have affected the result. There could be no real controversy that there was evidence, uncontradicted, from which the jury might well find that the defendant did the shooting. The proposition laid down by the court that the plaintiff sought and could recover only compensatory damages was clearly correct. And these were the only matters in the case. Moreover, the irrelevant testimony was brought out in reply to the same kind of testimony elicited from the plaintiff's witnesses by the defendant on cross-examination.

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*An Insane Person is Ordinarily Answerable for His Torts*, the same as a sane person: *Williams v. Hays*, 143 N. Y. 442, 42 Am. St. Rep. 743, and note thereto. The proper measure of damages is mere compensation for the injury sustained. It cannot include punitive damages: *McIntyre v. Sholty*, 121 Ill. 660, 2 Am. St. Rep. 140; *Holdom v. Ancient Order of U. W.*, 159 Ill. 183, 50 Am. St. Rep. 183.

**HENDREN v. HENDREN.**

[153 N. C. 505, 69 S. E. 506.]

**PAROL TRUST—Dower—Evidence.**—On a petition by a second wife for dower, proof by the defendant heirs, who were the children by a former wife, that, while the legal title to certain property was in their father at the time of his death, the same had been bought, paid for, and improved from funds which constituted the separate estate of their mother; and also that the deed had been made to their father by mistake, instead of to their mother, establishes a trust in favor of defendants, superior to the claim for dower, which must be assigned, if at all, from the estate of the father. (p. 680.)

**PAROL TRUST.—Evidence to Establish a parol trust** must be clear, strong, and convincing, but if the testimony is sufficient to carry the case to the jury, it is for them, under proper instructions, to determine whether the evidence is of such a character. (pp. 680, 681.)

Petition by a second wife for dower. Some of the heirs at law filed an answer. In effect, the jury was instructed that, if the evidence was believed, the plaintiff was entitled to dower, as claimed, out of all lands described in the petition. The plaintiff obtained a verdict and judgment, and all but two of the defendants excepted and appealed.

Hackett & Gilreath, for the plaintiff.

Finley & Hendren, for the defendant.

**505 HOKE, J.** The court does not take the view of this evidence which seems to have impressed his honor below. The heirs at law of E. B. Hendren, who were children by a former wife, admitting <sup>506</sup> that the petitioner was entitled to dower in a portion of outlying land, described in the petition, answered and alleged that as to certain property, situate in the town of North Wilkesboro, while the legal title thereto was in their father, E. B. Hendren, at the time of his death, the same had been bought, paid for and improved from money and funds which was the sole and separate estate of their mother. Defendants alleged further that the deed conveying title had been made to the father by mistake instead of their mother, who paid for the property. If these averments are made good, and there was evidence introduced tending to sustain them, they would establish a trust estate in favor of the defendants, as children and heirs at law of their mother, superior to the claim for dower, which must arise, if at all, from the estate of the father: Ray v. Long, 128 N. C. 90, 38 S. E. 291; Kirkpatrick v. Holmes, 108 N. C. 206, 12 S. E. 1037. True, the court has repeatedly held that in order to establish a trust of this character, in contravention of the terms of a written deed, the evidence must be clear, strong and convincing, but our



decisions are also to the effect that "when the testimony is sufficient to carry the case to the jury, as on an ordinary issue, the judge can only lay this down as a proper rule to guide the jury in their deliberations, and it is for them to determine whether, in a given case, the testimony meets the requirements of the rule as to the degree of proof": *Gray v. Jenkins*, 151 N. C. 80, 65 S. E. 644. It was insisted, on the argument, that the proof did not connect the alleged payments with the property in controversy, but we do not so interpret the testimony. Several of the witnesses spoke of the purchase of the property and the payments on it in terms sufficiently definite to require that the issue raised should be determined by the jury. There is error, and this will be certified that a new trial may be had.

*The Creation of Trusts in Land by Parol* is the subject of a note to *Insurance Co. of Tennessee v. Waller*, 115 Am. St. Rep. 774. As to what evidence will overcome the objection that a trust in land cannot be established by parol, see *Kollock v. Bennett*, 53 Or. 395, 133 Am. St. Rep. 840.

*As to When a Resulting Trust Arises* in favor of a husband or wife who pays the purchase price and takes title in the name of the other spouse, see the note to *Stonecipher v. Kear*, 127 Am. St. Rep. 252.

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## **HORNER v. OXFORD WATER AND ELECTRIC COMPANY.**

[153 N. C. 535, 69 S. E. 607.]

**ELECTRICITY—Rates—Reasonable Regulation.—An Electric Company** is subject to reasonable regulation and control for the public benefit. The municipality has the power to fix upon maximum rates for electricity to be consumed, which rates the company has no right to disregard, where they are reasonable in their terms and are without any discrimination as between citizens receiving the same kind and degree of service; and in the absence of more specific legislative regulation, such rates may, under some circumstances, be made the subject of judicial scrutiny and control. (p. 683.)

**ELECTRICITY—Regulation of Charges—Flat and Meter Rates.** When a town has, by an accepted ordinance, fixed maximum charges for both flat and meter rates, under which electricity is to be furnished by an electric company, and the ordinance is treated as expressing a contract between the company and consumers, such ordinance is subject to the principle of interpretation that when a promise is in the alternative, as to do a thing one way or another, the right of election is with the promisor in the absence of an express provision to the contrary. Hence, the company has the option to furnish electricity to its consumers, at a reasonable charge, either upon the flat or meter basis. (p. 684.)

**ELECTRICITY—Ordinance Fixing Rates—Parol Evidence.—**When maximum flat and meter rates for electricity have been fixed by a town under an accepted ordinance, the plain terms of the

ordinance cannot, in an action against the electric company wherein a consumer claims the right to change from a meter rate to a flat rate, be affected by parol evidence that the assignor of the franchise to the company orally agreed that he would furnish electricity according to the option of the consumer. (p. 684.)

**ELECTRICITY—Flat or Meter Rates—Change of Service.—**

If a town has by ordinance fixed a maximum charge for electricity to be furnished by an electric company, either upon a flat or meter rate, and the company has the option, under the ordinance to supply electricity upon either basis, a consumer, who has contracted with the company for electricity upon a meter basis, cannot restrain the company from cutting off the current when he refuses to accept electricity at the meter rate and demands to have it furnished upon a flat-rate basis, where it appears that the company is supplying him in accordance with a reasonable and fair meter basis correctly measured, and it does not appear that other consumers upon the flat-rate system have any advantage, or are enjoying a privilege not accorded to those using meters. The action of the company does not discriminate unjustly against the plaintiff, although it has, with a desire to benefit the public, changed from a twelve hour to a twenty-four hour service, and has ceased to supply electricity upon a flat-rate basis. (pp. 684, 685.)

Action by plaintiff, the head and proprietor of a boarding-school, and a large consumer of electricity, to restrain the defendant company from shutting off the current of electricity supplying lights for said school. The company, as assignee of one H. L. Millner, was engaged in operating an electric plant and supplying lights for the citizens of Oxford under an ordinance which had been duly ratified by the voters of the town, and which provided "that said H. L. Millner, his successors and assigns, may charge and collect the following maximum rates for light and power furnished by them." It was provided therein that the flat rates might be collected monthly or quarterly, in advance, and the metered rates monthly, after service. Specifications were also therein made for light for flat rates, but a difference was made between the charges for domestic and commercial purposes. Maximum rates for meter charges were also specified.

Plaintiff had his house wired, proper appliances installed, and entered into a contract to obtain electricity at the meter rate. Electricity was furnished and used for some time at the meter rate, but the plaintiff, becoming dissatisfied with the charges made against him, notified the company that he would no longer accept lights at the meter rate, and tendered the scheduled amount due for flat rates. The company refused to make this arrangement, and threatened to shut off the light supplied for the school unless the charges for the meter rate were paid according to the stipulations of the contract.

When the ordinance was passed and service entered on, electricity was supplied for twelve hours only in one day, but the company made a change from the twelve-hour basis

and, with the desire and intent to benefit the entire public, endeavored to furnish a full service of twenty-four hours, but there was evidence that the flat rate originally provided for would, under this measure of service, speedily bankrupt the company. The company discontinued its flat-rate contracts and finally furnished electricity only at meter rates. It was in evidence on the part of the company, that all charges in difference affecting this litigation were estimated by a correct meter. There was evidence, also, that no company in North Carolina was furnishing electricity at the time by flat rates; that the meter rate is the only fair and equitable method of furnishing electricity; and that such method has been generally adopted all over the country.

The matter in dispute was referred by order of court, and the referee found that the charge against the plaintiff was according to the specifications of the ordinance as to meter rates, and was a reasonable charge for electricity consumed; but he held that, under the franchise, the plaintiff had the right, at his election, to change from the meter to the flat rate; that the charge should be estimated against the plaintiff as for commercial purposes; and that the injunction should be made perpetual, forbidding the defendant from shutting off the light for nonpayment of the meter rate. The lower court reversed this ruling that the plaintiff had the right to make such change, and held that the defendant company had the option to charge its patrons either for flat or meter rates. The injunction was therefore dissolved and the plaintiff appealed.

Graham & Devin and B. S. Royster, for the plaintiff.

John W. Hinsdale, for the defendant.

<sup>538</sup> HOKE, J. We are of opinion that the judge below has correctly construed the contract or ordinance, and that the rights of the parties thereunder have been properly determined. The defendant company having dedicated its property to the public service, it thereby became the subject of reasonable regulation and control for the public benefit and by the public agencies properly designated for the purpose. Subject to this principle, the municipal corporation had the power to fix upon a maximum charge reasonable in its terms and which defendant would have no right to disregard. Even with such maximum rates properly established, our decisions are to the effect that the charges must be reasonable and without discriminations as between citizens receiving the same kind and degree of service, and that in the absence of more specific legislative regulation, the rates may, <sup>539</sup> under some circumstances, be

made the subject of judicial scrutiny and control: *Griffin v. Goldsboro Water Co.*, 122 N. C. 206, 30 S. E. 319, 4 L. R. A. 240; *Rushville v. Gas Co.*, 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321. It is shown that the charge made against plaintiff in this instance according to meter rates is reasonable. So far as appears, then, from the findings of fact or the proof, the ordinance is a valid regulation fixing the maximum rates stated, and requiring defendant company to supply electricity within the rate to all persons living within the corporation who should apply for it, but we agree with his honor in holding that, as to the method of rating, the said ordinance not improperly left and referred this question to be determined by the contract of the parties. This not only appears from a perusal of the ordinance by which "H. L. Millner, his successors and assigns, are authorized to charge and collect the following maximum rates for light and power furnished by them, etc., specifying the flat and meter rates," but in so far as the ordinance expresses a contract between the company and the municipality, and both parties to this controversy seem to have so treated it, the same is subject to the principle of interpretation generally applicable, "That when a promise is in the alternative, as to do a thing one way or another, the right of election is with the promisor in the absence of an express provision to the contrary": 7 Am. & Eng. Ency. of Law, 2d ed., p. 125; *Homesly v. Elias*, 75 N. C. 564; *Exchange & Building Co. v. Roanoke G. & W. Co.*, 90 Va. 83, 17 S. E. 789; *Powell v. City of Duluth*, 91 Minn. 53, 97 N. W. 450; *Paige on Contracts*, sec. 1391; 1 *Farnham on Water and Water Rights*, sec. 163. We find no evidence in the record supporting the suggestion made that defendant's assignor, as an inducement, had given assurance that he would furnish electricity according to the method of rating selected by the householder or purchaser, and if there had been, it should not, in our opinion, be allowed to affect the plain and explicit terms of the ordinance. Nor do we think that the action of the company should be held to discriminate unjustly against the plaintiff in view of the facts in evidence; that the charge made against the plaintiff is a fair and reasonable charge for the electricity actually consumed and correctly measured; that the company is endeavoring to furnish a full service of twenty-four hours, a change made from the original method of half time <sup>540</sup> with the desire and intent to benefit the entire public, and that the flat rate originally provided for under this measure of service would speedily bankrupt the company; that no flat-rate contract had been made since May, 1907, and since June, 1908, no one had been furnished electricity except by meter rates. In *Powell v. City of Duluth*, 9 Minn. 53, 97 N. W. 450, on

facts not dissimilar to those presented here, the court said: "The only ground upon which appellants can assail the act of the commissioners in refusing to place them upon the flat-rate basis is that it resulted in a discrimination between them and other consumers who pay at flat rates, or that the meter rates were unreasonable; but according to the evidence and the findings, the meter rates were reasonable. If it appeared that other consumers, upon the flat-rate system, had an advantage, and were enjoying a privilege not accorded those using meters, and that the commissioners were arbitrarily making such discrimination, there might be some ground for complaint. But such is not the case. On the contrary, the evidence and findings are to the effect that a large majority of those using meters save money by so doing. The fact that according to appellant's experience with a meter prior to the time it was taken out showed their water bills to be more than the flat rate does not establish discrimination, nor prove that the rate by the meter is unreasonable. It is found by the court that all consumers situated as appellants have been similarly treated, and it does not appear that the method adopted by the board to gradually bring consumers upon the meter basis is illegal or arbitrary, or that it resulted in discrimination."

Upholding, as we do, the decision of the judge below that under the ordinance and the facts in evidence the plaintiff may be lawfully subjected to the meter rate, we further concur in the position of his honor that the question whether plaintiff could be charged under the flat rate as domestic or commercial is no longer material, and for that reason is not considered or passed upon.

We are of opinion that there was no error in dissolving the injunction, and the judgment to that effect is affirmed.

<sup>541</sup> CLARK, C. J., Dissenting. The commissioners of Oxford made a contract with the defendant company to furnish water and lights to said town and its citizens. The contract was in the shape of an ordinance, which was submitted to the voters at the ballot-box and approved by them. This ordinance specified the rates, both flat and meter, in separate columns, at which the defendant should furnish both light and water. This table of rates was not intended to confer any option upon the defendant, but was a restriction upon the defendant company, and a guarantee to the town and the citizens that they would be furnished lights and water at prices not exceeding those rates, and by the flat or meter system at the option of the consumer.

The ordinance and the table were not required to confer any option upon the defendant. Without them, the company had full choice whether it would furnish upon a light or flat-meter rate, and as to the price it would charge. It

was not to confer an option upon the company, but for the exactly opposite purpose of restricting the powers of a monopoly, and to confer upon the consumer the option that the ordinance was adopted.

This will more clearly appear by reference to the provision as to the water rate, which specifically provides that upon the expiration of any contract with a citizen as to the furnishing of water upon a flat rate, the company should have the right to substitute a meter rate. There is no provision reserving such right to the company to substitute a meter rate for a flat rate in furnishing lights.

It is true that the flat rate for lights was based upon a twelve-hour service. Of course, the plaintiff cannot require a longer service upon a flat rate than that which existed at the date of the adoption of the ordinance, and it seems that the plaintiff does not claim it. In my judgment, the court below should have adopted in all respects the report of Governor Stedman, the very careful and able referee in this case.

*Where the Charter of a Gas Company Fixes the Maximum Rate* that can be charged at one dollar and sixty-two cents per thousand feet for lighting and one dollar and eight cents for other purposes, the company is not authorized to charge consumers a minimum of one dollar per month as meter rent when they do not consume one dollar's worth of gas during the month: *Montgomery Light etc. Co. v. Watts*, 165 Ala. 370, ante, p. 71. And according to *Robbins v. Bangor Ry. & Electric Co.*, 100 Me. 496, 62 Atl. 136, 1 L. R. A., N. S., 963, a water company may change from a flat to a meter rate if no contract forbids and the new rate is reasonable and not discriminative.

## HARRIS v. NORFOLK AND WESTERN RAILWAY COMPANY.

[153 N. C. 542, 69 S. E. 623.]

**WATERS—Material Diminution.—Riparian Proprietors**, in the absence of specific limitation upon their rights, are entitled to have the stream which washes their lands flow as it is wont by nature, without material diminution. (p. 688.)

**WATERS—Property in Flowing Water.—Riparian Proprietors** have no property in the flowing water, which is indivisible and not the subject of riparian ownership. They may use the water for any purpose to which it can be beneficially applied, but in doing so they have no right to inflict material or substantial injury upon those below them. (p. 688.)

**WATERS—Withdrawal of, from Stream—Riparian Rights.—**The size and character of the stream have much to do with the quantity of water which may be withdrawn from it, and where there has been no appreciable, perceptible diminution of the volume of the stream, by the upper proprietor, the lower one has no cause of action. (p. 688.)

**WATERS.—A Railroad Company, Being a Riparian Proprietor,** may take a reasonable amount of water from a stream for the purpose of supplying its locomotives, but it cannot do so in such way as to interfere with other rights on the stream. (p. 688.)

**WATERS—Right of Railroad to Use from Stream.**—A railroad company crossing a stream may take water for its locomotives, provided the quantity taken does not materially, appreciably, perceptibly, or sensibly reduce the volume of water flowing down the stream. If it materially lowers the stream, it is liable to a lower proprietor who suffers a substantial injury thereby. (p. 689.)

**WATERS—Diminution by Use—Conflicting Evidence.**—The question as to whether the water in a stream has been materially lowered by withdrawing water therefrom is properly submitted to the jury where the evidence is conflicting. (pp. 689, 690.)

**WATERS—Riparian Rights.—One Who Owns a Water-mill** cannot recover damages of a railroad company for withdrawing water from the stream, above the mill, for use in its locomotives, where the jury finds that the flow of water has not been materially or substantially diminished. (pp. 687, 690.)

Action by the owner of a water-mill on a running stream to recover damages of the defendant railway company for pumping water from the stream, above the plaintiff's dam. Among various issues submitted, the fourth one and its answer were as follows: "Has the defendant unlawfully and wrongfully diverted and used the water from plaintiff's mill pond as alleged in the complaint? Answer: No." Upon this finding in favor of the defendant upon the fourth issue, the court rendered judgment that the plaintiff take nothing by his writ, and that the defendant go without day and recover costs. The plaintiff appealed.

J. F. Cothran, R. P. Reade, V. S. Bryant and H. A. Foushee, for the plaintiff.

Guthrie & Guthrie, for the defendant.

<sup>543</sup> **BROWN, J.** The evidence discloses that the plaintiff is the owner of a tract of land, known as Burton's old mill, situated on Flat river, upon which plaintiff has a water-mill. The mill gets its flowage of water from both the north and south forks of Flat river. It is two miles by the river from the mill tract to the defendant's bridge across the south fork. The north fork and south fork come together between the mill and the bridge. Defendant has a water tank at its bridge across south fork, from which it supplies its engines with water pumped from the stream.

<sup>544</sup> It is claimed by the plaintiff that the taking of the water by the defendant is unlawful and wrongful, in that it materially lowers the stream, to the injury of plaintiff's mill. This is denied by the defendant, which contends that the quantity of water taken is so small that it does not appreciably affect the flowage of the stream. Both parties introduced evidence.

The only assignment of error relied upon on argument or presented in plaintiff's brief is to the refusal of the court to give the following instruction asked by plaintiff: "If the jury believe the evidence, they will answer fourth issue, Yes."

There being no exceptions, except this, the charge of the court is not sent up.

It is well settled that riparian proprietors, in the absence of specific limitation upon their rights, are entitled to have the stream which washes their lands flow as it is wont by nature, without material diminution.

The proprietors of lands along streams have no property in the flowing water, which is indivisible and not the subject of riparian ownership. They may use the water for any purpose to which it can be beneficially applied, but in doing so they have no right to inflict material or substantial injury upon those below them: *Williamson v. Lock's Creek Canal Co.*, 78 N. C. 156; *Gould on Waters*, pp. 394, 395; *Angell on Water Courses*, 7th ed., pp. 96, 97.

What, then, gives to the lower riparian proprietor the right to complain? Not the mere taking of the water by the upper proprietor, because the water itself is not the subject of ownership as it flows in nature's course. The right of action accrues from the taking it in such unreasonable quantity as to materially, substantially injure the lower proprietor in some legitimate use he is making of the water. As Mr. Farnham expresses it: "Since the right to make use of the stream is common to all who own property upon its shores, there would prima facie seem to be no cause of complaint on the part of one for any use made by another unless he was actually injured by such use": 2 *Farnham on Waters and Water Rights*, p. 1584, sec. 468.

It seems to be generally conceded that the size and character of the stream has much to do with the quantity of water which may be withdrawn from it, and that where there has been no <sup>545</sup> appreciable, perceptible diminution of the volume of the stream by the upper proprietor, the lower has no cause of action: *Elliott v. Fitchburg R. R. Co.*, 10 Cush. 191, 57 Am. Dec. 85; *Newhall v. Ireson*, 8 Cush. 595, 54 Am. Dec. 790.

It is generally held that a railroad company, being a riparian proprietor, may take a reasonable amount of water from a stream for the purpose of supplying its locomotives. Mr. Farnham says: "Therefore, the water cannot be taken from the stream for use in locomotive engines so as to interfere with the rights of the riparian owner in the stream. But if the water can be taken for such purpose without interfering with other rights on the stream, it may be done": 2 *Farnham on Waters and Water Rights*, p. 1583. In England it is held that a railroad company which crosses a river



may take a reasonable quantity of water for the supply of its engines from the river, and "the quantity will not be held unreasonable if it does no injury in wet weather and never shortens the working hours of mills lower down the stream more than a few minutes a day at any time": *Sandwich v. Great Northern R. R. Co.*, L. R. 10 Ch. D. 27.

The English courts also hold that equity will not restrain the taking of water from a stream by a railroad company for its locomotives when the quantity taken deprives the lower riparian owner of but eleven-twelfths of one horsepower: *Graham v. Northern R. Co.*, 10 Grant Ch. 259.

In this country it seems well settled that a railroad company crossing a stream may take water for its locomotives, provided the quantity taken does not materially, appreciably, perceptibly or sensibly (some authorities use one word and some the other) reduce the volume of water flowing down the stream. If it materially lowers the stream, it is liable to a lower proprietor who suffers a substantial injury thereby: 2 Elliott on Railroads, sec. 977, and notes; *Elliott v. Fitchburg R. R.*, 10 Cush. (Mass.) 191, 57 Am. Dec. 85 (a case in which Chief Justice Shaw discusses the subject with his usual thoroughness); *Fay v. Salem & Danvers A. Co.*, 111 Mass. 27; *Pennsylvania R. R. v. Miller*, 112 Pa. 34, 3 Atl. 780.

In this case Mr. Justice Paxson closes a learned discussion of the matter with these words: "As before observed, the railroad <sup>546</sup> company may use this water by virtue of its rights as riparian owner; but such use must be such as not to sensibly diminish the stream to the riparian owner below. The water belongs to both, and if the former wants more than its share, it must take it under its right of eminent domain and pay for it."

In the case of *Garwood v. New York etc. R. R. Co.*, 83 N. Y. 400, 38 Am. Rep. 452, the right of the defendant as riparian owner to take water for its locomotives is recognized, but the jury having found that the quantity taken was sufficient to "materially reduce or diminish the grinding power of plaintiff's mill," and "to perceptibly reduce the volume of water in the stream," the court held the taking wrongful and unlawful, and that the defendant was liable for the damage sustained.

But a diminution of the stream which is not sensible, appreciable, perceptible, is not actionable: *Gould on Waters*, sec. 410, and cases cited in notes; *Wadsworth v. Tillotson*, 15 Conn. 366, 39 Am. Dec. 391; *George v. Wabash W. Ry. Co.*, 40 Mo. App. 433.

Although the charge of the court—there being no exceptions to it—is not before us, yet we can perceive from the character of the evidence and examination of witnesses on

both sides that the case was properly tried and upon the true theory of liability.

It requires only a cursory perusal of the evidence to bring us to the conclusion that the court committed no error in refusing plaintiff's prayer upon the fourth issue.

The plaintiff's evidence tends to prove that at times the water taken by defendant from the south fork materially lowers the water in the stream, and inflicts substantial damage upon plaintiff by compelling him to shut down his mill.

The defendant introduced a number of witnesses who testified that plaintiff's mill was not damaged by the water taken by defendant, and that it does not perceptibly decrease the volume of the stream; that water runs over plaintiff's dam when he is grinding, and that the lowest water some witnesses have seen is a foot from the top of the dam. Defendant also proves by a civil engineer that he measured the stream and calculated its volume; that he made surveys and calculations at different times; that the flow of the stream in twenty-four hours is two hundred and ninety-three million gallons, and that the quantity taken out <sup>547</sup> during that time by the railroad company is only twenty-six thousand gallons, or about one-fiftieth part of one percent of the total flowage. The civil engineer further testified that "the pumping of twenty-six thousand gallons of water out of the stream of south fork every twenty-four hours with the total flowage of the stream would not be appreciable. It would be about three two-hundredths ( $3/200$ ) of one part of one per cent. A person standing on the bank of the river could not see any difference at all. To the eye, it would show no difference."

In view of the conflicting character of the evidence, his honor properly submitted the question to the jury and denied the plaintiff's prayer. As the jury found there had been no unlawful and wrongful taking and usage of the water by the defendant, the issues in regard to the statute of limitations and damages were properly left unanswered.

No error.

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*A Riparian Proprietor's Right to Use and Detain Water* is discussed in the note to *Davis v. Getchell*, 79 Am. Dec. 638. As to property in water, see the note to *Gardner v. Newburgh*, 7 Am. Dec. 531. That the common-law doctrine of riparian rights has been displaced, in the western states, by the doctrine of prior appropriation, see *Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho, 484, 133 Am. St. Rep. 125.

*An Upper Riparian Owner on a Stream has No Right*, according to *Garwood v. New York etc. R. R. Co.*, 83 N. Y. 400, 38 Am. Rep. 452, to divert water by pipes and reservoirs for the use of his locomotive engines, to the detriment of a lower proprietor, a mill owner.

*What is a Reasonable Share of Water for Each Riparian Owner* is a question of fact, to be decided in each case according to its circumstances: *Turner v. James Canal Co.*, 155 Cal. 82, 132 Am. St. Rep. 59.

# CASES

## IN THE

# SUPREME COURT

OF

## NORTH DAKOTA.

### STATE v. MINNEAPOLIS AND NORTHERN ELEVATOR COMPANY.

[17 N. D. 23, 114 N. W. 482.]

**CONSTITUTIONAL LAW—Title of Warehouse Act.**—Chapter 113, page 167, of the Laws of 1907, which is entitled "An act requiring elevator companies transacting business in this state to return certificates of inspection and weighmaster's certificate of weight to the local buyer," and which provides for the return of such certificates by the elevator companies, etc., to their local agents, and also that the latter shall post the same in a conspicuous place in the elevators, does not contravene section 61 of the state constitution, which requires that no bill shall embrace more than one subject, which shall be expressed in its title. The subject or object of the act is to furnish information to the public of the facts which such official certificates will impart, and the provisions of section 2 (page 168), requiring local agents to post such certificates in their elevators, are germane to the provisions of section 1, and hence to the subject embraced in the title of the act. (pp. 694, 695.)

**CONSTITUTIONAL LAW—Warehouse Regulation—Interstate Commerce.**—Such act is not vulnerable to the objection that it contravenes the provisions of the interstate commerce clause of the federal constitution, as its operation will not directly or remotely interfere with interstate commerce; but its enactment is a legitimate exercise of the police power of the state. (pp. 696, 697.)

**CONSTITUTIONAL LAW—Warehouse Regulation—Foreign Corporation.**—Appellant's contention that the law is void because it attempts to make acts or omissions committed in a foreign state a crime in this state is not sustained. The conditions on which foreign corporations are permitted to do business in this state are within the legitimate power of the state to prescribe, and defendant corporation, having been authorized to transact business in this state, is amenable to its laws enacted under its police powers to the same extent as its citizens. (pp. 697, 698.)

(Syllabi by the court.)

Ball, Watson, Young & Hardy, for the appellant.

T. F. McCue, attorney general, R. N. Stevens, assistant attorney general, W. H. Barnett, state's attorney, and Seth Richardson, assistant state's attorney, for the respondent.

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<sup>24</sup> FISK, J. The defendant and appellant was convicted in the district court of Cass county for the violation of the provisions of chapter 113, page 167, of the Laws of 1907, and a judgment was rendered imposing a fine against it in the sum of one hundred dollars, from which judgment this appeal is prosecuted.

This statute is as follows:

“An act requiring elevator companies transacting business in this state to return certificate of inspection and weighmaster’s certificate of weight to the local buyer.

<sup>25</sup> “ . . . . Every elevator company, corporation, copartnership or association of individuals, operating any elevator, building or place in this state for the purchase, storage, or deposit of any grain or other farm commodity, shall return to the local buyer at the place where such grain or other farm commodity is purchased, stored or deposited, the official certificate of inspection, together with the weighmaster’s certificate for any such grain or other farm commodity sold, whether said grain is sold in this state or in any foreign state where such grain is weighed and inspected. . . . . It shall be the duty of the local buyer or agent of the elevator company or other association enumerated in section 1 of this act, to post in a conspicuous place in such elevator building or place, the official weighmaster’s certificate, and the official inspector’s certificate, and have the same at all times so that the public may inspect the same. . . . . The elevator company or other association enumerated in section 1 of this act, shall forthwith upon the sale of each car or part of car or grain or other farm commodity, return the certificates provided for in this act. . . . . Any elevator company, corporation, copartnership, or other association of individuals, or any person who shall violate any of the provisions of this act, shall be guilty of a misdemeanor and all right to transact any business in this state shall be forfeited.”

A demurrer to the information was interposed upon the ground, as stated in such demurrer, “that it appears upon the face thereof that the facts stated therein do not constitute a public offense, in this: (1) That the act under which the information is drawn is void in its entirety; (2) that said act is void so far as the same applies to the facts set out in the information.” The material facts alleged in the information, and which are admitted by the demurrer to be true, are, in substance, as follows: That defendant is a foreign corporation duly authorized to operate a line of elevators or warehouses in this state, and as such it had an elevator at Argusville, in said county, with an agent in charge, which was on May 27, 1907, and prior thereto used by it for the purpose of receiving and storing grain for

others and also grain purchased by it; that on said date defendant, having on hand in said elevator certain flax which it had purchased from farmers in that vicinity, shipped the same to Duluth, Minnesota, where it sold said grain; that the same was regularly inspected and weighed by the state inspector of the state of Minnesota; and that defendant has failed, neglected <sup>28</sup> and refused to return to its said agent at Argusville an official certificate of the inspection and the official weighmaster's certificate to the weight of the grain so sold by it.

No question is raised by appellant's counsel as to the sufficiency of the facts alleged in the information to constitute the crime defined by said statute, although there are no allegations therein that any official certificates such as are mentioned in the statute were ever in fact issued and delivered to defendant, or that under the laws of Minnesota there is any provision or requirement for the issuance and delivery of such certificates. The necessity for such allegation is to our minds quite apparent. In view, however, of the fact that no such question is raised by the demurrer, we will dispose of the appeal solely upon the grounds urged in appellant's printed brief. But two errors are assigned, and they relate to the same question, to wit, the validity of the act in question; it being appellant's contention, first, that said act is void in its entirety, and, second, that it is void at least so far as it applies to the facts alleged in the information. If either contention be sound, it was error to overrule the demurrer, and the judgment appealed from must be reversed. In disposing of appellant's contention, we must be governed by certain well-established rules of statutory construction, among which are the following: A statute will not be declared unconstitutional unless in plain violation of some constitutional provision. Every presumption is in favor of the validity of a statute, and in case of a reasonable doubt as to its constitutionality, it is the duty of a court to sustain it. A statute will be construed, if possible, in harmony with the constitution, and a part may be unconstitutional and the remainder valid, provided the invalid part is so independent of the remainder that it may be eliminated without rendering ineffective the entire statute, unless the invalid portion was evidently the inducement for the enactment of the remainder; but where a law is so emasculated by the elimination of invalid portions that it cannot be said that the legislature would probably have enacted the law in its form as thus emasculated, if it had known that the portions thus eliminated were unconstitutional and void, the whole law must fall. The prime object sought in the construction of a law is to ascertain as far as possible and render effectual the legislative will. The

wisdom or policy of a law and the motives which prompted its enactment by the legislature are matters with which the courts have no concern. Keeping in mind <sup>27</sup> these rules of our guidance, we will dispose of appellant's points in the order in which they are discussed in the brief.

1. It is asserted that the entire act is void because it contravenes the provisions of section 61 of the state constitution, which requires that a bill shall embrace but one subject, which shall be expressed in its title. The argument, in brief, is that sections 1 and 2 each relate to different subjects; the first to the duty enjoined upon elevator companies to transmit to their local agents the official certificates of inspection and weights, and the second to the duty enjoined upon the local agents to post such certificates. We are entirely clear that such contention is without merit. It is manifest that the act embraces but one subject or object, to wit, the furnishing to the public such information as may be imparted by the posting in the elevators of the official certificates mentioned in the act. In furtherance of this general design, section 1 requires such certificates to be transmitted by the elevator company to its local agent, and section 2 requires the latter to post and keep posted such certificates in a conspicuous place in the elevator. It is thus apparent that these two sections are closely related to the subject matter of the act. In fact, the provisions of one would be rendered abortive without the other. The fact that the title of the act is somewhat restricting in its terms does not render the act void, as the provisions of section 2 which are not expressly referred to in the title are, we think, clearly germane to the subject matter embraced in the title. A reading of the title readily suggests that the body of the act might contain provisions similar to those embraced in section 2; for, without any requirements other than those expressly mentioned in the title, the act would accomplish no useful purpose. This court has so often and so recently passed upon the questions relating to the construction and purpose of the constitutional provision aforesaid that we deem it unnecessary to do more than refer to such decisions. They are the following: *State v. Burr*, 16 N. D. 581, 113 N. W. 705; *Powers Elevator Co. v. Pottner*, 16 N. D. 359, 113 N. W. 703; *State v. Woodmansee*, 1 N. D. 246, 46 N. W. 970, 11 L. R. A. 420; *State v. Haas*, 2 N. D. 202, 50 N. W. 254; *State v. Nomland*, 3 N. D. 427, 44 Am. St. Rep. 572, 57 N. W. 85; *Divet v. Richland Co.*, 8 N. D. 65, 76 N. W. 993; *Richard v. Stark Co.*, 8 N. D. 392, 79 N. W. 863; *State v. Home Society*, 10 N. D. 493, 88 N. W. 273; *Power v. Kitching*, 10 N. D. 254, 88 Am. St. Rep. 691, 86 N. W. 737. For a very recent treatment of this subject, together with <sup>28</sup> citations of numerous recent decisions in other jurisdictions, see 6 Current

Law, 1531-1535. We accordingly hold that the act in question does not contravene the provisions of section 61 of the constitution.

It is next contended by appellant that the act is void as an unlawful interference with interstate commerce. Our attention is directed to section 8 of the federal constitution, which is familiar to all, and which provides that "Congress shall have power . . . to regulate commerce with foreign nations and among the several states and with the Indian tribes," and we are asked to hold that the statute in question violates this section. As appellant's counsel state, this provision of the federal constitution "has been construed and applied in so many cases that its scope and meaning are no longer debatable. It operates as an effective prohibition upon the states against all interference by legislation with interstate commerce, and it is well settled that whatever constitutes a burden upon interstate commerce, whatever form it may take, is prohibited." This statement, to be strictly accurate, should be qualified to the extent that the interference which is thus prohibited is a direct and substantial interference, as distinguished from an indirect interference. The crucial question is, therefore, whether the act aforesaid in its proper application will operate to directly interfere with commerce between the states. We freely admit that such would be its effect if the construction contended for by appellant's counsel is sound. The claim is made by them that the act by its express terms applies to all shipments and sales of grain made in this or in any other state, regardless of the fact whether such shipments are made to points where there are official inspectors and weighmasters or not. If such is the necessary or proper construction to be given this statute, we should have no hesitation in pronouncing the same unconstitutional and void, as being an unreasonable and direct interference with interstate commerce. We do not agree, however, to this construction. We must, if possible, construe the act so as to give effect to the legislative intention, and at the same time uphold the law as a valid enactment. To say that the legislature intended to require shipments and sales to points only where there are official inspectors and weighmasters, which is the logical result of appellant's contention, seems to us a strained and unwarranted construction. While the meaning and purpose of the law is somewhat obscure, we think by a fair and <sup>29</sup> reasonable construction thereof it discloses that the legislative purpose was to require the return of the official certificates only in cases where in the due and regular course of business such certificates are issued and delivered to the elevator company.

As thus construed, we see no constitutional objection to the enactment and enforcement of such a law.

A somewhat analogous question was recently before the supreme court of Minnesota in *State v. Edwards*, 94 Minn. 225, 102 N. W. 697, 69 L. R. A. 667. In that case it was held that a statute requiring grain commission merchants to make a report to the consignor within twenty-four hours after the sale is not an interference with interstate commerce. The court there said: "The provisions involved in this case take no account of the grain as an article of commerce until it has been sold, and even then only to require the consignee to make a true report of the transaction within a reasonable time. The subject matter of the law as applicable to this case no more relates to interstate commerce than the criminal statutes which protect grain from larceny after arrival within the borders of the state. If it be an interference with the prerogative of Congress to require commission merchants to make a true report of their dealings with citizens of Dakota or Wisconsin for their protection, why is it not equally an interference with interstate commerce when our criminal laws are put in force to arrest and punish for the larceny of such grain upon arrival within our lines?" It was also held in *Atlantic Coast Line R. Co. v. Commonwealth*, 102 Va. 599, 46 S. E. 911, that "under its police power a state may reasonably regulate the relative rights and duties of all persons or corporations within its jurisdiction, though incidentally affecting interstate commerce." The court there sustained certain rules relative to storage and demurrage, adopted by a commission. We quote: "The questions raised on this appeal, which have been discussed at length and very ably, . . . are of great importance. They involve the right of the state, under its reserve power, whether that power be called police, governmental or legislative, to regulate the relative rights and duties of persons and corporations within its jurisdiction, so as to provide for the public good and the public convenience by laws which are not inconsistent with the constitution of the state, and which do not, by their operation, directly intrench upon the authority of the United States, or violate some right protected by the federal constitution. . . . The validity of the <sup>30</sup> rules and regulations in question, so far as they apply to intrastate commerce, is not denied; . . . but it is insisted that they are wholly invalid, so far as they apply to interstate commerce, . . . upon the ground that that subject is wholly within the jurisdiction of the federal government. That this contention is not true to the extent claimed is well settled by numerous decisions of the supreme court of the United States"; citing and quoting from *Lake Shore* etc.



R. Co. v. State, 173 U. S. 285, 19 Sup. Ct. Rep. 465, 43 L. ed. 702, and other cases too numerous to mention.

We are unable to perceive how the necessary effect of the act in question would be to directly, or even remotely, interfere with interstate commerce. It is well settled that a state statute requiring inspection of property, the subject of interstate commerce, does not violate the commerce clause of the federal constitution: *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. 345, 18 Sup. Ct. Rep. 862, 43 L. ed. 191; *Territory v. Denver & R. G. R. Co.*, 12 N. M. 425, 78 Pac. 74, 79 Pac. 295; *Globe El. Co. v. Andrew (C. C.)*, 144 Fed. 871; *State v. Edwards*, 94 Minn. 225, 102 N. W. 697, 69 L. R. A. 667. In *Globe El. Co. v. Andrew*, 144 Fed. 871, Judge Sanborn, after citing numerous decisions of the supreme court of the United States, says: "Under these precedents, it seems clear that the Wisconsin legislature might lawfully prevent fraudulent changes of grades, arbitrary or fraudulent 'dockage' practiced by warehousemen, and shipping out at a higher grade than that on which the grain was taken in. Such regulations would be in aid and furtherance of commerce, by protecting the rights of both buyer and seller. Thus many objections to the Minnesota system, and frauds practiced under it, might be cured. Such regulations, although indirectly affecting interstate commerce, would be wholly local in their character, and would undoubtedly be sustained. Such regulations might even include inspection and weighing for the purpose of detecting and punishing fraud, preventing changes of grades, fraudulent dockage, storage and resale on the weights found before such dockage occurred, etc. All this would be local regulation, to protect the public from fraud and imposition, and as such would not be unlawful regulation of interstate commerce." Inspection laws being constitutional, as a legitimate exercise of the police power of the state, it is entirely clear that a law requiring the result of such inspection to be made public is also constitutional. We must therefore overrule appellant's second contention.

<sup>31</sup> His third and last contention is "that the act is void in so far as it attempts to make acts or omissions committed in a foreign state a criminal offense." There is no merit in such contention. The assumption that the offense was committed in Minnesota is not true. The statutory offense consists in defendant's failure to deliver to its agent in this state the official certificates aforesaid. The defendant corporation, having been authorized to transact business in this state, is amenable to its laws enacted under its police power to the same extent as its citizens; and, furthermore, it is within the legitimate power of the state to prescribe the

conditions upon which foreign corporations may be permitted to transact business within its borders.

We conclude, therefore, that the act in question is not vulnerable to any of the attacks made upon it, and it follows that the judgment appealed from was correct, and should be affirmed. It is so ordered.

All concur.

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*The Sufficiency of the Title to Statutes Within Constitutional Requirements* is discussed in the notes to *Lewis v. Dunne*, 86 Am. St. Rep. 267; *Crookson v. County Commrs.*, 79 Am. St. Rep. 456; *Bobel v. People*, 64 Am. St. Rep. 70.

*The Business of Handling Grain in Elevators* is a subject of state regulation: *Vega Steamship Co. v. Consolidated Elevator Co.*, 75 Minn. 308, 74 Am. St. Rep. 484; note to *San Diego Water Co. v. City of San Diego*, 62 Am. St. Rep. 290.

*A Foreign Corporation Accepts Its License* admitting it to this state subject to the proper exercise by the state of the police power: *State v. Creamery Package Mfg. Co.*, 110 Minn. 415, 136 Am. St. Rep. 514; and the legislature has the power to impose such conditions as it may choose for the exercise of powers and privileges within the state, subject to the power of Congress to regulate commerce among the several states: *Lehigh Portland Cement Co. v. McLeas*, 245 Ill. 326, 137 Am. St. Rep. 322.

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### PFEIFER v. HATTON.

[17 N. D. 99, 115 N. W. 191.]

**EXECUTIONS—Verdict of Sheriff's Jury—Replevin.**—In an action of claim and delivery brought by a third person as claimant to the property against an officer who levied upon and took into his possession personal property under an execution as the property of the defendant in the execution, it is no defense that a sheriff's jury prior to the commencement of such action found that the title to such property was in the defendant in such execution. (p. 699.)

**EXECUTIONS—Sheriff's Jury.—The Sole Function** of the summary proceeding of a sheriff's jury is to justify the officer in delivering the property to the claimant in the event the jury find in his favor, unless the plaintiff in the execution furnishes indemnity to the officer against the claims of such third person. (pp. 699, 700.)

**EXECUTIONS—Sheriff's Jury.—Defendant's Answer** contained a paragraph alleging the impaneling of such sheriff's jury, and the fact that the jury found against the contention of the claimant. On motion of plaintiff's attorneys such paragraph was stricken from the answer. Held, not error. (pp. 699, 700.)

(Syllabi by the court.)

O. S. Sem, for the appellant.

Rourke, Kvello & Adams, for the respondent.

<sup>100</sup> FISK, J. But one question is presented on this appeal, which is the correctness of an order made by the trial court striking out on motion a portion of the answer.

The action is in claim and delivery, the complaint being in the usual form. The defendant, who is a constable, seeks to justify his taking and detention of the property under an execution issued to him upon a judgment rendered in an action wherein one Tisdell was plaintiff and one Ben Pfeifer was defendant. The portion of the answer which was ordered stricken out, and the striking out of which constitutes the only basis for appellant's assignments of error, is as follows: "The defendant further alleges that after the said levy and prior to the ninth day of April, 1906, the plaintiff demanded of the defendant that a constable's jury be called and impaneled to try the right of property in the property described in the complaint, and that the defendant immediately complied with said demand, and that, upon previous notice to plaintiff and the said Lewis Tisdell, he convened such jury before him at his office in De Lamere, in said <sup>101</sup> county, on the second day of April, 1906, and then and there a trial was had before such jury duly impaneled and sworn; the plaintiff being present and represented by counsel, and the said Lewis Tisdell being present and represented by counsel, and evidence being adduced by both parties and the questions of right and property and possession thereof duly submitted to such jury for adjudication, and that after trial had, and after submitting same to the jury, said jury returned into court with verdict that at the time of the said levy said property was the property of Ben Pfeifer, and not the property of plaintiff, and that, upon such adjudication and verdict, the defendant retained the property until it was taken from him by the sheriff of Sargent county as aforesaid under the demand of plaintiff for a jury as aforesaid." We have duly considered appellant's argument in support of his contention that such ruling was error, and we are entirely clear that there is not merit in such contention. The facts alleged in said paragraph were wholly irrelevant to the issue involved, which was the right to the possession of the personal property at the time of the commencement of the action. Upon no theory can this paragraph be held pertinent or relevant to such issue. The facts therein alleged furnish no justification for the defendant's conduct in taking or detaining the property, nor can they be considered in mitigation of such acts in view of the fact that punitive damages are not claimed in the complaint. Citation of authorities is unnecessary upon propositions so elementary.

The matters embraced in said paragraph cannot be considered a defense in bar of the action, as it is well settled that the verdict of a sheriff's jury is not a bar. Such a verdict is

entitled to no weight as an adjudication. It is not a judgment, nor has it any force or effect as such: *Townsend v. Phillips*, 10 Johns. 98; *Phillips v. Harriss*, 3 J. J. Marsh. 122, 19 Am. Dec. 166; *Matheson v. F. W. Johnson Co.*, 16 S. D. 347, 92 N. W. 1083. See, also, 2 *Freeman on Executions*, 3d ed., sec. 277, and numerous cases cited. Under the provisions of our code (Rev. Codes 1905, sec. 7114), relating to the calling of a sheriff's jury, as well as under the statutes of Nebraska, New York, New Jersey and Ohio, as stated by Mr. Freeman, "the importance of the proceeding is that it justifies the officer in delivering possession to the claimant, if the verdict or judgment is in his favor, and no bond of indemnity is tendered to the officer." It is a mere summary proceeding, and under our code its only function, as stated by Mr. Freeman, is to justify the officer in delivering the <sup>102</sup> property to the claimant in the event the verdict of such jury is in his favor, unless he receives indemnity from the person in whose favor the execution is issued.

It follows that the order appealed from was correct, and is accordingly affirmed, with costs to respondent.

All concur.

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*Replevin or Claim and Delivery Against Officers Acting Under Executions* is discussed in the note to *Sinnott v. Feiock*, 80 Am. St. Rep. 751, 754, 755. As to the effect of giving a bond of indemnity to a sheriff before he sells property on execution, see *Winstead v. Hicks*, 135 Ky. 154, 135 Am. St. Rep. 446.

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## HEBDEN v. BINA.

[17 N. D. 235, 116 N. W. 85.]

**QUIETING TITLE—Duty of Plaintiff to Establish Title as Alleged.**—In an action to determine adverse claims to real property, it is incumbent upon plaintiff to establish his title to the property as alleged by him. This the plaintiff failed to do, and the action was therefore properly dismissed. (pp. 704, 706.)

**MORTGAGE.—A Foreclosure by Advertisement of a Mortgage** on real property is of no validity where the person in whose name the same is foreclosed has not the legal title to the mortgage at the date of such foreclosure. (pp. 703, 704.)

**MORTGAGE.—An Assignment of a Real Estate Mortgage**, which merely describes the instrument as "the mortgage executed by Matj Bina and his wife to the Bank of Minot, and recorded in Book F of Mortgages, on pages 556-558 in the office of the register of deeds of the county of Walsh," is too indefinite in description to vest in the assignee the legal title so as to authorize such assignee to foreclose by advertisement a mortgage executed by B. alone to such bank, and which was recorded in Book 15 of Mortgages. Especially is this true when the proof shows that two mortgages were executed by B. to said bank on the same day, and both were recorded in Book

15 of Mortgages, and the proof fails to show that there was no mortgage corresponding to the description contained in such assignment. (pp. 702, 703.)

**QUIETING TITLE—Sufficiency of Evidence to Show Possession.**—Evidence examined, and held insufficient to show possession of the real property in plaintiff prior to the commencement of the action, and hence the prima facie presumption of title resulting from possession does not apply in plaintiff's behalf. (p. 705.)

**LANDLORD'S TITLE—Estoppel of Tenant to Deny.**—The doctrine of estoppel cannot be invoked to prevent defendant from questioning plaintiff's title, first, because the evidence fails to show that defendant was plaintiff's tenant of the land; and, second, even if such tenancy existed, defendant would not be thus estopped in an action like this, where plaintiff claims title in fee. (p. 706.)

(Syllabi by the court.)

Scott Rex, for the appellant.

Frich & Kelly and Bangs, Cooley & Hamilton, for the respondent.

<sup>237</sup> **FISK, J.** This is the statutory action to determine adverse claims to real property. The complaint is in the usual form, alleging plaintiff's ownership in fee of the property in question, and that defendant claims a certain estate or interest therein adversely to plaintiff, and containing the usual prayer for relief. The defendant, Bina, answered, denying plaintiff's title, but admitting that he claims an estate or interest in the property as alleged, without setting out the nature or source of such adverse interest, and he prayed merely for a dismissal of the action with costs. For the purpose of proving title plaintiff introduced in evidence the record of a receiver's receipt, issued for the property by the United States to defendant, dated August 27, 1890; also the record of a mortgage from defendant, Bina, to the Bank of Minot, dated September 4, 1890; also the record of a mortgage from defendant, Bina, to the Bank of Minot, dated September 4, 1890, as recorded in Book 15 of Mortgages, at page 556, together with the record of an assignment by the Bank of Minot to one Nelson of a mortgage claimed to be the mortgage aforesaid, but which describes the same as "the mortgage executed by Matj Bina and his wife to the said Bank of Minot, and recorded in Book F of Mortgages on pages 556-558 in the office of the register of deeds of the county of Walsh, state of North Dakota." Then followed record proof of foreclosure proceedings by advertisement of the mortgage aforesaid, culminating in the issuance to said Nelson of a sheriff's deed; also the <sup>238</sup> record proof of a warranty deed of the premises from Nelson to plaintiff. No question is raised as to the regularity of such foreclosure proceedings, provided the assignment of the mortgage to Nelson was sufficient to authorize him to foreclose such mort-

gage by advertisement; it being respondent's contention that such assignment was insufficient for this purpose, and hence that the foreclosure proceedings are void. It is appellant's contention that such proof was sufficient to show title in him as alleged, but, even if this is not true, that he sufficiently proved title by showing possession of the premises from which possession his title is presumed, and also that defendant is estopped to assert title as against him on account of the contract relations between them of landlord and tenant arising through certain written leases offered in evidence. Appellant also contends that defendant's answer is insufficient to raise any issue, because it fails to set forth defendant's adverse claim to the property, and contains merely a denial of plaintiff's title. The trial court held plaintiff's proof insufficient to show title as alleged, and entered judgment dismissing the action without prejudice, from which judgment this appeal is prosecuted.

These questions will be disposed of in the order presented in appellant's brief. Was plaintiff's proof of title, based upon the foreclosure proceedings, sufficient? In answering this question we shall assume (without deciding) that if the plaintiff, through the warranty deed from Nelson to him and the foreclosure proceedings under the mortgage, acquired all of defendant's interest in the property, under the receiver's receipt, he is entitled to maintain this action. We are therefore required to determine, first, whether the assignment of the mortgage to Nelson conferred upon him the legal title to the mortgage, so as to authorize him to foreclose the same by advertisement; second, if this is answered in the negative, then whether there is any other sufficient proof of plaintiff's title; third, whether defendant is estopped by reason of the leases which were introduced in evidence from questioning plaintiff's title; and, lastly, whether the defendant's answer, which embraces merely a denial, is sufficient to raise an issue as to plaintiff's title. We are agreed that each of these questions must be answered in respondent's favor, and we will briefly give our reasons for so holding.

1. The assignment of the mortgage was insufficient to authorize Nelson, the assignee, to foreclose by advertisement, for the reason <sup>239</sup> that such assignment did not operate to vest in such assignee the legal title to the mortgage. The assignment did not describe the mortgage with sufficient definiteness. It described it as a mortgage executed and delivered by Matj Bina and wife, and recorded in Book F of Mortgages, while the mortgage foreclosed was executed and delivered by Matj Bina, and was recorded in Book 15 of Mortgages. The proof shows that there were two mortgages executed and delivered by Bina to the Bank of Minot and recorded in Book 15. If we assume, as contended by appel-

lant, that the intention was to assign the mortgage which was foreclosed, and which was a mortgage executed by Matj Bina alone, and which was recorded in Book 15, instead of Book F, we are confronted with the fact that the record of such assignment fails to impart such information to the public. From an inspection of the record of such assignment it is impossible to say with any degree of certainty that the mortgage assigned was intended to be the same mortgage which was foreclosed. Our statute (Rev. Codes 1905, sec. 7457) provides: "To entitle a party to make such foreclosure [by advertisement] it shall be requisite: . . . Subd. 3. That the mortgage containing such power of sale has been duly recorded, and if it shall have been assigned, that all the assignments thereof have been duly recorded." A similar statutory provision is in force in our sister states of Minnesota and South Dakota, and these statutes have been repeatedly construed, both in this state and in the state aforesaid, to mean that before a person can foreclose a mortgage by advertisement, he must be the owner and holder of the record title of the mortgage: *Morris v. McKnight*, 1 N. D. 266, 47 N. W. 375; *Brown v. Comonow*, 17 N. D. 84, 114 N. W. 728; *Backus v. Burke*, 48 Minn. 260, 51 N. W. 284; *Lowry v. Mayo*, 41 Minn. 388, 43 N. W. 78; *Burke v. Backus*, 51 Minn. 174, 53 N. W. 458; *Dunning v. McDonald*, 54 Minn. 1, 55 N. W. 864; *Clarke v. Mitchell*, 81 Minn. 438, 84 N. W. 327; *Thorpe v. Merrill*, 21 Minn. 336; *Ross v. Worthington*, 11 Minn. 438 (Gil. 323), 83 Am. Dec. 95; *Johnson v. Sandhoff*, 30 Minn. 197, 14 N. W. 889; *Martin v. Baldwin*, 30 Minn. 537, 16 N. W. 449; *Van Meter v. Knight*, 32 Minn. 205, 20 N. W. 142; *Benson v. Markoe*, 41 Minn. 112, 42 N. W. 787; *Hickey v. Richards*, 3 Dak. 345, 20 N. W. 428; *Langmaack v. Keith*, 19 S. D. 351, 103 N. W. 210. In *Morris v. McKnight*, 1 N. D. 266, 47 N. W. 375, it was said: "From the adjudicated cases and the wording of the statute we conclude that, when a <sup>240</sup> party seeks to foreclose his mortgage in this state by advertisement, claiming such right as assignee, the record must show complete legal title to such mortgage in such assignee. Otherwise such foreclosure will be a nullity." And quoting with approval from a Minnesota case, the court further said: "The statute authorizing this method of foreclosure evidently designs that there shall be of record a legal mortgage, and that the record shall be so complete as to satisfactorily show the right of the mortgagee or his assignee to invoke its aid." In *Morrison v. Mendenhall*, 18 Minn. 232 (Gil. 212), it was held, construing a similar statute, that: "The manifest purpose of this requirement of the statute was to make the contents of the mortgage, and, as far as the statute goes, to make the title of the mortgage, a matter of record; and, as it was for such purposes, it follows that they must be in

writing. A mere equitable or parol assignment would not answer." Appellant's counsel says in his brief that *Morris v. McKnight*, 1 N. D. 266, 47 N. W. 375, has been expressly departed from in *McCardia v. Billings*, 10 N. D. 373, 88 Am. St. Rep. 729, 87 N. W. 1008, in so far as it follows the doctrine of the early Minnesota decisions which lay down the rule of strict and literal compliance with the statute in mortgage foreclosures by advertisement. Counsel is in error in assuming that any such rule was announced or followed in the *Morris-McKnight* case, as an examination of the opinion in that case will disclose. Not having the legal title to the mortgage, Nelson could not foreclose the same by advertisement, and hence the sheriff's deed to him was a mere nullity, and plaintiff therefore acquired no title through the warranty deed from Nelson. This sufficiently disposes of appellant's first contention.

But appellant contends that respondent is estopped by his laches from questioning the validity of the foreclosure, and in support of his contention he confidently relies upon the decision of this court in *Higbee v. Daeley*, 15 N. D. 339, 109 N. W. 318. It was there held that a foreclosure by advertisement, made in the name of the mortgagee by the assignee, whose assignment was unrecorded, is voidable merely, and not a nullity. It was also held under the facts in that case that a party desiring to have such foreclosure adjudged void is guilty of laches if he neglects to assert his rights promptly upon discovering the facts, and for such reason is estopped from asserting title as against third persons, who, in good faith, have purchased what upon its face appeared to be a perfectly good title to <sup>241</sup> the land, and who, in reliance thereon, have gone into possession and made valuable improvements thereon. The facts in the case at bar widely differ from those in the case last referred to. In the case at bar the record upon its face discloses an irregular or void foreclosure. In other words, it discloses a foreclosure in the name of one Nelson, and it fails to disclose any ownership in him of the mortgage foreclosed. The plaintiff is in a court of equity, asking affirmative relief, based upon an alleged title acquired through such foreclosure proceedings, and he cannot be considered a good faith purchaser, as he took his deed necessarily with full knowledge of such irregular foreclosure as disclosed by the public records. On the other hand, in *Higbee v. Daeley*, the defendant was the person asserting title under the foreclosure which, as before stated, was in all things regular upon its face. He had a right to invoke the doctrine of estoppel as a defense, while in the case at bar the plaintiff, who is required to establish a legal title, is seeking to do so by urging defendant's laches in failing to affirmatively attack such foreclosure proceedings. Defendant



was not obliged to act in order to protect his rights, but could wait, as he in fact did, until his title was attacked by plaintiff.

It is next contended that plaintiff proved possession of the land prior to the commencement of the action, and that this was sufficient proof of title, for the reason that the law presumes title from possession, in the absence of other proof. The difficulty in the way of giving force to this contention is the fact that plaintiff wholly failed to show such possession. Plaintiff sought to show such possession by the introduction in evidence of certain written leases of the premises signed by the defendant, being three in number, covering the period from November 1, 1898, to September 1, 1903. The first two relate to the time prior to October 18, 1902. These were objected to upon the ground that no proper foundation for their introduction had been laid by proof of their execution. We think this objection was well taken, and hence they cannot be considered. The third lease upon its face recites that it was made by Bina as party of the first part and one "Thomas J. Baird, owner of the real estate" described, as party of the second part, and it was signed by said persons individually. Plaintiff offered certain testimony tending to show, however, that Baird was acting as plaintiff's agent in making these leases, but he failed in proving such fact by competent testimony. Plaintiff's only proof of such fact consists of <sup>242</sup> the testimony of the witness Frazer, as follows: "Q. Mr. Frazer, I notice that in Exhibit 'B' Mr. Baird, the lessor, is named as agent, and that he appears as lessor in Exhibits 'A' and 'C.' State whether or not, so far as you know, Mr. Baird was acting in this matter as representing Mr. Hebden, the plaintiff in this suit." This question was objected to as "immaterial, irrelevant, calling for a conclusion of the witness," and upon other grounds, after which the witness answered: "He was acting as representing Mr. Hebden." This testimony falls far short of proving such fact. There was no proof that the witness possessed any personal knowledge regarding the fact sought to be established, and the question did not call for an answer based upon any such knowledge. All this testimony amounted to, at the most, was to show that the witness had no knowledge that Baird was acting for anyone other than Hebden in signing the leases. It did not amount to a statement that he was, as a matter of fact, acting for Hebden. We conclude, therefore, that plaintiff wholly failed in any respect to prove title to the property as alleged.

Appellant's third contention to the effect that defendant is estopped to question plaintiff's title is based upon the theory that the relation of landlord and tenant existed between the parties through the leases aforesaid. This contention is suf-

ficiently answered by what we have just stated regarding plaintiff's failure to prove any such relation. The proof, at the most, discloses that Bina was the tenant of Baird, and not Hebden. But, conceding that appellant succeeded in establishing that defendant was holding merely as his tenant, it is well settled that a tenant is not estopped to deny his landlord's title in an action such as this, but he is thus estopped merely in actions arising out of the relation of landlord and tenant: 18 Am. & Eng. Ency. of Law, 419-421; 24 Cyc. 942, and cases cited; Jochem v. Tibbells, 50 Mich. 33, 14 N. W. 690; Shaw v. Hill, 83 Mich. 322, 21 Am. St. Rep. 607, 47 N. W. 247; Knefel v. Daly, 91 Ill. App. 321; Young v. Severy, 5 Okl. 630, 49 Pac. 1024; McKie v. Anderson, 78 Tex. 207, 14 S. W. 576; Van Winkle v. Hinckle, 21 Cal. 342; Franklin v. Merida, 35 Cal. 558, 95 Am. Dec. 129.

Lastly, it is contended by appellant's counsel that defendant's answer, which in effect contains a bare denial of plaintiff's alleged title, is insufficient to raise an issue, and therefore the trial court erred in denying his motion to strike the same out. This contention <sup>243</sup> is based upon the language of section 7526, Revised Codes of 1905, as follows: "In an action to determine adverse claims a defendant in his answer may deny that the plaintiff has the estate, interest, lien or encumbrance alleged in the complaint, coupled with allegations setting forth fully and particularly the origin, nature and extent of his own claim to the property; . . . or he may likewise set forth his right in the property as a counterclaim," etc. We are clear that this contention is erroneous. It is an unwarranted construction of this statute to say that the legislature intended thereby to restrict defendant's answer in such cases to such denials only as are coupled with allegations setting forth the origin, nature and extent of his own claim to the property. This court in *Larson v. Christianson*, 14 N. D. 476, 106 N. W. 51, in effect held contrary to such contention, and we think the clear weight of authority is in accordance with the rule there announced: See *Pennie v. Hildreth*, 81 Cal. 127, 22 Pac. 398; *Adams v. Crawford*, 116 Cal. 495, 48 Pac. 488; *United Land Assn. v. Pacific Improvement Co.*, 139 Cal. 374, 69 Pac. 1064, 72 Pac. 988; *Redd v. Murry*, 95 Cal. 48, 24 Pac. 841, 30 Pac. 132; *Wheeler v. Winnebago Paper Mills*, 62 Minn. 429, 64 N. W. 920.

It follows from the views herein expressed that the judgment appealed from was correct, and must therefore be affirmed, and it is so ordered.

All concur.

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*Foreclosure of Mortgage by Advertisement*, when a nullity: *Bausman v. Kelley*, 38 Minn. 197, 8 Am. St. Rep. 661. As to effect of abortive attempt to foreclose mortgage by advertisement, see *Rogers v. Benton*, 39 Minn. 39, 12 Am. St. Rep. 613.

*Sales Under Powers in Mortgages and Trust Deeds* are discussed in the notes to *Houston v. National etc. Loan Assn.*, 92 Am. St. Rep. 573; *Tyler v. Herring*, 19 Am. St. Rep. 266.

*For Illustrations of What has Been Held as an Insufficient Description in a Mortgage*, see note to *Duke v. Neisler*, 137 Am. St. Rep. 259.

*Acquisition of Title by a Tenant* is discussed in the note to *Davis v. Williams*, 89 Am. St. Rep. 79-92.

## GROVE v. GREAT NORTHERN LOAN COMPANY.

[17 N. D. 352, 116 N. W. 345.]

**USURY.—Effect on Validity of Mortgage.**—A mortgage given for interest partly in excess of twelve per cent per annum is not void in this state. (pp. 709, 712.)

**USURY.—A Purchaser of Real Estate Subject to a Mortgage** thereon for interest partly in excess of twelve per cent per annum is entitled to defend against the foreclosure of such mortgage so far as the entire interest is concerned, unless the amount of the usurious mortgage was deducted from the purchase price. (pp. 709, 711.)

**USURY.—Purchase Subject to Usurious Mortgage.**—The purchaser in such cases is permitted to defend as against usury, on the ground that he stands in privity of contract and estate with the mortgagor. (p. 711.)

**USURY.—Foreclosure of Usurious Mortgage.**—The mere fact that the purchaser of real estate did not have actual notice of a mortgage on the land does not entitle him to set aside the sheriff's deed under a foreclosure regular in all respects where the mortgage was duly recorded, and the only ground on which relief is asked is that the mortgage was usurious. (p. 713.)

**MORTGAGE.—A Foreclosure by Advertisement has the Same** binding force as foreclosures by action in which the parties are personally served with process. (p. 712.)

**MORTGAGE.—Foreclosure.—No Personal Notice to the Mortgagor** or his grantees is required to render a foreclosure by advertisement effectual. (pp. 709, 711.)

**MORTGAGE.—Foreclosure.—Mere Inadequacy of the Price** at a foreclosure sale is not ground to set aside the foreclosure in the absence of fraud, undue advantage, or prejudice. (p. 713.)

**MORTGAGE.—Foreclosure.—Filing Certificate of Sale.**—The statutory provision that a certificate of sale shall be filed thirty days after the sale is not mandatory. (p. 713.)

**MORTGAGE.—Foreclosure.—The Absence of a Date** in the mortgage as recorded will not vitiate a foreclosure thereof. (p. 713.)

**USURY.—Setting Aside Foreclosure of Mortgage.**—A purchaser of real estate on which there is a mortgage given for interest, partly usurious, is not entitled to have a sheriff's deed given on the foreclosure of the mortgage, regular in all particulars, set aside on account of such usury and on the ground that he had no actual notice of the mortgage or of the foreclosure, when the mortgage was duly recorded and the notice of foreclosure duly published, where the application is not made until about three months after the redemption period has expired. (p. 712.)

(Syllabi by the court.)

Butler Lamb, for the appellants.

Christianson & Weber, for the respondent.

<sup>354</sup> MORGAN, C. J. This is an action to set aside a sheriff's deed issued pursuant to a foreclosure of a real estate mortgage by advertisement under a power of sale.

The complaint states the following facts: The plaintiff Grove was the owner of the land involved in said mortgage from September, 1903, until May, 1904, and in the latter month conveyed the same by a warranty deed to Fultz, his coplaintiff in this case. In September, 1903, and while said land was owned by Grove, he entered <sup>355</sup> into negotiations with the defendant, under which it was agreed between them that the defendant would furnish said Grove with \$500, and said Grove was to mortgage said real estate to the defendant or to anyone to whom the defendant should direct said mortgage to be given. Pursuant to this contract, a mortgage was executed and delivered by Grove to one Laton to secure \$500 at seven per cent annual interest from its date, September 3, 1903, which mortgage was to become due in December, 1908. Two other mortgages were given at the same time pursuant to that contract, one to E. P. Gates for \$82.50, of which \$41.25 was due December 1, 1903, and \$41.25, December 1, 1904, and the other to the defendant for \$60, of which \$10 was to be paid annually on November 1st until fully paid. All of these mortgages were duly recorded in the proper office. This \$60 mortgage was foreclosed by the defendant by advertisement on February 5, 1905, and the land was bid in by it for the sum of \$129.06, and on February 27, 1906, the sheriff issued a deed of the premises to the defendant. The complaint also alleges that this mortgage was wholly and entirely usurious and void, and that the foreclosure proceedings were for that reason void. It is further alleged that the plaintiff Fultz did not have any actual knowledge of the existence of the \$60 mortgage, and had no actual notice of the foreclosure proceedings until in May, 1906, which was after the sheriff's deed had been delivered. It is claimed that this foreclosure was invalid for the following additional reasons: (1) That the mortgage was not dated as shown by the records of McHenry county, where the same is recorded. (2) That the affidavit of publication is dated March 11, 1905, and the sheriff's certificate is dated on February 25, 1905. (3) That the amount due on the mortgage is incorrectly stated in the notice of foreclosure; that the amount due is stated to be \$81.96, whereas the amount due is only \$67.50, conceding that the mortgage was not usurious. That in June, 1904, the plaintiff Grove conveyed the premises involved in this suit to said Fultz by a warranty deed for a valuable consideration. That said land was conveyed free of all en-

cumbrances except the mortgage for \$500, and said Grove expressly warranted that said mortgage did not draw interest in excess of twelve per cent per annum. That the defendant was informed of the conveyance of said premises to said Fultz and knew his postoffice address, and did not notify said Fultz of said foreclosure nor of the default in the payment of the 1904 installment. That he has tendered <sup>35¢</sup> to the defendant the full amount for which the defendant did purchase said premises at said sale and subsequent costs, but defendant refused to accept said tender. The relief demanded is that said \$60 mortgage be declared canceled as well as the deed issued on the foreclosure thereof, and, if such relief be denied, that said defendant Fultz be permitted to redeem from said foreclosure sale. The defendant demurred to the complaint on the ground that it fails to state a cause of action, and the trial court sustained the demurrer, and plaintiffs have appealed to this court.

The appellant's contention is that the foreclosure sale, as well as the deed issued pursuant thereto, was absolutely void for the reason that it was wholly usurious. Conceding that the transaction was usurious, it nevertheless appears that the foreclosed mortgage did not represent interest wholly in excess of twelve per cent per annum on \$500 for five years. It was usurious, however, and, being a mortgage for interest only, the interest would be subject to forfeiture in a proper case. The question is therefore presented whether a foreclosure of a mortgage representing in part a usurious transaction is void, and, if void, whether the plaintiffs are permitted to set up that fact as a ground for affirmative relief against a foreclosure sale after the redemption period has expired. Conceding that the \$60 mortgage represented some interest in excess of twelve per cent, the highest legal rate allowed, we are agreed that the plaintiff Grove is clearly not entitled to the relief demanded. There is no allegation or claim that he did not have actual notice of the foreclosure and permitted it to go on until the deed was issued without asserting his defense. If he has a right to be heard now in defense of his covenant of warranty, he had the same right while the foreclosure was pending. Conceding that he had a legal right to prevent the foreclosure jointly with Fultz, he did not invoke that right, and now demands equitable relief without attempting to excuse this default. He has lost all right to equitable relief. He should have made his defense seasonably.

The plaintiff Fultz seeks equitable relief upon different grounds. He alleges that he had no knowledge of the \$60 mortgage, and no actual notice of the foreclosure thereof. The regular notice prescribed by statute for a foreclosure of mortgages by advertisement was given by publication. This

notice was conclusively binding on Fultz, and had the same legal effect on him as if a personal notice had been served on him. He cannot now be heard to assert <sup>357</sup> that he did not know of the foreclosure. He is presumed to have had notice thereof, and will not be heard to assert that he did not know what the law imputes to him as notice: *Barney v. Little*, 15 Iowa, 527; *Ensign v. Batterson*, 68 Conn. 298, 36 Atl. 51; *Smith v. Boyd*, 162 Mo. 146, 62 S. W. 439; *Beach v. Osborne*, 74 Conn. 405, 50 Atl. 1019, 1118; *Curtis v. Moore*, 152 N. Y. 159, 57 Am. St. Rep. 506, 46 N. E. 168; *Chadwick v. Russell*, 117 Ala. 290, 23 South. 524. Whether Fultz is entitled under any conditions to raise the question of usury is a question of serious contest between the parties. The defendant claims that a purchaser of land, subject to an existing mortgage, can never raise the question of usury in such mortgage. Under many circumstances the contention is true, as that right is generally personal to the borrower. Under the allegations of the complaint, however, we do not think that the general rule applies. In the first place, the borrower brings this action jointly with Fultz, the purchaser, and consents thereby that Fultz may raise the question of usury, and shows that he does not intend to waive the usury. The general rule is that the borrower and those in privity of estate may attack the mortgage or mortgage sale when void for usury. *Jones on Mortgages*, section 644 (sixth edition). says: "But the doctrine more generally adopted is that not only the mortgagor, but any person who is seised of his estate and vested with his rights, unless he has assumed payment of the mortgage, may interpose this defense, although a mere stranger cannot. . . . Anyone in legal privity with the mortgagor, unless he has debarred himself of the right to dispute the mortgage, may set up this defense; otherwise, the property would be practically inalienable in the hands of the mortgagor, unless he should be willing to affirm the usurious mortgage by selling the property subject to it. But the owner of the property has, of course, the right to sell the property as though such void mortgage did not exist; and the purchaser necessarily acquires all the rights of his vendor to question the validity of the usurious encumbrance." The respondent also contends that Fultz cannot raise the invalidity of the mortgage on the ground of usury, for the reason that he purchased subject to the mortgage and is presumed to have retained a sufficient sum out of the purchase price to fully pay the mortgage. The complaint, we think, clearly refutes that presumption, and negatives the idea that any sum was so retained out of the purchase price to pay anything above twelve per cent interest on the <sup>358</sup> \$500 loan. The general rule applicable in cases where the purchaser deducts from the purchase price enough to pay the mortgage,

including the usurious interest, cannot be invoked in this case, as the complaint shows that the \$60 mortgage was not known to have been in existence by Fultz, and the amount thereof, therefore, could not have been reserved out of the purchase price.

The case, therefore, comes within the principle that the borrower and those in privity of estate with him are permitted to defend as against usury in proper cases: Webb on Usury, sec. 350; Union Nat. Bank v. International Bank, 123 Ill. 510, 14 N. E. 859; Merchants' Exch. Nat. Bank v. Commercial Warehouse Co., 49 N. Y. 635; National Mutual Bldg. & Loan Assn. v. Retzman, 69 Neb. 667, 96 N. W. 204. If the borrower waives the usury and pays it, or makes a deduction of the purchase price to that extent on a sale of the premises subject to the mortgage, the purchaser cannot raise the question of usury, even in an action on the usurious note or mortgage. The right to raise the question of usury is personal to the borrower, and, if he ratifies the usurious transactions, others cannot assume a contrary attitude. If these plaintiffs had appeared and resisted the foreclosure by advertisement, as they might have done under section 7454, Revised Codes of 1905, no legal objection could have been interposed to allowing them to raise the question of usury.

It is further claimed that the defendant did not notify plaintiffs that the mortgage was to be foreclosed. No such notice is provided for by the statute. Hence the defendant was not required to give such notice, and the foreclosure cannot be invalidated on that ground: Reilly v. Phillips, 4 S. D. 604, 57 N. W. 780.

It is claimed that the foreclosure was void by reason of the usurious character thereof. Whether this is so or not depends upon the statute in force when the mortgage was given. Unless the statute declares that usury vitiates and renders void the notes and mortgages given therefor, then the proceedings are not void. There are no penalties or forfeitures for usurious transactions, except such as are prescribed by statute. The statute in force when the loan was made was the same as the usury law now is, and it is as follows: "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 5510 (5511), when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it or which has <sup>350</sup> been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back in an action for that purpose twice the amount of interest thus paid from the person taking or receiving the same; provided, that such action is commenced within two years from the time the usurious transaction occurred." In addition to this

forfeiture of interest in a civil action, the taking of usury is declared to be a misdemeanor by the Penal Code. Under section 5511 a rate of interest not exceeding twelve per cent is lawful. It will be observed that section 5513 is silent as to the effect upon the contract or upon the securities or notes if usury is stipulated for or charged therein. The contract is not declared to be void by this section, nor is the effect of usury upon the contract mentioned therein. It prescribes only as to the penalty in case usury is charged or paid, and no mention is made nor can be read into the statute so far as affecting the contract is concerned. The penalties laid down by the statute, therefore, are the only ones that can be considered, as the rule is that the terms of the statute govern as to that question. The following authorities and many others sustain these principles: *National Bank v. Pick*, 13 N. D. 74, 99 N. W. 63; *Northwestern Mortgage Trust Co. v. Bradley*, 9 S. D. 495, 70 N. W. 648; *Oates v. First Nat. Bank*, 100 U. S. 239, 25 L. ed. 584; *Robinson v. McKinney*, 4 Dak. 290, 29 N. W. 658; *Haseltine v. Central Nat. Bank*, 183 U. S. 132, 22 Sup. Ct. Rep. 50, 46 L. ed. 118; *Fletcher & Sons v. Circuit Judge*, 136 Mich. 511, 99 N. W. 748. It follows that the remedy sought in this action by both plaintiffs is not available to them. They seek to have the mortgage and sheriff's deed declared void when they are not void as a matter of law or fact. On the main question, whether the foreclosure was void, the plaintiff cites many authorities. After carefully reading them, it is clear to us that they are not in point. They refer mostly to foreclosure sales under statutes declaring the usurious contracts void. Other cases are cited which are not applicable. They are cases where defenses of usury were interposed in actions to foreclose mortgages.

The foreclosure by advertisement, followed by the issuing of a deed, is not subject to attack on these grounds any more than if the deed were based on a decree of foreclosure in court. A sale under decree is no more efficacious as a basis of title than a sale by advertisement when all statutory requirements have been complied with. <sup>360</sup> This is the express effect given to deeds under foreclosures by advertisement by section 5856, Revised Codes of 1899, in force when the foreclosure was made. Fultz relies on the fact that he had no actual notice of the \$60 mortgage, and no actual notice of its foreclosure until after the redemption period had expired. Under the circumstances of this case, we do not think those facts entitle him to the equitable relief demanded. The mortgage was recorded, which gave him constructive notice of its existence. The notice of foreclosure was regularly published, which as a matter of law is as binding upon him as though he had been personally served with notice of the foreclosure.



He purchased the land from Grove, and relied on his covenant that the \$500 mortgage was the only mortgage, without any examination of the record.

There is no allegation of fraud or undue influence on the part of the defendant in foreclosing the mortgage. Under such circumstances, we are satisfied that the foreclosure sale is not subject to an attack by an equitable action, based solely on the ground that the mortgage was usurious. If the statute rendered the mortgage void, a different question would be presented. To allow him or parties similarly situated in other cases to come in merely on the ground of want of actual notice would render this method of foreclosure subject to grave abuse, though the foreclosure was attended by strict compliance with the statute. Relief under such circumstances should not be granted in the absence of some distinct ground for equitable relief.

The fact that the publisher's affidavit of the notice of sale was dated as of a later day than the sheriff's certificate does not invalidate the sale. The statute providing for such filing within thirty days from the day of sale does not provide that the failure to do so shall invalidate the sale. The jurisdictional requirement is that the notice shall be published. In the absence of some statutory provision invalidating the sale for failure to file the proof within the prescribed time, we think that the reasonable construction to be given to the provision is that it was intended to be merely directory: *Johnson v. Day*, 2 N. D. 295, 50 N. W. 701. The notice of sale stated the amount due on the mortgage to be \$81.96, when it should have been only \$67.50 according to the terms of the notes. There is no allegation of fraud or bad faith in inserting a wrong amount, and there is no allegation that anyone was misled thereby, and there could not well be ground for such allegation of actual prejudice: *Jones* <sup>361</sup> on Mortgages, c. 1855; *Cook v. Foster*, 96 Mich. 610, 55 N. W. 1019. The absence of a date from the mortgage does not invalidate the mortgage. The fact that the record of the mortgage shows no date is therefore immaterial, as the validity of the mortgage does not depend upon its being dated, but it becomes effective by delivery.

The judgment is affirmed.

All concur.

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*That Defense of Usury may be Interposed by Purchaser of Lands, in a suit to foreclose a mortgage thereon, where there is no agreement or understanding to the contrary, see First Nat. Bank v. Drew, 226 Ill. 622, 117 Am. St. Rep. 271. But that the purchaser cannot interpose such defense, see Tidball v. Schmeltz, 77 Kan. 440, 127 Am. St. Rep. 424; Spinney v. Miller, 114 Iowa, 210, 89 Am. St. Rep. 351. The defense of usury may be pleaded by anyone claiming under and in privity with the borrower: Ford v. Washington Nat. Bldg. Assn., 10 Idaho, 30, 109 Am. St. Rep. 192.*

*A Notice of Foreclosure by Advertisement is Sufficient* if it is in substantial compliance with the statute: *McCardia v. Billings*, 10 N. D. 373, 88 Am. St. Rep. 729. If the statute does not require a mortgagee to give notice to the mortgagor of an intention to exercise a power of sale contained in the mortgage, and the instrument does not contain any provision for notice other than by advertisement in a certain way, no other notice is necessary: *Garrett v. Crawford*, 123 Ga. 519, 119 Am. St. Rep. 398.

*Sales Under Powers in Mortgages and Trust Deeds* are discussed in the notes to *Houston v. National etc. Loan Assn.*, 92 Am. St. Rep. 573; *Tyler v. Herring*, 19 Am. St. Rep. 266.

*Inadequacy of Price at a Foreclosure Sale* is not ground for setting such sale aside, unless the price is so gross and unconscionable as to shock the moral sense: *McDonnell v. De Soto Sav. etc. Assn.*, 175 Mo. 250, 97 Am. St. Rep. 592. This subject is discussed in the note to *Houston v. National etc. Loan Assn.*, 92 Am. St. Rep. 582, and is specially treated in the note to *Johnson Brothers v. Selden*, 103 Am. St. Rep. 51.

### MARINER v. WASSER.

[17 N. D. 361, 117 N. W. 343.]

**PERSONAL PROPERTY**—Possession as Evidence of Ownership.—A person in actual possession of and having actual control over personal property is prima facie the owner thereof. (p. 715.)

**EXECUTION**.—A Sheriff is not Guilty of Conversion of Property when taken and sold under an execution, when he finds the property in the actual possession and under the control of the execution debtor, until a demand for the return of the property is made or notice given of the ownership of the property, or the sheriff has knowledge of the actual ownership of the same. (pp. 715, 716.)

(Syllabi by the court.)

George W. Thorpe and S. E. Ellsworth, for the appellant.

Carr & Kneeland, for the respondent.

<sup>362</sup> **MORGAN, C. J.** This is an action for damages for the conversion of personal property by the defendant sheriff, who sold it under an execution in an action to which the plaintiff was not a party. A jury trial was duly waived, and a trial was had to the court, who made findings of fact and conclusions of law in plaintiff's favor, and rendered judgment in his favor for sixty-six dollars and costs. The plaintiff was the owner of the property beyond dispute, as shown by the evidence. No demand was made upon the sheriff for the return of the property or for damages for its wrongful taking prior to the commencement of this action. The answer was a general denial but the evidence, unobjected to, showed that the sheriff was acting under an execution, regularly issued in an action in which the plaintiff's brother was the judg-

ment debtor. The property, when levied on, was in the actual possession of the execution debtor, and, when levied on, the sheriff was in no way notified or informed that the plaintiff was the owner thereof. The sole question presented for consideration is whether a sheriff is liable for damages in levying on and selling the property of a third person under execution when he finds the property in the actual possession of the execution debtor, <sup>see</sup> and he is in no way advised and has no knowledge that the property does not belong to the execution debtor. In this state there is no statutory provision applicable to the question, although section 6954, Revised Codes of 1905, provides that, when property of a third person is taken under a writ of attachment, the sheriff is not liable for damages for so doing, unless such third person notifies the sheriff by a verified claim of such ownership. We have recently held that said section is not applicable to cases where the property is taken from the actual possession of such third person: *Aber v. Twichell*, 17 N. D. 229, 116 N. W. 95. A determination of the question depends upon the force and effect of the actual possession by the execution debtor of the property when levied on.

It is a general principle of law that the person in actual possession of personal property is *prima facie* the owner thereof. Does the fact of such possession except the sheriff from his general liability for selling the property of a stranger to the execution writ, when there is an entire want of notice or knowledge, and he is acting in entire good faith? The plaintiff placed the property in the execution debtor's hands, and is to that extent the cause of the sheriff's mistake. Had a demand been made before suit, and the sheriff had refused to comply therewith, the sheriff would be liable. In such a case his liability would be the result of his own act as he had an opportunity to remedy the mistake. In the case at bar the sheriff has had no opportunity to return the property, and he had sold it before a suit was brought against him for damages. We think it would be an unjust and harsh rule to force him to respond in damages unless a demand be first made. The requirement of a previous demand by the owner of the property before suit can be maintained does not inflict upon the owner a burdensome task, and the enforcement of the opposite rule would often inflict upon the officer serious consequences without any fault whatever on his part. We think that the general rule as to demand should be applied, and that is that a demand is necessary where the possession is not wrongful. The *prima facie* ownership by virtue of the possession was sufficient to authorize a levy on the property by the sheriff, and, until notice or a demand for the possession, his possession cannot be said to have been wrongful. The precise question involved here has been be-

fore the California courts. In *Killey v. Scannell*, 12 Cal. 73, the absence of demand was declared fatal to a recovery by the owner on the sole ground that the possession of the judgment debtor authorized <sup>364</sup> a levy on the property so found. This case, however, was expressly disaffirmed in *Boulware v. Craddock*, 30 Cal. 190, and in *Wellman v. English*, 38 Cal. 583. But both of these last-mentioned cases were expressly disapproved in *Fuller Desk Co. v. McDade*, 113 Cal. 360, 45 Pac. 694, and the rule in *Killey v. Scannell* 12 Cal. 73, returned to. In *Vose v. Stickney*, 8 Minn. 75 (Gil. 51), the same rule was followed, and in the syllabus is stated as follows: "Where a person is in possession of and exercising acts of possession over personal property of another, the owner cannot, until demand or notice to the sheriff, maintain an action against him for levying upon and taking it under process against the person in possession." For an instructive discussion of the question, see *Masten v. Webb*, 60 How. Pr. 302, where the California rule is followed. In *Freeman on Executions*, section 254, the same rule is laid down, and in commenting on the doctrine of the California cases, above cited, where it is held that the sheriff is liable for wrongful levies, although the property is in the possession of the judgment debtor, it is said: "This statement requires some modification. If the property is in possession of the defendant in execution, it is *prima facie* his. The officer may, therefore levy upon it, if he knows nothing to rebut this presumption, and cannot be charged as guilty of a conversion, unless, after notice that it belongs to another, he insists upon retaining possession of it and refuses to deliver it to the owner."

It follows that the action cannot be maintained without notice or proof of a demand for possession and that the defendant is not shown to have wrongfully levied on the property, and the findings of the court that the defendant wrongfully levied upon it are not sustained by the evidence. The judgment is reversed, a new trial granted, and the cause remanded for further proceedings.

All concur.

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*A Sheriff is not Guilty of Conversion for Levying Execution* upon property in the possession of the defendant in execution, unless after notice that it belongs to another he insists upon retaining possession of it and refuses to deliver it to the owner (*Pilcher v. Hickman*, 132 Ala. 574, 90 Am. St. Rep. 930; note to *Worden v. Witt*, 95 Am. St. Rep. 121), because the possession of personal property is *prima facie* evidence of ownership.

NORTH DAKOTA HORSE AND CATTLE COMPANY v.  
SERUMGARD.

[17 N. D. 466, 117 N. W. 453.]

**MORTGAGE FORECLOSURE.**—A "Redemption" from the Purchaser at a foreclosure sale by one not the mortgagor is a compulsory sale of the interest acquired by the purchaser at the foreclosure sale, and such redemption can only be enforced by one given that right by statute, and then only by pursuing the method prescribed by the statute conferring the right. (p. 722.)

**MORTGAGE FORECLOSURE—Redemption by Superior Mortgagee.**—The holder of a mortgage superior to the one foreclosed, assuming to be a redemptioner when not made so by statute, who tenders the amount necessary to redeem, becomes by the issuance to him of a certificate of redemption and the acceptance and retention by the holder of the certificate of sale of the money tendered, as between himself and the party who parts with such certificate, a "redemptioner." (p. 723.)

**MORTGAGE FORECLOSURE—Redemption from Previous Redemptioner.**—One who is not made by statute a redemptioner, but thus acquires the rights of a redemptioner, also assumes the obligations and liabilities of a redemptioner, and it follows that he must permit the lawful redemptioner to redeem from him within the period given by statute to a subsequent lienholder by judgment or mortgage for such purpose. (pp. 724, 725.)

**MORTGAGE FORECLOSURE—Redemption—Tender of Check.** The tender, by a lawful redemptioner, of a bank check issued by a solvent and reputable bank for the sum necessary to be paid to effect a redemption, to a prior redemptioner or his agent, for the purpose of receiving redemption money, effects a redemption, unless refused because it is a check, instead of legal tender, and the subsequent lienholder given an opportunity to procure and tender the necessary currency to comply with the legal requirements of the holder of the certificate. (pp. 725, 726.)

**MORTGAGE FORECLOSURE—Sheriff as Agent of Purchaser.** The sheriff or other person who conducts the sale on foreclosure by advertisement is the agent of the purchaser or holder of the certificate to receive redemption money, but is not such an agent as can bind his principal to accept a check, instead of money, from one qualified to redeem, or to retain the money received by such agent from one not a lawful redemptioner, if the principal makes seasonable objection to the form of payment, or refuses forthwith to recognize the party making the tender as entitled to redeem as a redemptioner, when he is not made so by statute. (p. 726.)

**MORTGAGE FORECLOSURE—Redemption from Previous Redemptioner.**—Under section 7465, Revised Codes of 1905, the property sold may be redeemed within one year from the day of sale in like manner and to the same effect as provided in chapter 12 for redemption of real property sold upon execution, so far as the same may be applicable, by (1) the mortgagor or his successor in interest in the whole or any part of the property; (2) by a creditor having a lien by judgment or mortgage upon the property sold, or on some share or part thereof, subsequent to that on which the property was sold. Only those mentioned in subdivision 2 of the above section are redemptioners, and as such entitled to sixty days in which to redeem from a previous redemptioner. (p. 722.)

**MORTGAGE—Whether Land Subject to During Redemption Period.**—Real estate is subject to mortgage by the holder of the legal

title between the act of sale on foreclosure under a power contained in a prior mortgage and the expiration of the period allowed by statute for redemption. (p. 728.)

**MORTGAGE FORECLOSURE—Purpose of Redemption Statute.**—The redemption statute is remedial in its nature, and is intended, not only for the benefit of creditors holding liens subsequent to a lien in process of foreclosure, but more particularly for the purpose of making the property of the debtor pay as many of his debts as it can be made to pay, and to prevent its sacrifice, and should be liberally construed. (p. 729.)

**MORTGAGE FORECLOSURE—Who may Redeem.**—Every Person Having an interest in property subject to a lien has a right to redeem it from the lien at any time after the claim is due, and before his right of redemption is foreclosed: Rev. Codes 1905, sec. 6141. (p. 729.)

**MORTGAGE FORECLOSURE—Effect of Certificate of Sale.**—The provision of section 7464, Revised Codes of 1905, that the certificate given on the execution of a power of sale contained in a mortgage shall have the same validity and effect as the certificate of sale in like manner furnished upon the sale of real property upon execution, provided for by section 7137, Revised Codes of 1905, does not relate to the effect of the act of sale, but to the validity and effect of the certificate. (p. 730.)

**MORTGAGE FORECLOSURE—The Certificate of Sale in such case is only evidence of what transpired for the purpose of record, notice to protect purchasers against intervening claims, and to show who may become entitled to a deed, and it conveys no title.** (p. 730.)

**MORTGAGE FORECLOSURE—Proceedings Embraced by Sale.** A "foreclosure sale" under a power contained in the mortgage, which conveys the title of the mortgagor, is in a legal sense the complete foreclosure proceedings, beginning with the act of sale and terminating with the execution of the deed after the expiration of the period allowed for redemption. It includes all the proceedings for the foreclosure of the right of redemption by sale and deed. (pp. 731, 732.)

**MORTGAGE FORECLOSURE—Title Conveyed by Sale.**—The title conveyed by such completed foreclosure sale is all the right, title and interest in and to the mortgaged premises which the mortgagor possessed at the time the mortgage was executed or which was subsequently acquired by him. (pp. 732, 738.)

**MORTGAGE FORECLOSURE—Who is a Redemptioner.**—The phrase "on the property sold," in the statutory definition of a redemptioner as being one holding "a lien by judgment or mortgage on the property sold," applies to the land or premises, as those words are commonly used. (p. 738.)

**MORTGAGE FORECLOSURE—Who is a Redemptioner.**—The holder of a mortgage given after the act of sale under a prior mortgage, and before the expiration of the period allowed for redemption from such sale, is a redemptioner. (p. 738.)

**MORTGAGE FORECLOSURE—Sale Under Power, When Completed.**—The sale in the exercise of a power contained in a mortgage which conveys the title of the mortgagor is the sale as completed by the execution of a deed at the expiration of the period allowed for redemption. (p. 739.)

**MORTGAGE DURING PERIOD OF REDEMPTION—Registration—Redemption.**—The fact that a mortgage given after the act of sale occurred on a prior mortgage, and before the expiration of the period allowed for redemption, is not recorded until after the expira-

tion of one year from the sale, but is recorded within the sixty days additional allowed where there has been a redemption, does not deprive the holder of the last mortgage given of the right to redeem on complying with the other statutory requirements. (pp. 739, 740.)

(Syllabi by the court.)

Guy L. Whittemore, Scott Rex and Engerud, Holt & Frame, for the appellant.

A. E. Coger and Guy C. H. Corliss, for the respondent.

<sup>471</sup> SPALDING, J. This is an action brought by the respondent for the determination of adverse claims to certain real property situated in Pierce county, North Dakota. The complaint is in the statutory form. The defendant answers, setting forth a series of transactions, involving mortgages, redemptions, and an attempted redemption, and prays for judgment that the plaintiff has no right, title, interest, or estate in the premises described, or any part thereof, but holds the pretended title thereto in trust for the defendant, and demands judgment that the plaintiff be denied the relief asked in its complaint and that the defendant be awarded affirmative relief: First, that the defendant is the sole owner in fee of said premises, and of the whole thereof; second, that the plaintiff holds said premises in trust for the defendant herein; third, that the plaintiff be required to reconvey said premises to the defendant herein; fourth, that the plaintiff be forever enjoined from asserting any claim, right, title, interest, or estate in or to said premises, or any part thereof, adverse to the defendant herein; fifth, for such other and further relief as to the court may seem just in the premises; sixth, for his costs and disbursements. The court made its findings, and judgment was entered for the plaintiff, adjudging and decreeing that the plaintiff is the owner in fee of the real estate involved, and that defendant has no title, legal or equitable, in any part thereof, and has no interest or lien thereon, and quieting the title of the plaintiff in and to the property described, as against the defendant, Siver Serumgard, and for its costs and disbursements. The defendant appeals from the judgment, contending that on the facts found judgment should be entered in his favor.

As found by the court, one Russell was the owner of the premises involved and gave five mortgages thereon for various sums and on <sup>472</sup> different dates between the eighth day of October, 1898, and the twenty-first day of March, 1902. All such mortgages became the property, by assignment or otherwise, prior to the twenty-eighth day of June, 1904, of one Lillian M. Plummer. All these mortgages, and the assignments of those assigned, were duly recorded at about the date of their execution or assignment. On the

second day of June, 1904, Russell gave a sixth mortgage on the same premises to one Coger to secure the sum of \$600, and this mortgage was assigned to one Williams on the twenty-fifth day of March, 1905, and the assignment thereof duly recorded on the same day. This mortgage was recorded on the second day of June, 1904. Mrs. Plummer foreclosed her fifth mortgage by advertisement, and the sale occurred March 26, 1904. She became the purchaser and received the certificate, bearing date March 26, 1904, and it was duly recorded on that day. No question is made as to the regularity and validity of this foreclosure, or of the assignments. March 25, 1905, Williams, holding the sixth or Coger mortgage by assignment, redeemed from the foreclosure sale of the fifth mortgage as a redemptioner and received a certificate of redemption, which was recorded on the 25th of March, 1905. The validity of this redemption is not questioned. April 12, 1905, one Sannan acquired by purchase and assignment the first four mortgages on said premises held by Mrs. Plummer, and his assignments were duly recorded on the fourteenth day of April, 1905. On the twenty-fifth day of April, 1905, Sannan filed his affidavit and notice of redemption as required by law for a redemptioner, which were recorded on the same day, and the sheriff executed and delivered to said Sannan his certificate of redemption, dated that day, and recorded April 26, 1905. On the third day of March, 1905, Russell executed and delivered to Theo. P. Scotland & Co., incorporated, a seventh mortgage on said premises, which was not recorded till the twenty-second day of June, 1905. On the seventeenth day of June, 1905, Scotland & Co., assigned this mortgage to the defendant, Serumgard, and this assignment was recorded on the twenty-second day of June, 1905. On the twenty-second day of June, 1905, the defendant, Serumgard, as assignee of the Scotland mortgage, attempted to redeem the land in controversy from the foreclosure sale made on the fifth mortgage by serving and filing his affidavit and notice of redemption, which were recorded on that date, and tendering to the sheriff of Pierce county a banker's check for \$3,187.50 as and for the total amount due on account of said foreclosure, together with interest and costs, and thereupon <sup>473</sup> such sheriff, without the knowledge or consent of Sannan, the holder of the certificate of sale, issued to Serumgard his certificate of redemption, bearing date and recorded on that day. After Sannan was informed of the delivery of such check by Serumgard to the sheriff for the purpose stated, and of the issuance of a certificate of redemption by the sheriff to Serumgard, he refused to acknowledge the right of Serumgard to redeem the property, and repudiated the act of the sheriff, and re-



fused to acknowledge his right to issue said certificate of redemption, and when the sheriff delivered the banker's check, hereinbefore referred to, to Sannan, Sannan forthwith returned it to the sheriff, with instructions to return the same to Serumgard. In returning said check to the sheriff, Sannan did not object to the manner in which Serumgard had attempted to make redemption; that is, he did not object to it by reason of its having been tendered in form of a check, instead of legal tender money. After the check was returned to the sheriff, he on the same day, by mail returned it to Serumgard, who subsequently returned it to the sheriff, and some time after the 24th of June, 1905, the check was paid by the bank which issued it, it being a reputable and solvent bank, and the sheriff deposited the proceeds of the check to his own credit in the First National Bank of Rugby, North Dakota, and since such deposit the money derived from such check has been held by the sheriff for and subject to the control of Serumgard on deposit in that bank. The court found that Sannan had at no time in any manner recognized the right of Serumgard, as assignee of the mortgage given to Scotland & Co., to redeem said land from foreclosure sale, and that on the twenty-sixth day of June, 1905, the sheriff of Pierce county, refusing to recognize the validity of the redemption of Serumgard, or of the certificate of redemption issued to said Serumgard, executed to said Sannan, under the certificate of redemption theretofore issued to him, and on the theory that there had been no lawful redemption of the property since his redemption, a sheriff's deed in due form, in and by which he conveyed, as such sheriff, title to said premises in fee simple to Sannan. After the execution of said sheriff's deed, Sannan, on the twenty-sixth day of June, 1905, executed and delivered to the plaintiff a deed of conveyance of said premises. The seven mortgages referred to constituted and were the only liens affecting the premises, or any part thereof, at any time during the period covered by the events described.

<sup>474</sup> The court found, as conclusions of law, that the mortgage executed and delivered by Russell to Scotland & Co., under which Serumgard attempted to redeem, was not a mortgage of the property sold under the foreclosure, but only of such interest as Russell retained after the foreclosure sale to Plummer, and that at the time of the attempted redemption by Serumgard, as assignee of the Scotland mortgage, Serumgard was not a redemptioner, and was not entitled to redeem the land from such foreclosure sale, and that the certificate of redemption issued to him by the sheriff was void and should be canceled of record. It also

found that the sheriff's deed executed by the sheriff to Sannan, as well as the certificate of redemption issued to him, were lawful instruments, and conveyed title to the land involved in this action in fee simple, and that the plaintiff, as the assignee of Sannan, is the owner in fee of said real estate, and that defendant had no title, either legal or equitable, and no interest therein or lien thereon, and that the plaintiff is entitled to the possession of said real estate. Judgment was entered on these findings as hereinbefore recited. The appellant raises many points in his brief, and we shall consider them nearly in the order in which they are submitted.

1. He contends that Sannan, as assignee of the four mortgages, which were all prior liens to the mortgage foreclosed, was not a redemptioner, strictly and technically, within the statute, but maintains that nevertheless in fact he was a redemptioner, and cites section 7465 of the Revised Codes of 1905, which provides that property sold may be redeemed within one year from the day of sale in like manner and to the same effect as provided in chapter 12 of this code for redemption of real property sold upon execution, so far as the same may be applicable, by (1) the mortgagor or his successor in interest in the whole or any part of the property, or (2) a creditor having a lien by judgment or mortgage on the property sold, or some share or part thereof, subsequent to that on which the property was sold, and such creditor is termed a "redemptioner," and has all the rights of a redemptioner under that chapter, and the mortgagor and his successor in interest has all the rights of a judgment debtor and his successor in interest, as provided therein, and that in law he is a redemptioner by reason of having asserted himself as such, and having exercised the right of redemption, and because the money paid by him for redemption on the issuance of the sheriff's certificate of redemption was accepted <sup>475</sup> and retained. If Sannan is not to be considered and treated as a redemptioner, Serungard was not entitled to sixty days after Sannan's attempt to redeem in which to redeem from him, and therefore his attempt at redemption came too late. Respondent contends that Sannan is not a redemptioner, because he does not come within the definition of a redemptioner under the section of the statute quoted. Redemption from the purchaser at a foreclosure sale by the holder of a subsequent lien by judgment or mortgage is a compulsory sale of the interest acquired by the purchaser on foreclosure, and such redemption can only be enforced by one given this right by statute, and then only by pursuing the method prescribed by the statute conferring the right. The title acquired by redemption on the part of a redemp-

tioner is the same which he would acquire by a voluntary sale and purchase of the sheriff's certificate of sale, except that the statutes recognize the equity of requiring one given this right by law to permit those similarly situated to purchase from him within a specified time; in other words, it gives the subsequent lienholder the same right given him. A redemptioner is a statutory purchaser, and his right under the statute to redeem is the right to buy the purchaser's interest at the price paid by him, with interest: *Tinkcom v. Lewis*, 21 Minn. 132.

Sannan, not being a subsequent lienholder, could not compel Williams to accept his money and issue to him a certificate of redemption; but having asserted himself as a redemptioner, and having paid to Williams the money which would have entitled him to his certificate of redemption, had he been a statutory redemptioner, and Williams having accepted and retained the money, and issued a certificate of redemption to Sannan, Sannan at least became, as between himself and Williams, a redemptioner, and entitled to all the rights of a redemptioner. It has been so held by several courts: See *Hare v. Hall*, 41 Ark. 372; *Roose v. Gove*, 32 Colo. 522, 77 Pac. 246; *Smith v. Jackson*, 153 Ill. 399, 39 N. E. 130; *MacGregor v. Pierce*, 17 S. D. 51, 95 N. W. 281; *McDonald v. Beatty*, 10 N. D. 511, 88 N. W. 281; *Hervey v. Krost*, 116 Ind. 268, 19 N. E. 125; *Carver v. Howard*, 92 Ind. 173. In *McDonald v. Beatty*, 10 N. D. 511, 88 N. W. 281, this court said: "Concededly that plaintiff paid to the holder and owner of the sheriff's certificate the amount required to make redemption and such payments were made for such purposes, it might be conceded that <sup>476</sup> the owners of the sheriff's certificate could have successfully challenged plaintiff's right to redeem on the ground now urged; but they did not see fit to do so. On the contrary, they accepted and retained the redemption money, and by doing so they waived any question as to the right to redeem which may have existed, and thereby validated the redemption, and clothed plaintiff with their statutory right under plaintiff's certificate. That such effect follows the retention of redemption money is well settled, and in cases where the persons redeeming did not possess the strict statutory right of redemption. . . . It is also well settled that the holder of the sheriff's certificate and the person redeeming it are the only persons concerned in the regularity of the redemption. The owner of the certificate may deal with it as he sees fit. He may sell and assign it, or he may retain it, and insist that anyone who wishes to secure his right thereunder by redemption shall do so only by strictly complying with the statute, or he may waive his right to require exact and formal observance of the stat-

utory mode, and his acceptance of the redemption money will be such a waiver: *Carver v. Howard*, 92 Ind. 173. In this case it makes no difference to the defendant whether the rights evidenced by the sheriff's certificates were owned by the original purchasers or the plaintiff, McDonald. He could redeem from the plaintiff, as well as from the original purchasers, and it did not add anything to the amount required to free his premises from the lien, and by failing to redeem, his rights in the real estate were lost." In 3 *Freeman on Executions*, third edition, 317, Mr. Freeman says: "If a redemption made by a disqualified person is acquiesced in . . . by the purchaser or other person from whom redemption is made, it will estop such person, after he has received such redemption money, from denying the validity of the redemption." Numerous other authorities, which it is not necessary to cite, hold that the party who receives and retains the money from one not entitled to redeem is estopped from questioning the validity of the redemption.

These cases, it will be observed, take into consideration only the rights of the two parties dealing together; that is, the party who holds the certificate of sale and the unqualified redemptioner whose money is accepted. More than that question, however, is involved in this case, because it may be assumed that, whatever the relations of the two parties themselves or their status as to each other may <sup>477</sup> be, the unqualified redemptioner is not a redemptioner, and not to be treated as one by, and does not assume any of the obligations of a redemptioner to, subsequent lienholders who might otherwise be entitled to redeem. The respondent contends that this redemption by Sannan gave him and his assigns the rights of a successor in interest to the mortgagor, freed from the obligations of a redemptioner, and that the statute allowing sixty days in which a redemptioner may redeem from a prior redemptioner does not apply; but we are of the opinion that it does apply, and that as Sannan voluntarily placed himself in a position where he became a redemptioner, as between himself and Williams, as is held in *McDonald v. Beatty*, 10 N. D. 511, 88 N. W. 281, then he must be considered a redemptioner for all purposes. This is implied in the decision above quoted, and we hold that a holder of a mortgage superior to the one foreclosed, assuming to be a redemptioner, and who, in the method prescribed by statute, tenders the amount necessary to redeem, becomes by the issuance to him of a certificate of redemption, and the acceptance and retention by the holder of the certificate of sale of the money tendered, as between himself and the party who parts with such certificate, a redemptioner, and that, thus acquiring the rights of a redemptioner, he in

equity assumes the obligations and liabilities of a redemptioner. Hence he must permit a lawful redemptioner to redeem from him within the sixty days which the statute gives a subsequent lienholder by judgment or mortgage for such purpose. It necessarily follows that Sannan became a redemptioner under the circumstances and facts of this case, and that a qualified redemptioner holding a lien subsequent to his could redeem from him within sixty days after his redemption. We are satisfied that this is in accordance with sound principles of equity.

Respondent's counsel quotes at some length from *White v. Gostigan*, 134 Cal. 33, 66 Pac. 78, where it was held that one unqualified to redeem, but whose money was accepted and retained, became an equitable assignee of the interest of the party from whom he redeemed and entitled to have his equitable right perfected. We see nothing in that case in conflict with our theory on this point. A certificate of redemption is only an assignment of the rights of a prior holder under the sale. It is a statutory assignment, and we simply go a step further than it was necessary for the court to go in the California case, by holding that, having assumed the attitude of and obtained the benefits accruing to a redemptioner, <sup>478</sup> which he was not entitled to, Sannan must also assume the obligations of a redemptioner, precisely the same as though he had been entitled to enforce a redemption, and that he cannot now change his attitude to the prejudice of other redemptioners: *Ohio & M. Ry. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693; *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187; *Power v. Larabee*, 3 N. D. 502, 44 Am. St. Rep. 577, 57 N. W. 789; *Davis v. Wakelee*, 156 U. S. 680, 15 Sup. Ct. Rep. 555, 39 L. ed. 578.

2. The next point in logical order is made by the respondent. It is to the effect that Serumgard has no rights in the premises, because the payment made to the sheriff in his effort to redeem from Sannan was not in money, but in the form of a bank check issued by a solvent and reputable bank. Objection was made on other grounds, but no objection was made as to the form of payment. We find some very early cases to support this doctrine, but the decisions in such cases were made when a very small part of the business of the country was conducted by means of checks and drafts. In these days, when the commercial transactions of the country are almost universally carried on by means of bank checks and drafts, we feel that a business custom so universal should be recognized, and that payment by check issued by a reputable and solvent bank should constitute payment, unless seasonable objection is made to its receipt, and the reason specifically given, so as to give the person tendering the check an opportunity to procure and

tender legal tender currency if available. This is in accordance with the weight of modern authority: *Jessup v. Carey*, 61 Ind. 584; *Boyd v. Olney*, 82 Ind. 294; *Koehler v. Buhl*, 94 Mich. 496, 54 N. W. 157; *Lathrop v. O'Brien*, 57 Minn. 175, 58 N. W. 987; *McGrath v. Gegner*, 77 Md. 331, 39 Am. St. Rep. 415, 26 Atl. 502; *Moynahan v. Moore*, 9 Mich. 9, 77 Am. Dec. 468; *Ball v. Stanley*, 5 Yerg. 199, 26 Am. Dec. 263; 28 Am. & Eng. Ency. of Law, 26.

3. The sheriff having at first accepted the check and issued his certificate of redemption to Serumgard, the question arises whether he could, by so doing, bind Sannan, and make the certificate of redemption valid as against the protest and objection of the person entitled to receive the money. In this class of proceedings the person making the sale may be the sheriff or any other person properly designated for that purpose, and under our statute the person making the sale may issue the certificate of sale, as well as <sup>479</sup> the certificate of redemption, and such sheriff or other person who conducts the sale on foreclosure by advertisement is the agent of the purchaser or holder of the certificate to receive the redemption money; but this does not make him an agent for all purposes, or for the purpose of binding the principal on an illegal redemption, if his principal promptly repudiates the action of the sheriff or other person. In the very nature of things it should not make him an agent for such purpose. He is a statutory agent, and possesses only a limited authority on behalf of his principal. The distance between them may be so great as to preclude speedy communication, and necessitate delay between the time of the attempted redemption and the receipt of information concerning the same by the holder of the certificate. For this and many other reasons, to hold the sheriff's acts binding on his principal in this respect might often work great injustice. We are of the opinion that he is not such an agent as to bind his principal to accept a check, instead of money, from one qualified to redeem, or to retain the money received by such agent from one not a lawful redemptioner, if the principal makes a seasonable objection to the form of payment or refuses forthwith to recognize the party making the tender as entitled to redeem, when he is not made a redemptioner by statute: *Bennett v. Wilson*, 122 Cal. 509, 68 Am. St. Rep. 61, 55 Pac. 390.

4. Having concluded that a qualified redemptioner, whose lien was subsequent to that of Sannan, had sixty days after his redemption in which to redeem from him, and that the payment by bank check was good, because not objected to for the reason that it was a check, instead of legal tender currency, it becomes necessary to consider whether, under the statute, the defendant, Serumgard, himself was entitled

to redeem. He had become the owner and holder of the seventh mortgage. The foreclosure sale which we are considering occurred on the twenty-sixth day of March, 1904. The owner, or his successor in interest, had until the twenty-sixth day of March, 1905, to redeem. Sannan redeemed from this sale as a redemptioner on the twenty-fifth day of April, 1905, and the holder of any lien by judgment or mortgage on the property sold, subsequent to the mortgage on which the sale occurred, therefore, had until June 24, 1905, in which to redeem. Serumgard contends that he is a redemptioner, because he says he holds a lien by mortgage upon the property sold subsequent to the one foreclosed. In considering <sup>480</sup> this question, it is necessary to determine what right or property in real estate may be the subject of mortgage, whether appellant's mortgage is upon property which may be mortgaged, and, if so, whether he is given by the statute the right of a redemptioner. In this state a mortgage is not a conveyance of title, but is simply evidence of a lien. It is defined by section 6149, Revised Codes of 1905, as a contract by which specified property is hypothecated for the performance of an act, without the necessity of a change of possession. Section 6154 provides that any interest in property which is capable of being transferred may be mortgaged, and section 6162 that a mortgage is a lien upon everything that would pass by a grant of the property, and upon nothing more. Section 4945, Revised Codes of 1905, defines a transfer as an act of the parties, or of the law, by which the title to property is conveyed from one living person to another, and section 4947 permits property of any kind to be transferred, except as otherwise provided by the two following sections, which sections are in no way material to this case. Section 4965 provides that a transfer vests in the transferee all the actual title to the things transferred which the transferer then has, unless a different intention is expressed or is necessarily implied. A transfer, as applied to real estate, is termed a "grant."

According to the authorities, the power to mortgage and the right to sell are governed by the same principles, as likewise are the rights to redeem from execution sale and from the foreclosure of a mortgage. While there are few statutes on these subjects identical with ours, yet these questions are largely governed by certain general principles of substantially uniform application in those states where a mortgage is held only to be a lien; and authorities supporting this construction of the provisions of the statutes cited above are not lacking. In *Fish v. Fowlie*, 58 Cal. 373, it is held that the holder of the legal title to real estate can mortgage it. Such is the express provision of our code:

Rev. Codes 1905, sec. 6154. In *Curtis v. Millard*, 14 Iowa, 128, 81 Am. Dec. 460, it is held that, prior to the sheriff's deed, land is subject to sale under execution or to conveyance by deed, and that a judgment rendered after execution sale, and before the expiration of the time for redemption, attaches as a lien on the debtor's interest. In *Bridgeport v. Blinn*, 43 Conn. 274, the supreme court of that state held that the mortgagor during the period allowed for redemption <sup>481</sup> had a right which he could alienate, and one which his creditor could attach. In *Atwater v. Manchester Savings Bank*, 45 Minn. 345, 48 N. W. 187, 12 L. R. A. 741, it is held that an attachment levied on the last day for redemption constitutes a lien, and the attaching creditor a redemptioner. Freeman, in his work on Executions, at section 182, states the rule to be that pending the expiration of the time for redemption, while the debtor has possession of the property, he has a beneficial as well as a legal estate therein, which is subject to his voluntary disposition, and that a preponderance of authorities now affirms that such an estate is susceptible of levy and sale under execution against him, and at section 173 says the legal title may always be bound to the extent of the beneficial interest covered by it. In *Kaston v. Story*, 46 Or. 308, 114 Am. St. Rep. 871, 80 Pac. 209, the question was whether a judgment obtained during the period of redemption could form a basis for a sale as against the successor in interest of the mortgagee under a prior sale, and the court says: "The legal title remains in the mortgagor or his successor in interest until a sale under a foreclosure decree has ripened into a title by the execution and delivery of a sheriff's deed. . . . Therefore, at the time of the second judgment, . . . the legal title to the property was in Lundin, subject to the inchoate right of the purchaser at the foreclosure sale, and the judgment became a lien on such property, subject to be defeated only by the consummation of such sale by the execution and delivery of a sheriff's deed." *Robinson v. Thornton*, 102 Cal. 675, 34 Pac. 120, relied upon as an authority in favor of the respondent in this case, recognizes throughout that a creditor attaching land during the period of redemption obtains a valid lien upon it. It is plain that during the time allowed by law for redemption the debtor possesses such an interest in the real property sold as will support a mortgage thereon.

We feel that we might rest the right to redeem on the right to mortgage, as after a very careful consideration of all the authorities to which our attention has been called, ~~we are~~ <sup>therefore</sup> we are satisfied that the right to redeem with the right or power to mortgage, when of the statute subsequent mortgagees are in-



cluded among redemptioners, and that no technical or strained construction should be given the terms of the statute which may prevent the exercise of the right. This is evidenced by the object and policy of the law in providing for redemption <sup>483</sup> by holders of liens by mortgage or judgment. The redemption statute is remedial in its nature and purpose, and is intended not only for the benefit of creditors holding liens, but more particularly for the purpose of making the property of the debtor pay as many of his debts as it can be made to pay, and to prevent its sacrifice, and it should be liberally construed. In the case at bar the mortgage of the appellant is \$1,500, the amount necessary to redeem when he attempted to make redemption was \$3,187.50, and the property is alleged to be worth \$10,000. Concerning facts similar to these, and the policy of the law in such cases, the remarks of Judge Pardee in *Bridgeport v. Blinn*, 43 Conn. 274, are quite appropriate. He says: "The law intends to apply the property of debtors to the payment of their debts. Burns owes Blinn about \$400, and has secured payment of the debt by the mortgage of land worth \$1,500. He owes the petitioner about \$250. This land, upon every equitable principle, should be disposed of so as to pay both debts; and this can be done without violence to Blinn's right. He allowed Burns to become his debtor. He took a mortgage by way of security for his claim. All that he is entitled to is payment. The decree passed in his favor reserved to Burns the right to pay and redeem. If the mortgage performs its office, first in securing, and lastly in paying, the debt, Blinn can ask for no more. After payment the land should go back to the mortgagor, or his representative, or to his creditors. The tender by the petitioner prevented the title from becoming absolute in Blinn, preventing him from obtaining the inequitable right to retain as against other creditors of Burns' land worth \$1,500 for a debt amounting to less than \$250": See, also, *Williams v. Lash*, 8 Minn. 496 (Gil. 441), *Van Rensselaer v. Sheriff*, 1 Cow. 501, and *Atwater v. Manchester Sav. Bank*, 45 Minn. 345, 48 N. W. 187, 12 L. R. A. 741.

But in view of the fact that this case has been twice exhaustively argued, and that on this feature we have arrived at a conclusion opposed to that entertained after the first argument, as well as the great importance of the rule to be established as effecting titles, we deem it advisable to give our reasons somewhat more at length. Every person having an interest in property subject to a lien has a right to redeem it from the lien at any time after the claim is due, and before his right of redemption is foreclosed: Rev. Codes 1905, sec. 6141. Section 7464 provides that, upon a sale of

real property by virtue of a power of sale contained in a <sup>483</sup> mortgage, the officer making it shall give the purchaser a certificate containing a description of the real property, the price bid, the price paid, the costs and fees, and that it shall have the same validity and effect as the certificate of sale in like manner furnished upon sale of real property upon execution. Section 7137, being the corresponding section under executions, provides that such certificates shall be taken and deemed evidence of the facts therein recited and contained, and also that upon a sale of real property the purchaser is substituted to and acquires all the right, title and claim of the judgment debtor thereto, and that in cases like the one at bar the real property is subject to redemption. It is strenuously argued by the respondent that this last-mentioned provision applies in the case of foreclosure by advertisement. If this is correct, it can only be so by reason of the reference made in section 7464 to the validity and effect of the certificate; but we are of the opinion that that reference is limited to the validity and effect of the certificate only, and does not refer to the effect of the sale. The provision mentioned in section 7137 relates to the effect of the sale, and not to the effect of the certificate of sale. The certificate of sale is only evidence of what transpired for the purposes of record, notice and to protect purchasers against intervening claims, and as showing who is entitled to a deed, and it, of itself, conveys no title. It is said in *Smith v. Colvin*, 17 Barb. 157, "that it only operates by way of notice to protect the purchaser against intervening claims, except the right of redemption. . . . This mode of transferring title to real estate is in derogation of law, which requires the owner's consent, and the statute should, therefore, be construed strictly, or, in other words, title should not be regarded as devised or transferred by the sale alone, unless such is the plain import of the statute": See, also, *Foorman v. Wallace*, 75 Cal. 552, 17 Pac. 680; *Lightcap v. Bradley*, 186 Ill. 510, 58 N. E. 227.

First, the question arises as to what is meant by the sale—whether the word "sale" is used in this connection to refer simply to the act of knocking down the property to the highest bidder at auction, or whether it means the proceeding which commences at that time and terminates on the execution of the deed at the expiration of the period allowed by law for redemption. Some provisions in the statute regarding executions and foreclosures unquestionably, in referring to the sale, mean simply the act of receiving and accepting <sup>484</sup> a bid; but in the connection in which it is used in relation to the title conveyed by foreclosure by advertisement we have concluded that it must be taken in

the broader sense, and as applying to the whole proceeding from the auction to the deed—that the sale referred to means the foreclosure of the right of redemption by sale and deed. This is made clear by section 7467, wherein the officer, or other person making the sale, is required, if the premises are not redeemed, to complete such sale by executing a deed of the premises so sold, and it is provided that such deed shall have the same force and effect as if it had been executed pursuant to a sale under foreclosure of the mortgage by action. Section 7483 makes the deed on foreclosure by action vest in the grantee all the right, title and interest of the mortgagor in and to the property sold at the time the mortgage was executed, or which was subsequently acquired by him, etc. The provision that the deed shall vest all the right, title and interest of the mortgagor in and to the property sold is an idle and meaningless provision, if, as contended by the respondent, all such title vested at the time the purchase occurred. In *Daniels v. Smith*, 4 Minn. 172 (Gil. 117), it is said: "It is perhaps not strictly correct to say that the purchaser takes the title, inasmuch as the sale is not complete until the expiration of the time allowed for redemption and a deed has been executed as provided by statute. . . . Strictly speaking, no title passes by the sale itself. The sale, payment of the amount bid, and giving of the certificate provided for by statute has about the same effect as an escrow, which is a deed executed and delivered to some third person to keep until some act is done or condition performed, and then it is to be delivered to the grantee and to become of full effect. . . . But until this second delivery the title to the premises remains in the grantor." And in *Donnelly v. Simon-ton*, 7 Minn. 167 (Gil. 110), the court of that state says further on this subject: "I think it is true, as claimed by respondent, that upon the sale of mortgaged premises by advertisement the legal title vests in the purchaser, and he becomes the owner of the land. The principal difficulty in the matter is to determine what constitutes a sale, or when the sale becomes an act fully completed. Is it when the sheriff or other proper person offers the premises at public auction and knocks them down to the highest bidder? Or not until the time for redemption expires and the purchaser obtains a deed in pursuance of the provisions of the statute? It <sup>485</sup> is somewhat difficult to determine from the language of the statute what the intention of the legislature was in this regard, since sometimes the one and sometimes the other is spoken of as the sale. From a careful examination of the whole chapter, however, and subsequent enactments, it becomes, I think, apparent that the intention was not to vest the title (certainly not the abso-

lute title) in the purchaser until the expiration of the time for redemption. Section 12, chapter 75, Compiled Statutes, above cited, provides for the completion of the sale by the execution of a deed after the expiration of the time of redemption. . . . By our statute a mortgage of real property is not to be deemed a conveyance, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure." And in *Standish v. Vosberg*, 27 Minn. 175, 6 N. W. 489, it is held that a foreclosure is not complete, so as to operate as a sale, until the time allowed by statute for redemption has expired; that till then the title does not pass: See, also, *Horton v. Maffitt*, 14 Minn. 289 (Gil. 216), 100 Am. Dec. 222. In *Smith v. Colvin*, 17 Barb. 157, the New York court says: "The sale is not consummated until conveyance by the sheriff, and in *Curtis v. Millard & Co.*, 14 Iowa, 128, 81 Am. Dec. 460, it is held that there is no sale in a legal sense under a judgment or decree until the title passes, and till that time the purchaser has a mere inchoate and indefeasible right to conveyance of the legal title." And in *National Bank v. Union Ins. Co.*, 88 Cal. 497, 22 Am. St. Rep. 324, 26 Pac. 509, the supreme court of California holds that the foreclosure of a mortgage embraces the sale of the property and the execution of the sheriff's deed, as well as the decree of the court ordering sale, and that a mortgage cannot be said to be foreclosed, even in the sense of the California code, until the mortgagor's right of redemption is cut off, and that where the time for redemption had not elapsed, and no deed had been made to the purchaser, there has been no foreclosure of the mortgage, and that, unless the right of redemption has been extinguished, there is no payment pro tanto by the mortgagor in the sale; that, where no deed is passed, the foreclosure is incomplete, and no payment has been made. To the same effect, by the same court, see *Goldtree v. McAlister*, 86 Cal. 93, 24 Pac. 801. See, also, *Puffer v. Clark*, 7 Allen, 80.

In this connection it is strenuously argued by the respondent that all the title of the mortgagor passed at the time of the auction, <sup>486</sup> except the bare, naked, legal title, and it relies upon the case of *Pollard v. Harlow*, 138 Cal. 390, 71 Pac. 454, 648, as an authority sustaining such position, and that therefore the mortgage held by appellant did not constitute a lien upon the property sold under the proceedings through which respondent claims. But the *Pollard* case cannot be construed as an authority on that point, when carefully analyzed. The facts are entirely different. Foreclosure proceedings had taken place on two mortgages by action, and the holder of the certificate under the second mortgage sought to redeem from the holder of the certificate under the prior

mortgage. The code of California, like that of this state, provides that from such foreclosure redemption may be made by the mortgagor, or his successor in interest, or by a creditor having a lien by judgment or by mortgage on the property sold, etc. It was contended that the holder of the second certificate was not entitled to redeem, either as a redemptioner or as a successor in interest. The court held that she was not entitled to redeem as a redemptioner, because her judgment foreclosing the second mortgage was satisfied by the sale to her under that mortgage, and that the lien of the judgment had ceased to exist, and that this fact left her with neither a lien by judgment nor mortgage, and therefore placed her outside the statutory definition of a redemptioner. The opinion was a commissioner's opinion, and discusses the subject of the interest sold at the sale under the judgment foreclosing the first mortgage. The argument of the commissioners at first appears to sustain the theory of the respondent in this case, yet they expressly disclaim passing definitely on the question as to what title passed by the act of sale—i. e., whether it was legal or equitable—and held that, whatever it might be, the holder of the second certificate was a successor in interest and entitled to redeem as such. The decision hinges upon the extinction of the judgment lien by the act of sale. No such principle is involved in the case at bar. The Serumgard mortgage had not been foreclosed. It was a mortgage by description on the same land on which foreclosure proceedings on the prior mortgage had been instituted, and, if that mortgage constituted a lien upon the premises, its lien had not been extinguished, as in the California case, by any act of sale. If Serumgard comes within the definition of a redemptioner by holding a lien by mortgage upon the property sold, then he is entitled to redeem. The supreme court of California considered the Pollard <sup>497</sup> case on petition for rehearing, reported in 138 Cal. 390, 71 Pac. 648, and repudiated the argument of the commissioners in the first opinion, but concurred in the conclusion by saying: "It is enough for the purposes of the decision of the case to say that such purchaser acquires a qualified title, which is sufficient to, and does, carry with it the right to redeem from another sale." Robinson v. Thornton, 102 Cal. 675, 34 Pac. 120, is also cited; but, while there are sentences contained in the opinion which tend to support respondent's theory, when read in the light of the facts before the court and of the many other decisions of the supreme court of California, we think it cannot properly be given much weight as an authority in the case at bar. The most relevant authority cited by respondent is Dickinson v. Kinney, 5 Minn. 409 (Gil. 332), where the supreme court of that state held, through Judge Flandrau, that an execution sale carried all the estate that

the debtor had in the land, subject only to the right of redemptioners to purchase it, and that, therefore, the purchaser could assign his interest by deed or quitclaim deed. The latter case, taken by itself, appears to sustain respondent's contentions; but unfortunately the supreme court of that state has in the decisions of other cases, from some of which we have quoted, at least modified the view it there expressed.

There are, however, other reasons for disaffirming the views of respondent. It relies upon some of the later California cases, as above noted, to support its theory. In those cases the reasoning of that court was based upon the provisions of section 700 of the Code of Civil Procedure of that state, which is identical with section 7137, *supra*. In that state foreclosures are made by action only, and the sales are made upon execution, and hence the provision that upon the sale of real property the purchaser is substituted to and acquires all the right, title, interest and claim of the judgment debtor thereto is clearly as applicable on foreclosures as it is to sales under other judgments and executions; but, as we have seen, section 7464 of our code omits all reference to title conveyed. Without considering or determining what the effect of section 7137, *supra*, is on those sales to which it applies, or the distinction, if any, which it effects under our code between sales under execution, and those under a power of sale contained in a mortgage, it certainly has no controlling force in determining what title is conveyed by the bare act of sale under a power. Many of the California cases wherein that section has been in question may <sup>488</sup> readily be construed as extending its meaning to the sale when completed by the deed. Most of the cases from that state which we shall cite were decided on facts which arose before the enactment of that section into the law of that state, and when the statute, like ours on foreclosure by advertisement, was silent as to what title passed before the time for redemption expired. It is unnecessary to analyze all the California cases, or trace the reasons for the apparent changes of construction by the courts of that state relating to the title retained by the mortgagor, and that passing to the purchaser at the time the sale occurs, because, as we have shown, the paragraph relating to the purchaser acquiring all the right, title and interest of the debtor does not apply to sales under a power contained in a mortgage. We, however, in view of the argument, call attention to the doctrine of the earlier California cases, which, as we have shown, are the only cases in point. Those decisions have often been misinterpreted, both by counsel and courts.

One early leading case on the subject is *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655, wherein Judge Field, speaking on behalf of the court, and upon an exhaustive dis-

cussion of the subject of mortgages under the modern theory, and the rights of the different distinterested parties, says: "The settled doctrine of equity is that a mortgage is a mere security for a debt, and passes only a chattel interest; that the debt is the principal, and the land the incident; that the mortgage constitutes simply a lien or encumbrance; and that the equity of redemption is the real and beneficial estate in the land, which may be sold and conveyed by the mortgagor, in any of the ordinary modes of assurance, subject only to the lien of the mortgagee. . . . Proceedings for the foreclosure of mortgages in the sense in which the terms are used in England and in several of the states, by which the mortgagor, after default, is called upon to repay the loan by a specified day, or to be forever barred of his equity of redemption, are unknown to our law. The owner of the mortgage in this state can in no case become the owner of the mortgaged premises, except by purchase upon sale under judicial decree consummated by conveyance. A foreclosure suit by our law results only in the legal ascertainment of the amount due and a decree directing the sale of the premises in its satisfaction. . . . The estate of the mortgagor and of the judgment debtor after the sale stand upon the <sup>489</sup> same footing. . . . The decisions as to the estate of the judgment debtor after sale become, therefore, authorities for determining the estate of the mortgagor after sale under decree, and from them it will be found that the estate must remain in the mortgagor until a consummation of the sale by conveyance, as it does in the judgment debtor, and that the conveyance, when executed, will take effect in the one case from the date of the mortgage, as it does in the other from the time the lien of the judgment attached. . . . There is no difference, so far as the liens of judgments are concerned, between our statutes and that of New York. Here the statute requires the lien by judgment of the creditor to be subsequent to that on which the property is sold. There the statute requires the judgment which creates the lien to be recovered before the expiration of the time for redemption. The period within which the judgment creating the lien must be recovered is not limited in either case by the sale. In *Kent v. Laffan*, 2 Oal. 595, the judgment under which a redemption was claimed was recovered after the sale of the premises under the decree of foreclosure. . . . It follows, from the views above expressed, that the legal title of the premises remained in Randall after the sale under the decree of foreclosure, and that the plaintiff acquired a lien by his judgments. . . . The title remained in the debtor until conveyance executed. . . . Until then the purchaser had no legal estate in the premises, but only a right to an estate which might be perfected by conveyance." And this is followed by *People v.*

Mayhew, 26 Cal. 655, in which the court says: "When a judgment debtor pays to the purchaser, at a sale under an execution or an order of sale, a sum of money for the purpose of effecting redemption of the land, what can that which he pays be properly denominated? Suppose, first, that the judgment creditor is the purchaser, that the sum bid equals the amount of his judgment, and that thereupon the execution is credited by the sheriff with the amount bid. The purchaser does not thereby acquire the defendant's title to the land, for that passes to him by the execution and delivery of the sheriff's deed. This is manifest by the provisions of section 232 of the practice act (Stats. 1851, c. 5, p. 88), which declares, in effect, that upon a redemption being made by the debtor, the sale becomes null and void, which could not be the case if the title had passed, and by the fact that the purchaser can neither take nor recover the possession <sup>400</sup> of the land previous to the sheriff's deed. His judgment is not satisfied by the sale; for, if the sale should for any reason be set aside, the judgment remains in full force, and such could not be the case if it had been satisfied. The purchaser, prior to the execution of the sheriff's deed, holds merely a lien upon the land, differing from the lien of the judgment in this: that it is more specific and may continue after that of the judgment has expired, and that the lien is much nearer a complete enforcement than that of the judgment; the single act of the execution and delivery of the sheriff's deed being required."

This was likewise followed by *Page v. Rogers*, 31 Cal. 293, which has been cited many times by the California courts and the courts of both Dakotas. In some cases it has been cited to show that during the period allowed for redemption the debtor, or his successor in interest, retains only the mere dry, naked, legal title; but a careful perusal of the opinion discloses that this was not what that court held, and that the definition so used in the opinion in that case applies to the title of the debtor, or his successor in interest, between the date of the expiration of the time allowed for redemption and the execution and delivery of the sheriff's deed, and does not apply to the period between the sale and the expiration of the time for redemption. The court says: "To call the interest of the purchaser at a sale or execution before making of the sheriff's deed a lien merely is not very exact. In a general sense it may be a lien; but it is more. The purchaser obtains an inchoate right, which may be perfected into a perfect title without any further action than the subsequent execution of a deed in pursuance of a sale already made. . . . The sale is simply a conditional one, which may be defeated by the payment of a certain sum by certain designated parties within a certain limited time. If not paid



within the time, the right to a conveyance becomes absolute, without any further sale or other act to be performed by anybody. The purchaser acquires an equitable estate in the lands, conditional, it is true, but which may become absolute by simply lapse of time without performance of the only condition which can defeat the purchase. The legal title remains in the judgment debtor, with a further right in him and his creditors having subsequent liens to defeat the operation of a sale already made during the period of six months, after which the equitable estate acquired by the purchaser becomes absolute and indefeasible, and the mere <sup>491</sup> dry, naked, legal title remains in the judgment debtor, with authority in the sheriff to divest it by executing a deed to the purchaser." And this construction is followed in *Bennett v. Wilson*, 122 Cal. 509, 68 Am. St. Rep. 61, 55 Pac. 390, after the enactment of section 700 of the Code of Civil Procedure of that state: See, also, *Freeman on Executions*, secs. 193, 323; *Horton v. Maffitt*, 14 Minn. 289 (Gil. 117); *Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459; *Swain v. Stockton Savings & Loan Soc.*, 78 Cal. 600, 12 Am. St. Rep. 118, 21 Pac. 365; *Donnelly v. Simonton*, 7 Minn. 167 (Gil. 110); 8 *Current Law*, 576; *Smith v. Colvin*, 17 Barb. 157; *Foorman v. Wallace*, 75 Cal. 552, 17 Pac. 680.

The statute of Oregon is, in effect, like that of this state, and in the well-considered case of *Flanders v. Aumach*, 32 Or. 19, 67 Am. St. Rep. 504, 51 Pac. 447, the court of that state says: "During the interim between the sale and the deed the rights of the parties interested are measured by the statute. The sale is inchoate, and does not transfer title until consummated by the execution and the delivery of the deed in due course of law. If subsequent lienors redeem, the course of the sale is not thereby impeded or precluded, but finally culminates in a deed as if no redemption had been made by anyone, and the deed puts an end to the lien of the judgment or decree under which the sale was made, and all other liens subsequently acquired, but a redemption by the judgment debtor terminates the sale and restores the estate. The effect is the same on a redemption by a successor in interest. The lien of the judgment is only partially satisfied by the sale, is not arrested or eradicated, but is simply suspended, as are the liens of all creditors having subsequent judgments, decrees or mortgages pending the sale. If the sale is perfected, all these are swept away": See, also, *Kaston v. Story*, 46 Or. 308, 114 Am. St. Rep. 871, 80 Pac. 209; *Baber v. McClellan*, 30 Cal. 135; *Curtis v. Millard & Co.*, 14 Iowa, 128, 81 Am. Dec. 460; *Phillips v. Hagart*, 113 Cal. 552, 54 Am. St. Rep. 369, 45 Pac. 843.

In construing redemption statutes, to determine whether one is included in their terms, the principle is stated to be

that if one is in privity in title with the mortgagor, and has such an interest that he would be a loser by the foreclosure, he may redeem, and that any person who may have acquired any interest in the premises, legal or equitable, by operation of law or otherwise, in privity with the mortgagor, may redeem and protect such interest in the land, provided it be an interest in the land derived in some way, mediate or immediate, from or through or in the right of the mortgagor, <sup>492</sup> so as in effect to constitute a part of the mortgagor's original equity of redemption, and is a lien at the time when he comes to redeem, and that it need not be a lien at the time of the sale: See Mr. Freeman's note, 21 Am. St. Rep. 245, and cases cited; Story's Equity Jurisprudence, sec. 1023; Pomeroy's Equity Jurisprudence, sec. 1220; supplement to Wiltsie on Mortgage Foreclosures, secs. 959, 960; Van Rensselaer v. Sheriff, 1 Cow. 501; Perkins v. Center, 35 Cal. 713. To construe the phrase "upon the property sold" as applying only to the fraction of the title to the land, rather than to the land itself, would be extremely technical, and we are unable to find any authorities to bear out any such construction. On the contrary, the terms "property sold," "real estate," "premises," and "land" are applied in such cases indiscriminately and interchangeably by the authorities, and we are satisfied that the legislature, in enacting the law relating to redemptions, intended it to apply to the "land" or the "premises," as those words are used commonly, and not in any technical sense. In Phillips v. Hagart, 113 Cal. 552, 54 Am. St. Rep. 369, 45 Pac. 843, the California court expressly held that a deed executed by the mortgagor after foreclosure sale constituted the grantee in the deed a successor in interest and entitled him to redeem. If the grantor had a right to convey the land, and thereby constitute his grantee a successor in interest, the same grantor, under section 6154, supra, had a right to execute a mortgage upon the land and make the mortgagee a subsequent mortgagee, or a lienholder, and therefore a redemptioner.

Still further, as we have seen, under the statutes of this state, the deed executed by the sheriff relates back to and covers the whole title of the mortgagor at the time the mortgage was given. From this fact, and from the construction which is given the words "sale" and "foreclosure," in this connection, it necessarily follows that the property sold is the whole title and interest of the mortgagor in the mortgaged premises at the time the foreclosed mortgage was given, and that, if the contention of the respondent be correct, no other conclusion can be drawn than that the holder of no mortgage given after the one on which the foreclosure proceedings occurred can be a redemptioner, or have the right to redeem, and therefore the inevitable effect of respondent's

construction of the law would be to completely thwart the intention and the purpose of the legislature in providing for redemption by holders of subsequent mortgages. We conclude that the sale <sup>493</sup> in the exercise of the power contained in a mortgage, which conveys the title of the mortgagor, is the sale as completed by the execution of deed at the expiration of the period allowed for redemption.

5. It is contended in respondent's original brief that, Sannan having, as a redemptioner, redeemed from the holder of the prior certificate of sale when the records disclosed no subsequent encumbrance on the property, he is entitled to the protection of the recording act as against any attempted redemption by the holder of a mortgage given during the period allowed for redemption, and not recorded until just before the expiration of the sixty days allowed for a redemption from a redemptioner. On the first argument we were impressed with the soundness of this contention, and that it followed the conclusion there reached on the preceding point; but on reargument respondent did not insist upon it. We have, however, made a careful examination of authorities. The decision of the preceding point would seem to dispose of this question, because the mortgage held by Serumgard could not possibly have been recorded until after the sale under the prior mortgage, for the reason it had not been given at the time of such sale. It therefore becomes plain that, when we hold that Serumgard was a redemptioner under the redemption statute, the recording law cannot be held to deprive him of that right. If there is any conflict between the redemption law and the recording law, in view of the object of the former, it, rather than the latter, must control. The general recording law has no application. That applies only where it is sought under an instrument executed prior, but not recorded to assert rights superior to those claimed under an instrument subsequently executed, but first recorded. In the case at bar Serumgard is not attempting to assert rights superior to the plaintiff, but inferior thereto. He is asserting rights as a redemptioner, and necessarily thereby he concedes they are inferior, and not superior, to those of the prior lienholder. *Pollard v. Taylor*, 13 Ala. 604, squarely sustains this proposition. Nothing in *Foorman v. Wallace*, 75 Cal. 552, 17 Pac. 680, conflicts with it, and we construe *Phillips v. Hagart*, 113 Cal. 552, 54 Am. St. Rep. 369, 45 Pac. 843, as authority on this point, as well as the preceding one. This holding does not deprive the plaintiff of any legal right. He still obtains payment of his lien against the land, and repayment of all he has invested in making his redemption, with interest on both sums.

<sup>494</sup> A purchaser at a foreclosure sale and those redeeming from him are bound to know the law; i. e., they are bound

to know that the mortgagor may, at any time before the year for redemption expires, give a mortgage upon the property sold, and that the mortgagee in such mortgage is a redemptioner. Hence there is no possibility of the purchaser or the first redemptioner being prejudiced because the mortgage of the last redemptioner is not recorded. The purchaser and the prior redemptioner act with knowledge that there may be a subsequent redemptioner.

Indiana cases are not authority, because the statute of that state permits the party seeking to redeem to do so if his mortgage was recorded within the year for redemption. In *Condit v. Wilson*, 36 N. J. Eq. 370, there is practically no discussion of the question, and, even if it may be construed as in point, we are not justified in following it, in view of the plain purpose of the redemption law and the finding that defendant is a redemptioner. Several authorities establish the rule that a party seeking to redeem by virtue of holding a subsequent lien need only hold a lien at the time he seeks to redeem. It cannot be contended that an unrecorded mortgage is not a lien. Sannan suffers no loss by permitting a redemption. While he may suffer the loss of an opportunity to speculate on the land, or obtain it for less than its value, yet this is not such a loss as the redemption statute is intended to protect against. Respondent cites several cases holding that assignment of a mortgage is a conveyance within the meaning of the recording act, as being analogous to a certificate of redemption; but they are so held to protect debtors who make payment to the original mortgagee without notice of the assignment required by law.

We therefore conclude that the appellant must prevail. The judgment of the district court is reversed, and the case is remanded, with directions to that court to enter judgment in conformity with this opinion.

All concur.

Fisk, J., disqualified; Hon. Chas. F. Templeton, Judge of the first judicial district, sitting by request.

*Payment.—The Taking of a Check* is not usually considered as a payment of the debt for which it is taken: *Interstate Nat. Bank v. Ringo*, 72 Kan. 116, 115 Am. St. Rep. 176, and cases cited in the cross-reference note thereto; *Jacobsen v. Bentzler*, 127 Wis. 566, 115 Am. St. Rep. 1052, and cases cited in the cross-reference note thereto. Acceptance of checks as payment in full is discussed in the note to *Meyer v. Green*, 69 Am. St. Rep. 346.

*Who may Redeem from a Foreclosure Sale* is discussed in the note to *Horn v. Indianapolis Nat. Bank*, 21 Am. St. Rep. 245.

*The Purchaser at a Foreclosure Sale Acquires All the Interests* of the parties to the suit as effectually as he would have done by deed from them: *Bannard v. Duncan*, 79 Neb. 189, 126 Am. St. Rep. 661; *Currier v. Teske*, 84 Neb. 60, 133 Am. St. Rep. 602.

## STATE v. BLAISDELL.

[18 N. D. 55, 118 N. W. 141.]

**ELECTIONS—Primaries—Choice of United States Senator.—**

This is an application in the name of the state, by one Herschel James, as relator for an original writ to enjoin defendant, as Secretary of State, from certifying to the various county auditors the names of the two Republican candidates for the office of United States senator from this state, and to restrain him from placing upon the official ballot to be voted at such general election the names of said candidates. By such application the validity of chapter 109, page 151, Laws of 1907, known as the "Primary Election Law," is challenged in so far as it relates to the nomination and election of a candidate for the office of United States senator, which act, among other things, provides that at the primary to be held in June prior to each general election, for the nomination of state, district and county officers, the electors of each political party may designate their choice between the candidates of their party for United States senator, and that, if no candidate receives forty per cent of his party vote, the two candidates receiving the highest number of votes shall be placed on a separate ballot, under their proper party heading, to be voted on at the ensuing general election, and that the candidate receiving a majority of the votes cast shall be the nominee of his party for such office. Said act also provides that candidates for members of the legislature shall take and subscribe a certain oath, to the effect, among other things, that they are candidates for nomination to such office, and designating the political party with which they affiliate. And the act also provides that the petitions of all such candidates for members of the legislative assembly shall contain a pledge to the people that they will support and vote for that candidate of their party, for United States senator, who has received a majority of such party votes for that position at the primary election, or at the succeeding general election. Relator contends that the provision of said act requiring legislative candidates to take and subscribe the oath therein prescribed, and the pledge aforesaid, violates section 211 of our state constitution, in that it adds another oath, declaration and test, as a qualification for office. Held, that such contention is correct, but, held, further, that those provisions of the act providing a method for permitting the electors to designate their choice of a candidate for the United States Senate are not dependent for their validity upon such other provisions requiring the oath and pledge, and may be sustained regardless of the invalidity of such other provisions. (p. 746.)

**ELECTIONS—Primaries—Choice of United States Senator.—**

The provisions of said act, in so far as they permit the electors to designate their choice of a candidate for the office of United States senator, are not vulnerable to attack upon any of the grounds urged by relator. The provisions of the act permitting the electors to designate their choice do not amount to an election by the people of a United States senator. Hence they do not contravene the provision of the federal constitution (section 3, article 1), providing for the election of United States senators by the state legislature; but, if they do violate such constitutional provision, relator is powerless to complain. No constitutional right of the citizen is thereby violated. It is not a judicial question; the Senate of the United States being the tribunal to determine the same. (pp. 747, 748.)

**ELECTIONS—United States Senators—Title of Statute.—All**

the provisions of the act relating to the nomination and election of

United States senators are germane to the subject embraced within the title of the act. (pp. 748, 749.)

**ELECTIONS—Primaries—Choice of United States Senator.**—Certain provisions found in section 13 of the act (Laws 1907, p. 157, c. 109), relating to the ballots to be used at the general election for determining the choice between the candidates for the office of United States senator construed, and held to require that the candidate of each political party shall be placed on a ballot separate and apart from the candidates of other political parties. Held, further, that the general election, in so far as it relates to the choice between the candidates for the office of United States senator, is a mere continuation of the primary election, and that the provisions of chapter 109 aforesaid, which are designed to safeguard the rights of party organization, and to prevent members of one party from participating in the nominations by another party, apply. Hence, the provisions of the law, requiring judges and inspectors, when handing a ballot to a voter, to inform him that he must vote for the candidate of the political party such ballot represents only, and the voter shall call for his party ballot only, and the provisions making it unlawful to call for or vote a ballot not representing the party or principle with which he affiliates, and permitting challenges to be interposed, and the test oath to be required as to party affiliation, also apply. (pp. 748-750.)

**ELECTIONS—Primaries—Choice of United States Senator.**—Section 129 of the constitution of this state, guaranteeing a secret ballot, is not infringed by the act in question. (p. 751.)

**ELECTIONS—Primaries—Choice of United States Senator.**—Said act is not vulnerable to attack upon the ground that it is an unlawful delegation of power granted to the legislature by the federal constitution. (p. 752.)

**ELECTIONS—Primaries—Choice of United States Senator.**—The contention that said act unlawfully attempts to bind successive legislatures is, for reasons stated in the opinion, not tenable. (p. 752.)

**INJUNCTION—Questions of Practice.**—Certain preliminary questions of practice, urged by defendant pertaining to relator's right to make the application, considered, and disposed of adversely to his contention. (pp. 742, 743.)

(Syllabi by the court.)

Ball, Watson, Young & Lawrence, for the plaintiff.

T. F. McCue, attorney general, S. E. Ellsworth, A. G. Divet and Guy C. H. Corliss, for the defendant.

**53 FISK, J.** The relator, who is a qualified elector of Hettinger county, makes application to this court, in the name of the state, for the issuance of a prerogative writ to enjoin the defendant, as Secretary of State, from certifying to the various county auditors the names of certain persons as candidates for the office of United States senator from this state, for the purpose of having such names printed on ballots to be used at the ensuing general election, to determine the choice of the Republican electors as between such candidates. Relator prays that if such names have already been thus certified by defendant, he be required and commanded to cancel such certificate. In his affidavit, upon which the ap-

plication is based, relator avers that he requested the attorney general to make application for such writ, but he refused. Upon the filing of relator's said affidavit an order to show cause was issued, requiring defendant to show cause, if any there be, on October 3, 1908, why the writ prayed for should not issue. Upon the return day of such order to show cause defendant filed a motion to quash such order, and to dismiss the proceedings on specified grounds, only three of which it will be necessary to notice. First, it is defendant's contention that "no question of public right, or one affecting the sovereignty of the state, its franchises, or prerogatives, or the liberty of the people" is presented or involved by relator's application; second, that the affidavit upon which said order to show cause was issued affirmatively discloses that the relator has not sufficient interest in the subject matter of the proceeding, or the determination of the questions sought to be adjudicated, to enable him to institute or carry on same as plaintiff; and third, that it affirmatively appears from said affidavit that plaintiff has been guilty of laches in making the application, and hence is not entitled to the equitable relief prayed for. Answering briefly these contentions, we decide that the first and second points are not tenable. The questions involved clearly are publici juris, and some of them at least pertain directly to the sovereignty of the state, its franchises and prerogatives, and the liberty of its people, and the relator, being a citizen and elector, may institute and prosecute the proceedings when, as in this case, he has requested such proceedings to be instituted by the attorney <sup>59</sup> general, and the latter has refused such request. The third ground of the motion to quash the order to show cause pertains more properly to the merits, but, however this may be, we are clear that relator is guilty of gross laches in making his application, and we might well refuse the writ solely upon this ground. However, on account of the great importance of the public questions involved, we have concluded to ignore or overlook plaintiff's laches, and to rest our decision upon the more vital questions pertaining directly to the merits. Relator relies, for his right to the equitable relief sought by him, upon the following three propositions: "(1) The law in question (Laws 1907, c. 109, p. 151), and all parts thereof dealing, or attempting to deal, with the selection of a party candidate for the office of United States senator, is void and unconstitutional, in that it requires of each candidate for the legislative assembly that he shall take and subscribe an oath and pledge, which add to the qualifications of a candidate and of an elector, other than those required by the constitution of the state. (2) The act in question deals with the general election laws, providing for the submission of a certain form of ballot at such general elections, and con-

tains a subject not included within the title to the act, and one which cannot be included within the title to said act, nor considered in connection with the real object of the act. (3) The legislature cannot provide for any action by the electors or the people of the state, upon the subject of nomination or selection of members of the United States Senate." We shall assume for the purpose of this case that, if these contentions are sound, the writ should issue, although we confess our inability to understand just how the writ prayed for can, if issued, operate to undo what has already been done by defendant pursuant to this law. The candidates for the legislature have long since taken the oath, and made or given the pledge exacted of them by sections 3 and 4 of the act. Such pledge, at the most, merely created a moral obligation to fulfill the same. If the law under which the pledge was exacted is held void, the moral obligation will still continue, and no judgment of a court can obliterate it. It would seem that courts do not and cannot deal with mere moral obligations as distinguished from legal obligations. Their functions are restricted to the latter. But, however this may be, we shall assume for the purposes of this case that relator's counsel are correct as to the remedy invoked, and we will proceed to consider the correctness of <sup>60</sup> the contentions upon which relator bases his right to such remedy. It is broadly asserted that chapter 109, page 151 aforesaid, which is known as the "Primary Election Law," is unconstitutional and void, in so far as it relates to the nomination of, or permits an expression by the people of their choice of, a candidate for United States senator. To this extent only is the validity of the law challenged. It is urged, first, that the law is invalid and unconstitutional in that it requires of legislative members an additional oath, test, and declaration to that fixed by the constitution of the state, section 211. Said section is as follows: "Members of the legislative assembly and judicial departments, except such inferior officers as may be by law exempted, shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: 'I do solemnly swear (or affirm as the case may be) that I will support the constitution of the United States and the constitution of the state of North Dakota; and that I will faithfully discharge the duties of the office of ——— according to the best of my ability, so help me God' (if an oath)—under pain and penalty of perjury (if an affirmation)—and no other oath, declaration or test shall be required as a qualification for any office or public trust." Section 3 of the act in question requires the candidate for the office of member of the legislature to file a petition, to which shall be attached the following oath: "I, ———, being duly sworn, depose and say that I reside in the county of ——— and state



of North Dakota; that I am a qualified voter therein and a ———; that I am a candidate for nomination to the office of ——— to be chosen at the primary election to be held on ——— 190—, and I do hereby request that my name be printed upon the primary election ballot as provided by law as a candidate of the ——— party for said office." Section 4 of said act also requires such candidate to give the following pledge: "I, the undersigned, a candidate for the office of member of the legislative assembly of the state of North Dakota, do obligate myself to the people of the state of North Dakota and to the people of my legislative district that during my term of office I will support and vote for that candidate for United States senator in Congress of the party of which I am a member who has received a majority of such party votes for that position at the primary election next preceding the election of the United States senator in Congress; provided, that in case no candidate of my party receives forty per cent of <sup>61</sup> all the votes cast for the office of United States senator of my party, then and in that case I pledge myself to vote for the candidate of my party who receives the highest number of votes of my party at the general election succeeding such primary election." If the provisions of said act requiring said oath and pledge conflict with section 211 of the constitution of this state, then, of course, those portions of the act are null and void. We think it plain that they do thus conflict, as they add another oath, declaration, and test as a qualification for the office. The tendency of such provisions is to deter, hamper and interfere with, not only persons in becoming candidates for members of the legislature, but with the electors in nominating such candidates, and to this extent said provisions interfere with the free exercise of the elective franchise of the citizens.

The constitution of the state of Michigan contains an oath in substance the same as that required by section 211 of our constitution, and provides, as does our constitution that, "no other oath, declaration or test shall be required as a qualification for any office or public trust." And in the case of *Dapper v. Smith*, 138 Mich. 104, 101 N. W. 60, the court said: "Kent county primary election law (section 3), requiring that before the name of a candidate shall be placed on the ballot at a primary election, such candidate shall on oath declare his purpose to become such, is a violation of the constitution (article 18, section 1), prescribing the oath which shall be required of public officers, and providing that no other oath shall be required as a qualification for any public office, since thereby the voters are precluded from choosing as a candidate one who declines himself to seek the office." Later on in the opinion it is said: "This provision is not one designed for the benefit of the aspirant for public station

alone. It is in the interests of the electorate as well. The provisions of this law which requires that, before the name of any candidate shall be placed on the ballot at the primary election, such candidate shall on oath declare his purpose to become such, excludes the right of the electorate of the party to vote for the nomination of any man who is not sufficiently anxious to fill public station to make such a declaration. The man who may be willing to consent to serve his state or his community in answer to the call of duty, when chosen by his fellow-citizens to do so, is excluded, and the electorate has no opportunity to cast their votes for him. It is not an answer to this reasoning to say that the electors may still vote for such a man by <sup>as</sup> using pasters. We cannot ignore the fact that parties have become an important and well-recognized factor in government. Certain it is that this law fully recognizes the potency of parties, and provides for party action as a foundation toward the choice of an office at the election. The authority of the legislature to enact laws for the purpose of securing purity in elections does not include the right to impose any conditions which will destroy or seriously impede the enjoyment of the elective franchise. We cannot escape the conclusion that the provision in question does most seriously impede the elector in the choice of candidates for office, and that it is in conflict with the provisions of section 1, article 18, of the constitution."

It is, of course, plain that the provision of our statute exacting the pledge aforesaid is much more vicious than the Michigan provision, which was condemned in the foregoing case. The candidate is required by such pledge to obligate himself to discharge certain of his public duties, if elected, in a certain way. He by such pledge divests himself of all discretion and freedom of action in the discharge of a portion of his official duties, if elected. This necessarily operates to hamper and restrict persons in becoming candidates for such office, and is therefore void. It is no answer to this to say that the statute merely forces upon him a moral obligation in respect to the matters covered by the pledge, and that such an obligation would rest upon him in the absence of such statute. This would not necessarily be true where the candidate had not seen fit to voluntarily make such a pledge to his constituents. We conclude that the requirement of such a pledge violates section 211 of our constitution, in that it exacts an additional test in contravention thereof. But does it necessarily follow from this that all other portions of chapter 109, relating to the election of United States senators, and giving the electors of each party an opportunity to express their choice for the candidates for such office, are void also? We think not. The pledge requirement is but one step to effectuate the main object sought to be accomplished, to

wit, the selection of a United States senator in accordance with the choice of a majority of the members of the political party with which he affiliates. Another and entirely independent step or method looking to the accomplishment of this object is the provision permitting the voters of each party to record their choice at the primary, and, in certain cases, at the general election. The <sup>63</sup> fact that the legislative object sought to be accomplished is, or may be to a certain extent, interfered with by reason of the fact that one provision or measure looking to such end is ineffective on account of the invalidity of the law is, to our minds, no reason why the main object must fail when other independent provisions of the law, designed to aid in effecting such object, are not vulnerable to attack. In other words, the provisions of this law, permitting an expression of the party will as to United States senators, if constitutional, must stand, even though the provisions requiring a pledge from the legislative candidate that he will abide by such expressed will cannot stand because unconstitutional. The main object of the law will ordinarily be accomplished about as effectually without the statutory pledge as with it. As before stated, the statutory pledge, if valid, would create no more than a mere moral obligation. Therefore, it cannot be successfully contended that the legislative intent will be frustrated if one provision of the statute is upheld and the other nullified. Each are separate and independent provisions, although designed to effectuate the same main object or purpose. Furthermore, section 36 expressly provides: "In case any of the provisions of this act should be declared unconstitutional, that shall not affect the validity of any of the other provisions of this act."

This logically brings us to a consideration of relator's third proposition, which is that the entire act, so far as it relates to candidates for United States senator, is void under the constitution of the United States. Much of the argument of relator's counsel upon this branch of the case is based upon the assumption that the pledge feature of the law, when considered in connection with the provisions permitting the members of each political party to designate their choice as to senatorial candidates, in effect operates as an election of United States senators by popular vote, instead of by the legislature, as the federal constitution requires. If, therefore, the pledge feature of the statute is eliminated because unconstitutional, much of counsel's argument ceases to have any force. It certainly cannot be contended that the provisions permitting the voters of each political party merely to designate their choice for senator amounts to an election of such senator, as it amounts to nothing more than the right of petition, a right of which they cannot be deprived. The legislative member is in no manner obligated or required,

except perhaps morally, by reason of party <sup>64</sup> support and fealty, to vote and support the candidate of his party's choice as thus expressed.

But, conceding, for the sake of argument, that the provisions of this primary law contravene the provisions of the federal constitution relating to the election of United States senators, it by no means follows that this relator can raise the question, or that this court has jurisdiction to pass upon it. The federal constitution provides by section 5, article 1, that: "Each house shall be the judge of the elections, returns and qualifications of its own members." Manifestly, therefore, the question whether a senator has been elected in the constitutional way is not a judicial question for the courts to determine, but rests entirely with the United States Senate. If this court should decide that the provisions of the statute in question are constitutional, such decision would in no manner be controlling, and the Senate could say that a person elected by our legislature at the coming session was not legally elected, and could refuse him a seat. The question is a federal one exclusively, and the tribunal to determine the same is designated in the federal constitution to be the United States Senate. This identical question was before the supreme court of Louisiana in the recent case of *State v. Michel*, 121 La. 374, 46 South. 430; and the court very summarily disposed of the question as follows: "The next objection has reference to the promise which the voters at the primary are required to make that they will support the nominee. It is said that by this promise the nominees at said primary and members of the legislature find themselves pledged to vote for the nominee of the same primary for United States senator, and that that is contrary to the duty imposed upon them by the constitution of the United States in voting for United States senators. Suffice it to say on this ground that the engagement in question is precisely the same as that which the member of a political caucus enters into, and that no member of any legislative caucus has ever thought that he violated his duties, under the said provision of the constitution, by becoming a member of the caucus and binding himself to abide by the result." No right is guaranteed to the citizen by the federal constitution pertaining to the election of United States senators. Hence relator has no standing in this court to complain that the provisions of the primary law relating to the election of United States senators is obnoxious to the federal constitution.

<sup>65</sup> It is next contended that the law in question includes subjects not included within the title, as it amends the general election laws of the state. We are satisfied that this contention is wholly without merit. The feature of the law, in so far as it relates to what shall be done at the general

election, is clearly germane to the subject embraced in the title of the act. In fact, what takes place at the general election is merely a continuation of the party caucus or primary for the purpose of determining the choice of the two candidates receiving the highest vote at the June primary. The fact that it is conducted at the same time, and through the same election machinery, as the general election is conducted does not make it a part of the general election. This was done for convenience and to save expense. It is merely the consummation of an incomplete party nomination. It is therefore strictly germane to the subject expressed in the title. The case of *State v. Drexel*, 74 Neb. 776, 105 N. W. 174, is cited as an authority in support of counsel's contention upon this point, but as we read the opinion it is not in point at all. The court was there dealing with a section of the primary law, which read: "In no case shall the candidate of any political party be entitled to be designated upon the official election ballot as a candidate of more than one political party, and shall be designated upon the official ballot as the nominee of the party in whose nomination his name appears as the political party with which he affiliates." This section, as the court held, did not deal with the questions of a primary election at all, but with the make-up of the official ballot to be used at the general election, and hence was not germane to the title of the act. The question in the case at bar is widely different. But it is asserted by relator's counsel that the provisions of the act, in so far as they relate to the general election, tend to destroy the secrecy of the ballot, and hence are void. If their premise is correct, their conclusion would be sound, but to our minds their argument is based wholly upon an erroneous interpretation of the law in question.

Counsel say in their printed brief: "All tests are required under the theory that party preservation justifies such tests as may be necessary to prevent members of other political parties from participating in the primaries of parties of which they are not members, and yet this section provides for the determination of the republican candidacy for United States senator by the act and vote <sup>of</sup> of every elector of the state, whether Republican, Democrat, Socialist, Prohibition or Independent." They then quote the following portion of the statute: "The names of each candidate shall be placed on such ballot in the same manner as the candidate for state offices and shall be voted for in the same manner." Counsel then say: "Every elector, when he presents himself to exercise his right of suffrage, must be tendered the separate ballot containing the names of the Republican candidates for United States senator, whether such voter be a Republican or a member of any of the other parties. To pursue any

method would be wholly void and unconstitutional. Section 129 of the constitution of the state provides: 'That all elections by the people shall be by secret ballot subject to such regulations as shall be provided by law.' Such regulations would of necessity be only regulations consistent with the subject expressed, namely, secrecy. At the general election no voter could be questioned as to his intentions or as to whom he voted for, or as to what his party politics were; for this is not a primary election. The primary election is based upon the theory that publicity is essential in order to preserve the party organizations, while the entire Australian ballot system, used at general elections, and the constitution of the state also require that the general election shall be proceeded with under the theory that all ballots shall be secret." The language above quoted serves clearly to demonstrate that relator's counsel are laboring under a misconception as to the correct construction of the statute. As before stated, the provisions of the act relating to matters which shall take place at the general election with reference to determining the party choice as between the respective candidates for the United States Senate are as entirely separate and distinct from the general election as though they were to take place upon the following day after the June primary. And to say that the legislative intent was to place all candidates of all the parties upon one ballot is to impute to the legislature a purpose to obliterate party lines, and to ignore party organizations, which they theretofore had so carefully safeguarded and preserved. When this statute as a whole is considered, it is entirely clear what the legislative intent was, namely, that a separate ballot should be used for the candidates of each political party where such candidates failed to receive forty per cent of their party vote at the June primary. The wording of the statute is possibly susceptible of the construction assumed by counsel, but, where <sup>67</sup> reasonably permissible, we must give the language a construction which will effectuate rather than nullify the apparent legislative will, and the whole act must be construed together in order to arrive at a proper interpretation. In the same section we find the following clause: "That in case no candidate receives forty per cent of all the votes of his party . . . then the two candidates of each party who receive the highest number of votes cast at such primary election shall be placed on a separate ballot to be voted for at the general election following." The word "separate" as there used does not mean separate from the general ballot, but it means separate as to each political party and the sentence quoted by counsel should be read as follows: "The candidates of each party are to be placed on such separate party ballot under their proper party heading."

This construction harmonizes with the balance of the act. This effectually disposes of counsel's contention upon this point.

But a word with reference to the secrecy of the ballot at the general election. As we have said, what takes place at the general election with reference to recording the voter's choice as to his party's candidates for the United States Senate is a mere continuation of the June primary, and may be correctly said to be a part of the primary. This being true, the following provisions of the act are as applicable to such primaries held at the time of the general election as to the primary held in June: "The judges and inspectors of election when handing a ballot to a voter shall inform him that he must vote for the candidates of the political party such ballot represents only, and the voter shall call for the ballot representing the party or principles with which he affiliates and he shall receive such ballot and no other." Also: "It shall be unlawful for any person to call for or vote a ballot at the primary election herein provided for except a ballot representing the party or principle with which he affiliates, and any person who has reason to believe that the ballot called for by the voter does not represent the party or principle with which said voter affiliates, may challenge such voter and he shall not be entitled to cast his ballot unless he makes and files with the inspector of such primary election an affidavit to the effect that such ballot represents the political party with which he affiliates." The words "primary election herein provided for" refer, not only to the June primary, but the continuation thereof held at the general election. If the <sup>68</sup> above construction of the statute is sound, and we believe it is, then there is no room for the contention that the constitutional provision with reference to secrecy of the ballot will be infringed. Such a test, applied to voters at a primary election, is imperatively necessary to preserve the party organizations, and is everywhere upheld. The secrecy of the ballot to be voted at the general election is preserved just as effectually as though this caucus or primary was held on the day before, instead of on the day of, the general election. With reference to the meaning of the constitutional provision as to a secret ballot, the supreme court of California in a very recent case said: "It is the secrecy of the ballot which the law protects, and not secrecy as to the political party with which the voters desire to act. The primary law does not prevent him from voting secretly. We cannot perceive where this law exposes any person advocating doctrines distasteful to any section of the community to its enmity any more than such a person would be exposed if he cast his ballot at a primary election held under the direc-

tion of the party managers without control of the law": *Katz v. Fitzgerald*, 152 Cal. 433, 93 Pac. 112.

Another point urged by relator's counsel is that the act is a delegation of power expressly granted to the legislature. This contention is devoid of merit. In the first place, it does not amount to a delegation of power. The legislature still elects the senator, and the act merely gives the voters of each party an opportunity to express their choice of candidates, as we have heretofore observed. Furthermore, if it does, in effect, delegate such power, this relator is not the one to complain. As before stated, that is a federal question, with which this court has nothing to do. Again, conceding that it is a delegation of power, it is not a delegation of legislative power, as the legislature, in electing a United States senator, does not act in a legislative way at all. It merely acts as an elective body, and we know of no provision of our state constitution which thus limits the legislature.

Lastly, it is said that the act attempts to bind successive legislatures. Our answer to this is that each legislature has plenary power when not restricted by the state or federal constitutions, and hence may repeal the entire primary law at any time it chooses to do so. Furthermore, it is not true, as stated, that the act thus operates. It does not bind the legislature to do anything. It merely permits an expression of choice by the voters, and by its <sup>69</sup> provisions, in effect, provides a convenient method of exercising the constitutional right of petition. In section 165, Black's Constitutional Law, in speaking of the right of assembly and petition, as conferred by the first amendment to the federal constitution, the author says: "The right secured by the constitution extends only to petitions 'for redress of grievances.' In respect, however, to the privilege which attends petitions made in good faith and in a proper manner the term is one of wide import. It includes, not only requests for the passage or repeal of laws, and for the removal of officers who have abused their authority, but also recommendations to office, remonstrances against proposed appointments or the grant of licenses and privileges, and demands for any sort of official action or forbearance."

Entertaining the foregoing views, it follows that the writ prayed for must be denied, and it is so ordered.

Morgan, C. J., concurs.

**Spalding, J., Dissenting in Part.** With much of the opinion of my associates I agree. If, however, I were acting alone, I should not entertain the application in this proceeding at this late date. It is an application to this court on its equity side, and the relator does not come before us with the clean hands which should be presented when seeking equitable relief. I do not mean that he is guilty of



fraud, but that he has been guilty of gross laches, which should deprive him of standing in a court of equity. Under the primary law (Laws 1907, p. 151, c. 109), petitions of candidates, who desired their names placed upon the primary ballot, were required to be filed with the Secretary of State by the twenty-fifth day of last May. On that day this relator knew that six persons were candidates for nomination to the office of United States senator in this state. He could have then taken steps to test the validity of the senatorial provisions of the statute, and, had they been held void, much waste of effort would have been prevented. Again, when the vote was canvassed, and he ascertained that his favorite, whoever it may have been, was unsuccessful, an opportunity was open for application for the relief which he demands, without putting the candidates who had the highest number of votes to the expense, and the people to the inconvenience, of preparing for again submitting the question at the November election. Not doing so, the two candidates have been permitted to continue the campaign for some months, undoubtedly and naturally at great expense both in time, effort and money, until the seventeenth day of October, when application was made for the issuance of the writ. Notice of such application was not served on the candidates until Tuesday, the 20th inst. It was argued on Friday and Saturday, the 23d and 24th insts. The court has had three days in which to consider the many very important and new constitutional questions involved. Counsel for the relator were prepared with an elaborate brief in support of their contentions, but counsel for the respondent, and for the candidates, had not to exceed three days in which to prepare for argument, and were unable to submit briefs. Under these circumstances this court would be justified in refusing to give the matter consideration, and I am of the opinion that it is not justified in considering and attempting to decide such questions with so little opportunity for consideration and reflection. I would not, however, in view of the attitude of my associates, suggest these reasons were we able to agree on all other questions. The fact that we are not emphasizes the undesirability of considering and attempting to pass judgment upon such questions when at best, in my opinion, any conclusion at which the court arrives must be largely a guess.

On the merits of the proposition I can concur with most that is said in the majority opinion. No doubt can exist that the Senate of the United States is the final judge of the election of its own members, and that any decision which we reach in the premises will not control or influence that body, yet this fact, as it appears to me, should not, and does not, prevent or excuse the courts of a state from passing upon the validity of state laws which involve directly or indirectly the election of senators. The state courts are not courts of last resort on federal questions in any instance. My associates have arrived at a conclusion, however, upon one question, which, with my present light on the subject, I am unable to concur in. And it is a very important question in this election. Not important as to future elections, because it can readily be amended by the legislature. I refer to their construction of section 13, page 157, Primary Election Law of 1907. That section in part reads as follows: "The candidate receiving the highest number of votes at such primary election shall be the nominee of his party for the office of United States senator at the succeeding session of the legislative assembly

which is to elect a United States senator; provided, however, that in case no candidate receives forty per cent of all the votes of his party cast for the office of United States senator, then the two candidates of each party who receive the highest number of votes cast at such primary election shall be placed upon a separate ballot to be voted for at the general election following. Such ballot shall be prepared in the same manner as the general election ballot commonly known as the 'Australian Ballot,' is prepared. The candidates of each party are to be placed upon such ballot under their proper party heading. The names of each candidate shall be placed upon such ballot in the same manner as the candidate for state officers and shall be voted for in the same manner." The language in question refers to the general election, and to the Australian ballot used thereat. It is clear to me that in using the words "upon a separate ballot," the legislative mind was directed toward the Australian ballot, and that its intention was that the ballot for the nomination of United States senators should be separate and apart from the Australian ballot, on which are placed the names of the candidates for Congressional and state offices to be elected, and that it does not mean, as held by a majority of this court, a separate ballot for each party which had failed to make nominations at the June primary for senator.

This construction is fortified by further consideration of the section. It continues, "such ballot" shall be prepared in the same manner as the general election ballot is prepared. It does not read "such ballots," as it undoubtedly would have been made to read had the legislature contemplated a separate ballot for the senatorial candidates of each party which had failed to nominate at the June primary. And it continues, "The candidates of each party are to be placed upon such ballot under their proper party heading." It does not read, as it otherwise would have read, "upon such ballots." In each place the plural should have been used rather than the singular. "Under their proper party heading," refers to the headings of the columns devoted to the different parties, clearly contemplating that, in case two or more parties failed to nominate a candidate for senator in June, there should be one senatorial ballot containing a separate column, with a party heading, like the party heading in the Australian ballot, for each party. In other words, it appears clear to me that the meaning of this provision is that, when the candidates of one or more parties fail to receive forty per cent of the vote in June, the names of the two highest candidates of each of such parties go upon one ballot, known as the "senatorial ballot" at the November election, the Republican candidates in one column, headed "Republican," and the names of the other candidates in other columns, headed, "Democratic," and so on, and that this ballot is to be handed to each voter at the general election. It is true that courts should, where two constructions are possible, give to a statute that construction which will sustain its validity, but in doing so they are not required to give a strained construction, or to give to the language a meaning different from that in which it is ordinarily used, or read into the statute something which is not clear should be meant by the language which it does contain. I venture the assertion that of the several thousand election officers who will serve on the 3d proximo, not one per cent would, on reading this act, think of its bearing the construction given it in the majority opinion. Neither will it occur

to them that they should challenge votes, or take any steps to see that only Republicans vote the senatorial ticket. I am fortified in this belief by the fact that on the argument, where the relator, the Secretary of State, and each of the contesting candidates were represented, all by able counsel, it was conceded by counsel for the relator, and for the Secretary of State, and at least for one of the candidates that this provision only required or permitted one senatorial ballot for all parties which failed to make nominations at the June primary. This was the one point on which counsel for the different parties were unanimous. The provisions in other parts of the law for challenging voters as to their party affiliations clearly refer only to the June primary. Now, the importance of this point consists in this: Courts, so far as I have been able to learn, while uniformly holding that primary elections are so far matters of public concern as to be proper subjects of legislative oversight and of reasonable regulation, at the same time hold that, when the legislature undertakes to regulate them, it must do so in such a manner as to protect each party from having its affairs managed, or its nominations made by members of other parties, or by persons who belong to no party.

Primary election laws have several objects. Among them are the protection of the public against the corruption of the ballot, and the nominations of candidates by small fractions of the party, and the preservation of party organization. If a law permits people to vote indiscriminately, without reference to their party affiliation, for candidates representing a party to which they do not belong, the whole purpose of a primary law is subverted. Instead of preventing corruption, it would furnish the widest opportunity for it, by permitting the turning of the management of a party over to its enemies; and the courts, so far as they have passed upon this question, invariably hold that primary laws which permit this to be done are invalid. The legislature is not compelled to legislate on the subject of party nominations, but when it assumes and attempts to do so, it is in recognition of the fact that parties exist, and are necessary to the promotion of the public welfare, and any law which permits the destruction of parties by these means fails of its purpose and is invalid. If my interpretation of section 13 is correct, it means that in the present instance the Democrats having nominated their candidate for senator at the June primary, may take part in the nomination of a Republican candidate for senator at the November primary, thus not only nominating their own candidate, but possibly exerting a controlling influence in the nomination of the Republican candidate. The injustice of this cannot be denied. The legislature is not required to legislate regarding the organization of churches or secret societies, or to provide for their incorporation or management, but when it does so, it cannot provide that the members of the Lutheran church shall or may control the management of the Catholic church, nor would a law permitting the Odd Fellows to control the affairs of the Free Masons be sustained.

This question was passed upon by the supreme court of California, in *Britton v. Board of Election Commrs.*, 129 Cal. 337, 61 Pac. 1115, 51 L. R. A. 115. It says: "Active political parties—parties in opposition to the dominant political party—are, as has been said, essential to the very existence of our government. The right of any number of men holding common political beliefs or governmental principles

to advocate their views through party organization cannot be denied. As has been said: 'Self-preservation is an inherent right of political parties, as well as of individuals': *Whipple v. Broad*, 25 Colo. 407, 55 Pac. 172. A law which will destroy such party organization, or permit it fraudulently to pass into the hands of its political enemies, cannot be upheld. The procedure of political parties may be regulated, and the wisdom of the legislature may well be exercised, in devising methods to check political corruption and fraud; but the legislature itself, under the guise of regulation, cannot be permitted to throw open the doors to these very abuses. A law authorizing, or even permitting, the opponents of an organized political party to name the delegates to the nominating convention of that party would not for a moment be countenanced. Yet that, in effect, is precisely what the act under consideration does permit. It provides that the primary election of all political parties shall be held at the same time. To the intending voter at such primary one ticket is given. No question may be permitted touching his political affiliations—past, present or future. The voter takes the ticket, retires into the privacy of the booth, and there, secretly, and not in violation of any law, but in strict accordance with the law, names such delegates as he desires to the political convention of one or another of the parties, whether he is a member of that party or not, whether he ever intends to become such a member or not. The result is apparent. The control of the party and of its affairs, the promulgation and advocacy of its principles, are taken from the hands of its honest members, and turned over to the venal and corrupt of other political parties, or of none at all. Masquerading thus under the name of one of the great political parties might be a convention of men, authorized by this law to represent it, and place upon the general election ballot, as its candidates, those whom they might select—a body of men whose sole purpose might be the disruption and destruction of the party whose representatives this law declared them to be. It is expressly declared in the Declaration of Rights that the enumeration therein contained shall not be construed to impair or deny others retained by the people. A law which thus permits the disruption and misrepresentation of a political party is an innovation of these reserved rights." This construction has been approved in *Morrow v. Wipf*, 22 S. D. 146, 115 N. W. 1124, and *Rouse v. Thompson*, 228 Ill. 522, 81 N. E. 1109, and I think by other courts.

Of course, if the law contemplated the nomination of United States senators or the expression of a preference by the people as between the different candidates by voters of all parties, it would present a different question, but that is not the purpose of this law, its purpose being to provide for party nominations, and if my construction of this section is correct, the vice of the law lies in that it permits the voters of a party which succeeds in making a nomination in June to participate in the nomination of a candidate representing a party to which they do not belong, or with which they do not affiliate in November, for the same position. Even if section 13 does admit of the construction given it by my associates, the meaning is so obscure as to defeat the purpose of the provision and thereby render it invalid.

In brief, my opinion is that, because the legislature has attempted to regulate party primaries and nominations, it must do it in a manner which, with reasonable certainty, prevents the participation of any

but members of a party in its management or nominations; that if it has failed to do so, or if the language of the act is so involved, or its meaning so obscure, that most men of fair intelligence would, on reading its provisions, fail to find any method provided for party protection, it must fail. This, in my judgment, applies to that part of the law relating to the November nominations of senatorial candidates.

For these reasons, inadequately expressed, but as fully discussed as the brief time at my command, before the opinion must be filed to render it of any effect in the coming election, will permit, I conclude that the provisions of chapter 109, page 151 of the Laws of 1907, relating to the vote for the nomination of a candidate for United States senator at the same time and place as the general election is held, are invalid, and, to that extent, I dissent.

*In Passing upon the Constitutionality of a Law*, where parts thereof, viewed by themselves, are constitutional and other parts so viewed are not, the latter may be condemned and the former upheld if the two are separable; otherwise not: *Commonwealth v. Hana*, 195 Mass. 262, 122 Am. St. Rep. 251; *Bonnett v. Vallier*, 136 Wis. 193, 128 Am. St. Rep. 1061.

*The Legislature may Regulate Elections*, but it cannot deny the elective franchise: *Note to Chamberlain v. Wood*, 91 Am. St. Rep. 685.

*The Sufficiency of the Title to Statutes Within Constitutional Requirements* is discussed in the notes to *Lewis v. Duane*, 86 Am. St. Rep. 267; *Crookson v. County Commrs.*, 79 Am. St. Rep. 456; *Bobel v. People*, 64 Am. St. Rep. 70.

## MCCARTHY BROTHERS COMPANY v. McLEAN COUNTY FARMERS' ELEVATOR COMPANY.

[18 N. D. 176, 118 N. W. 1049.]

### ATTACHMENT—Affidavit Stating More Than One Ground.—

An affidavit for an attachment, which states, in the language of the statute, that the debtors "have sold, assigned, transferred, secreted or otherwise disposed of, or are about to sell, assign, transfer, secrete or otherwise dispose of their property with intent to cheat or defraud their creditors," states but one ground for attachment. (pp. 759, 760.)

ATTACHMENT—Grounds.—The Use of the Disjunctive Conjunction "or" in subdivision 4, section 6938, Revised Codes of 1905, is not to connect two grounds for an attachment, but said subdivision states one ground only consisting of different phases of facts or conditions, intimately related, pertaining to that one ground. (pp. 759, 761.)

(Syllabi by the court.)

Newton & Dullam and A. L. Brice, for the appellant.

McCulloch & Gibson and S. E. Ellsworth, for the respondents.

<sup>177</sup> MORGAN, C. J. This is an action for the recovery of money upon contract, and at the time that the summons

was issued a writ of attachment was procured, and thereafter levied upon the property of the defendant, the McLean County Farmers' Elevator Company. The sole contention between the parties on this appeal is as to the <sup>178</sup> sufficiency of the affidavit on which the writ of attachment was issued. So far as the question in issue is concerned, the affidavit is as follows: "And that the defendants have sold, assigned, transferred, secreted, or otherwise disposed of, or are about to sell, assign, transfer, secrete, or otherwise dispose of, their property, with the intent to cheat or defraud their creditors, or to hinder or delay them in the collection of their debts." The McLean County Farmers' Elevator Company and P. J. Hester appeared in the action, and moved to dissolve the attachment on the ground "that the said attachment was improvidently issued . . . without the filing of a sufficient and proper affidavit for attachment." After a hearing upon said motion the district court granted the same, and vacated the levies which had been made under the writ. Subsequently, and within the time prescribed by the statute, the plaintiff appealed to this court from the order vacating the attachment.

Respondents contend that the affidavit states no ground for attachment, for the alleged reason that two distinct grounds are stated in the affidavit, and that such distinct grounds are connected by a disjunctive conjunction, which fact renders the statements of the affidavit meaningless and inconsistent. The appellant contends that but one ground is stated in the affidavit, and that such ground is set forth in literal compliance with the provisions of the statute. The statute prescribing what an affidavit for attachment shall state is as follows (section 6938, Revised Codes of 1905): "In an action on a contract or judgment for the recovery of money only, the wrongful conversion of personal property, or for damages, whether arising out of contract or otherwise, the plaintiff, at or after the commencement thereof may have the property of the defendant attached in the following cases: . . . (4) When the defendant has sold, assigned, transferred, secreted, or otherwise disposed of, or is about to sell, assign, secrete or otherwise dispose of his property, with intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts." Although the authorities do not agree as to the construction which statutes like the one before us should receive, we are agreed they should be construed so that groups or classes of facts or conditions, connected disjunctively and placed under one subdivision as grounds for an attachment, should be deemed but one ground where they relate, in a general way, to one subject or condition, or to different phases of one general subject, leading to one and the same result. <sup>179</sup> In this case the subject dealt

with under subdivision 4 is the fraudulent sale or assignment or disposition of property with fraudulent intent as a ground of attachment. Whether the defendant is about to assign or sell, or has assigned or sold, his property with fraudulent intent, it is equally a ground for an attachment. Whatever the state of the transaction contemplated is, it is equally a ground for attachment, whether the sale has been consummated or is in process of completion. The result is the same as to the fraudulent character of the transaction. In either case it is fraudulent, and is a ground for issuing an attachment writ. It is often very difficult, if not impossible, to determine whether the fraudulent scheme has been consummated, and that fact would often render an attachment wholly ineffectual if the creditor must determine beforehand whether the fraudulent sale has been completed or is in process of completion. It will be noticed that the affidavit is in the exact language of subdivision 4 of said section 6938. Other subdivisions of that section relate to other grounds of attachment in the alternative. For instance, subdivision 2 of the section states as a ground of attachment that the "defendant has absconded or concealed himself." Subdivision 3 states as a ground for attachment that the defendant "has removed, or is about to remove," his property. We think it therefore clear that it was the legislative intention to make the facts stated in subdivision 4 of said section 6938 a separate ground of attachment, and, when they are stated in the language of the subdivision, are to be considered as one ground of attachment only, although stated disjunctively. The intent was, it seems clear to us, to include as one ground of attachment a sale, or contemplated sale, of one's property with fraudulent intent. The disjunctive conjunction "or" in such cases is not meant to connect independent grounds, but different phases of one ground.

Although there is a wide discrepancy in the holdings of the courts on this question in different states where the statutes are like ours, we think that the better rule is stated as follows: "Where the statute, which defines grounds for attachment, separates them into groups or subdivisions, an affidavit which follows the language of the statute in setting forth a cause embraced by one of the groups or subdivisions is sufficient. And though the statement of the grounds for attachment be made in the alternative by the use of the disjunctive conjunction 'or,' yet, if they are of the same class and <sup>180</sup> character, being the consummation of one wrongful act, the statement will be deemed consistent, and an attachment issued thereon sustained. Ordinarily, however, an alternative statement or the averment of two grounds disjunctively will be void for uncertainty, as will be shown in the next succeeding section": Shinn on Attachment and Garnishment, sec. 145,

p. 237. In section 146 the same authority says: "When the statute employs the disjunctive conjunction 'or' in connecting phrases, which, taken together, state but one ground for attachment, an affidavit following the words of the statute is not objectionable. As, for example, an averment that the debtor 'is converting, or is about to convert, his property into money, or is otherwise about to dispose of his property with intent,' etc., states but one ground for attachment. . . . An averment that the debtor has 'absconded or concealed himself,' etc., forms but one ground for attachment; and, where it is doubtful whether he has 'departed or keeps concealed,' the fact may be alleged in the alternative form. The statement in the affidavit that the plaintiff has good reason to believe that the defendant has done, or is about to do, the act complained of will not invalidate the affidavit when the statute allows an attachment for either case." In *Waples on Attachment and Garnishment*, section 136, the rule is stated as follows: "The use of the disjunctive is allowable in affidavits, if the statute uses it in such a sense as to express but one ground. For instance, if the grounds are numbered in the statute, and under one number is placed the ground 'if the debtor absconds or conceals himself,' may not the affiant swear that his debtor has absconded or is concealing himself? It is, under some circumstances, the only honest form of path that the plaintiff can take with regard to his debtors' disappearance. When the leading idea of a statute ground for attachment is the avoidance of process by absconding, the means of avoidance may be sworn to in the alternative; so may incidental facts respecting other leading grounds." In *Wood v. Wells*, 2 Bush, 197, the court said: "In setting out the grounds of attachment, the alternative word 'or' is used; but the grounds alleged are of the same class or character of acts, and are so intimately connected with the consummation of the wrongful act, usually in such cases following in quick succession, the conception to carry it out, it is most difficult to know or ascertain when the sale or disposition of the property, which is the last act of the drama, is accomplished; and the one may, therefore, and perhaps <sup>181</sup> should be, regarded as the antecedent of the other, and the grounds may be thus stated to guard against an error as to how the fact is. But even if it be taken as the statement of two grounds of attachment in the alternative, it must be regarded as sufficient. The appellant could neither be surprised nor prejudiced by the grounds being thus stated." In *Klenk v. Schwalm*, 19 Wis. 111, the court said: "These causes for an attachment, it is insisted, are repugnant and inconsistent, because it is argued that, if a man has assigned, disposed of, or removed his property with intent to defraud his creditors, there is no reason for saying that he is about to do it. The statute al-



lows an attachment for several causes, one of which is 'that the defendant has assigned, disposed of, or concealed, or is about to assign, dispose of, or conceal, any of his property with intent to defraud his creditors.' It is impossible, frequently, for a creditor to ascertain whether a debtor has actually consummated a fraudulent transfer of his property or whether he is about to do so, and therefore the legislature has made these one ground for an attachment. Fraudulent sales are generally secret, 'and it may be very difficult to say at a given moment whether they are fully accomplished or not.' And when regard is had to the manner in which the legislature has enumerated the different cases in which the attachments may issue, there can be no doubt that the second subdivision of section 2 (Rev. Stats. 1858, c. 130) was considered as constituting in fact one ground or cause of attachment." The following authorities sustain the principle laid down by the cases from which the foregoing quotations are taken: 3 Ency. of Pl. & Pr., pp. 24, 25; 4 Drake on Attachment, sec. 102; Cyc., p. 505; Tessier v. Englehart, 18 Neb. 167, 24 N. W. 734; Winner v. Kuehn, 97 Wis. 394, 72 N. W. 227; McCraw v. Welch, 2 Colo. 284; Coleman v. Teddlie, 106 La. 192, 30 South. 99; Cook v. Burnham, 3 Kan. App. 27, 44 Pac. 447; Penniman v. Daniel, 90 N. C. 154; Howard v. Oppenheimer, 25 Md. 350; Dawley v. Sherwin, 5 S. D. 594, 59 N. W. 1027; Parsons v. Stockbridge, 42 Ind. 121; Conrad v. McGee, 9 Yerg. 428; Irvin v. Howard, 37 Ga. 18; Johnson v. Emery, 31 Utah, 126, 86 Pac. 869, 11 Ann. Cas. 23.

In ruling that the affidavit stated more than one ground for attachment, the trial court erred. Order reversed and cause remanded for further proceedings.

All concur.

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*An Affidavit for Attachment is Fatally Defective*, as being in the disjunctive, where it states that the "defendant is a foreign corporation or a nonresident of the county": Note to Miller v. White, 76 Am. St. Rep. 802. An affidavit that defendant has disposed of his property "or any part thereof," or is about to do so with intent to defraud, etc., is also insufficient to support an attachment, for the reason that, if false, perjury cannot be assigned thereon: Note to Collins v. Stanley, 123 Am. St. Rep. 1040.

## CHRISTIANSON v. HUGHES.

[18 N. D. 282, 122 N. W. 384.]

**MECHANIC'S LIEN**—Property of Wife—Contract by Husband.—Where a husband, without the consent and against the protests of the wife, contracts for and purchases material to paint a dwelling-house on land owned by the wife, who, having no knowledge of where he purchased the materials, did not give notice of her objection to the improvements on the dwelling-house to the party who furnished said materials, the materialman, under the evidence in this case, acquires no lien under section 6237 of said Revised Codes of 1905 for the materials furnished. (pp. 765, 767.)

(Syllabus by the court.)

Turner &amp; Wright, for the appellant.

Pierce, Tenneson &amp; Cupler, for the respondent.

**282** CARMODY, J. This case, which was brought for the foreclosure of a mechanic's lien, is in this court for trial de novo. The complaint alleges that the defendant is the owner of the premises against which the plaintiff seeks to establish a lien, and also the making of the contract, on May 15, 1906, with one D. E. Hughes, the husband **283** of the defendant, under which the plaintiff was to furnish certain materials for the construction, alteration or repair of a certain building, situate upon land belonging to the defendant, which was then occupied by the said D. E. Hughes and the defendant as a dwelling-house. It alleges that between May 15, 1906, and June 29, 1906, at the request of the said D. E. Hughes, and by and with consent of the defendant, the plaintiff sold and delivered to the said D. E. Hughes building materials of the value of seventy-seven dollars and ten cents. It further alleges that said materials were furnished for, and were used in and upon, the construction, alteration or repair of said dwelling-house, and by and with the consent of the said defendant. The answer puts in issue every material allegation of the complaint, except that defendant admits her ownership of the premises in dispute, and that the same constitute the homestead of herself and husband. The case was tried to the court without a jury, and resulted in a personal judgment in favor of the plaintiff, and against the defendant, for the sum of one hundred and twenty-two dollars and two cents damages and costs, adjudging a lien therefor upon the premises in controversy, and directing the foreclosure thereof. The personal judgment was rendered inadvertently.

The plaintiff established at the trial that he sold to D. E. Hughes paint, oil, white lead, and other material used in painting the said dwelling-house, and states the circumstances as follows: D. E. Hughes, on or about May 15, 1906,

came into the store of plaintiff and said: "Lars, I want to get some paint to paint my house, and as soon as I get through, I will come in and give you a check for it." The plaintiff further testified that D. E. Hughes at one time was running a wagon-shop in Fargo, and that he purchased from plaintiff paints and varnishes for painting buggies, also paint the year before to prime his house, and that he paid for them. The testimony further shows that ten dollars' worth of the paint was sufficient to paint the house one coat; that D. E. Hughes was sent to the insane asylum on the twenty-second day of June, 1906; that after his incarceration in the asylum the defendant got Mr. Nelson, a painter in Fargo, to paint the house one coat, and that the paint then used cost less than nine dollars. This last-mentioned painting was necessary, on account of the condition of the building after the painting done by D. E. Hughes with the materials he purchased from plaintiff. The plaintiff does not claim to have ever had any conversation, understanding or agreement with defendant on the subject. He relies <sup>284</sup> solely upon the implied consent on her part to use the materials upon her house, and to the furnishing of them by the plaintiff. Defendant testified that she never consented to the use of the materials, or of the purchase of them for her house. She several times protested to her husband against painting the house with these materials. She told him he had painted the house the year before, and that it did not need painting, and that they could not afford it. She did not know, she never knew, where D. E. Hughes was procuring the paint. He had money with which he could have paid for the paint. He said he was paying for it. She never received any notice from plaintiff that he was extending credit for the materials. She testified that D. E. Hughes bought paint all his life, and she never paid any attention to it. She did not know where he bought it, or who furnished the paint the year before. She did not give notice to the plaintiff of her objection to his furnishing the materials. The alleged lien was duly filed on the twenty-seventh day of September, 1906.

Section 6237, Revised Codes of 1905, is as follows: "Any person who shall perform any labor upon or furnish any materials, machinery or fixtures for the construction or repair of any work of internal improvement or for the erecting, alteration or repair of any buildings or other structures upon land, or in making any other improvements thereon, including fences, sidewalks, paving, wells, trees, grades, drains or excavations under a contract with the owner of such land, his agent, trustee, contractor or subcontractor, or with the consent of such owner, shall upon complying with the provisions of this chapter have . . . . a lien upon

such building, erection or improvement and upon the land belonging to such owner. . . . The owner shall be presumed to have consented to the doing of any such labor or making of any such improvement, if at the time he had knowledge thereof, and did not give notice of his objection thereto to the person entitled to the lien." The case must turn largely upon the construction to be placed upon said section 6237 of the Revised Codes of 1905. It is not claimed, on the part of the plaintiff, that he had at any time, either directly or indirectly, any contractual relation with the defendant, or that her husband was either the agent, trustee, contractor or subcontractor of the defendant. He admits that his contract was with D. E. Hughes, the husband of the defendant, alone. He claims, however, that the defendant, having had actual knowledge that the improvements <sup>285</sup> were being made, and having failed to give the notice required by said section 6237, must be held to have impliedly consented to the furnishing of the materials. He contends that this is the construction placed upon similar statutes, and cites a large number of cases to sustain his contention. An examination of these cases shows that they were decided under statutes unlike ours. Section 3509, Revised Laws of Minnesota of 1905, as far as material here, reads as follows: "But any person who has not authorized the same may protect his interest from such liens by serving upon the persons doing the work or otherwise contributing to such improvement, within five days after knowledge thereof, written notice that the improvement is not being made at his instance, or by posting like notice and keeping the same posted in a conspicuous place on the premises." The mechanic's lien statutes of California and Oregon are practically the same as the statutes of Minnesota as far as giving notice is concerned. In some of the other states the statutes require the owner to file notice of his objection in the office of the county clerk.

In *Wheaton v. Berg*, 50 Minn. 525, 52 N. W. 926, the defendant Nilson sold a vacant lot to defendant Berg, the purchase price to be paid within ninety days. The sale contract did not provide for the erection of a building, but provided that in case of nonperformance by the vendee "all the improvements on said premises or which may be made thereon" should become the property of the vendor. Berg erected a house upon the premises. It was found as a fact by the court that he purchased the lot for that purpose, and that Nilson knew this when he contracted to sell; that he knew that the house was being constructed from the time when the building operations were commenced, and that he never made any objections thereto. Neither did he post any notice on the premises, as required by said section 3509 hereinbefore

quoted. Held, that the parties who performed labor on said dwelling-house, or furnished material therefor, were entitled to liens on the premises. In *Harlan v. Stufflebeem*, 87 Cal. 508, 25 Pac. 686, the court found that the owners of the land knew, at the time of the construction of the buildings, and of all the terms and conditions of the contract between Stufflebeem and the plaintiffs at the time it was made, and also that on the completion of the work, he had made a payment to the plaintiffs on account thereof. The other cases cited by plaintiff hold that, where the owner of the land has knowledge of, and consents to the <sup>286</sup> performance of, the labor and the furnishing of the material by the lien claimants under a contract with a person other than the owner, the parties so performing labor and furnishing materials are entitled to liens.

Plaintiff does not claim that defendant had any knowledge that he was furnishing materials which were used on her house. He relies solely upon the fact of her knowledge that the house was being painted, her knowledge of the improvements, as sufficient to charge her with the duty of ascertaining the further fact that plaintiff was furnishing materials, for such improvements, and giving him notice of her objection thereto. This we do not think is the correct construction of said section 6237. If it is, D. E. Hughes could have procured the materials from several different persons, or could have had them shipped from a foreign state, and the defendant would have had to hunt up the different parties supplying the materials, or, if they were shipped from a foreign state, find out who shipped them, and give the proper party notice that she objected to the making of the improvement. Such we do not think was the intention of the legislature in passing the law. In the case at bar the defendant never consented to the improvement being made, or to the furnishing of the materials therefor by plaintiff, or any other person. She objected to the improvements; her husband was not her agent; the contract was not made by her, or in her behalf, and she agreed to none of the terms, conditions or agreements thereof. She believed her husband to be, and he was in fact, financially able to pay for the materials, and had in fact bought paint from plaintiff for a number of years, and always paid for it. She did nothing to mislead the plaintiff. If her husband could be allowed to encumber the estate of the defendant, against her will and protest, such rights in her separate property granted to her by law would be of little value, and the husband could readily, and in this manner, contract her estate away, and bring her to financial ruin. Under the circumstances, in this case to allow a lien, and thus permit her to be stripped of the title to her estate, and possibly deprive her of a shelter for herself and family, would be

contrary to equity and subversive of that protection which the law intended should be thrown around her separate estate.

We do not think it necessary to pass upon the contention of appellant that the presumption mentioned in said section 6237 is a rebuttable one, as it has not application to the facts in this case. We <sup>287</sup> think such presumption only applies where the owner of the premises has such knowledge of the performance of the labor and the furnishing of the materials as would, by her silent acquiescence in such improvements, create an estoppel against her right to claim a want of consent. In the case at bar defendant evidently did everything within reason in the way of protesting against the making of such improvement. She did not protest to plaintiff against furnishing the paint, but this was not required, as she had no knowledge that he was furnishing the same; and, in view of this fact, it would be a manifestly unreasonable construction of the statute to require her to seek him out in order to give him notice of her objection.

Section 3314 of the statutes of Wisconsin of 1898, as far as material here, reads as follows: "Shall also attach to and be a lien upon the real property of any person on whose premises such improvements are made, such owner having knowledge thereof and consenting thereto." Section 3314, *supra*, is nearer like section 6237 of the Revised Codes of 1905 than the mechanic's lien statutes of any of the states in which the cases cited by respondent were decided. We believe that no case can be found in which a lien was upheld under facts similar to those in the case at bar. In most of the cases cited by respondent the owner not only had knowledge of the facts, but expressly consented to the improvements being made: *North v. La Flesh*, 73 Wis. 520, 41 N. W. 633; *Edwards & McCulloch Lumber Co. v. Mosher*, 88 Wis. 672, 60 N. W. 264. In the following cases it has been held that a party performing labor or furnishing material for improvements on land, under a contract with a person not the owner, was not entitled to a lien: *Coorsen v. Ziehl*, 103 Wis. 381, 79 N. W. 562; *Huntly v. Holt*, 58 Conn. 445, 20 Atl. 469, 9 L. R. A. 111; *De Klyn v. Gould*, 165 N. Y. 287, 80 Am. St. Rep. 719, 59 N. E. 95.

In *Coorsen v. Ziehl*, 103 Wis. 381, 79 N. W. 562, the court, seeking through Justice Bardeen, said: "The proof is that she [the wife] was not consulted before the contracts were made, and that she did not in any way sanction or direct the work as it progressed. She lived in the building with her husband, and undoubtedly knew of the work as it progressed, and from these facts it is argued that she is brought within the terms of section 3314." He then cites cases relied upon by counsel for the plaintiff, and continues: "But there is a clear distinction between these cases and the case at bar. In each case



**288** there was proof of the express consent of the owner to the erection of the building upon which the lien was claimed. Here there is not such proof. . . . Consent cannot be inferred from mere silence under these circumstances." In *Huntly v. Holt*, 58 Conn. 445, 20 Atl. 469, 9 L. R. A. 111, the court said: "Consent means the unity of opinion; the accord of minds; to think alike; to be of one mind. Consent involves the presence of two or more persons, for without at least two persons there cannot be a unity of opinion or an accord of minds, or any thinking alike." When the statute uses the words "by the consent of the owner of the land," it means that the person rendering the service or furnishing the materials and the owner of the land on which the building stands must be of one mind in respect to it." In *De Klyn v. Gould*, 165 N. Y. 287, 80 Am. St. Rep. 719, 59 N. E. 95, the court said: "Mere acquiescence in the erection or alteration with knowledge is not sufficient evidence of the consent which the statute requires. There must be something more. Consent is not a vacant or neutral attitude in respect of such material interest to the property owner. It is affirmative in its nature. It should not be implied contrary to the obvious truth, unless upon equitable principles the owner should be estopped from asserting the truth": See, also, *Clark v. North*, 131 Wis. 599, 111 N. W. 681, 11 L. R. A., N. S., 764, 11 Ann. Cas. 1080, and *McClintock v. Criswell*, 67 Pa. 183. True, the mechanic's lien statutes of Wisconsin and other states do not contain the presumption mentioned in section 6237; but, as hereinbefore stated, we think this presumption has no application to the facts in the case at bar.

The trial court will reverse its judgment, and enter judgment dismissing the complaint herein.

Fisk and Ellsworth, JJ., concur; Morgan, C. J., not participating.

SPALDING, J., Concurring Specially. I concur in the reversal but not for the reasons given by my associates. They work a judicial repeal of the statute applicable, to which I cannot assent.

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*A Mechanic's Lien cannot be Created upon the Land of a Married Woman* under a contract with her husband alone, acting merely for himself: *Rust-Owen Lumber Co. v. Holt*, 60 Neb. 80, 83 Am. St. Rep. 512, and note thereto discussing mechanics' liens on the separate property of married women.

**HANSON v. GREAT NORTHERN RAILWAY COMPANY.**

[18 N. D. 324, 121 N. W. 78.]

**CARRIERS—Conflict of Laws—Place of Contract.**—A contract entered into for carriage of freight from a point in one state to a point in another state will, in the absence of proof of a contrary intention, be governed by the law of the place where the contract was entered into. (p. 770.)

**CARRIERS—Conflict of Laws—Contract Against Public Policy.** Where, however, such contract is against the established public policy of this state, it will not be enforced by our courts. (p. 770.)

**EVIDENCE—Presumption as to Law of Other States.**—In the absence of proof to the contrary, the presumption prevails that the common law is in force in a foreign jurisdiction. (p. 770.)

**CARRIERS—Limitation of Liability for Freight.**—By statute in this state a common carrier may, by special contract signed by the consignor or consignee, limit or modify its common-law liability, except that it cannot exonerate itself from liability for loss or damage resulting from the negligence, fraud or willful wrong of itself or servants. Prior to the enactment of chapter 57, page 83, Laws of 1907, it was lawful by special contract, when signed by the consignor or consignee, to exonerate such carrier from liability except for its or its servants' gross negligence, fraud or willful wrong. (pp. 770, 772.)

**CARRIERS—Stipulation as to Value of Freight.**—Such special contract will not be enforced except when fairly entered into and when just and reasonable in the eye of the law. Stipulations fixing a mere arbitrary valuation upon goods for the sole purpose of limiting the carrier's liability in case of loss or damage are not just and reasonable in the eye of the law. (pp. 773, 777.)

**CARRIERS—Stipulation as to Value of Freight.**—Whether the carrier may by special contract fixing the value of goods for shipment, when fairly made, limit or restrict its liability for negligence to the value thus agreed upon, is not determined. (p. 777.)

**CARRIERS—Stipulation as to Value of Freight.**—Tested by the foregoing rules, the special contract in the case at bar, which fixes the value of the household goods at five dollars per hundred-weight, is, for reasons stated in the opinion, contrary to the public policy of this state, and hence will not be enforced here. (pp. 777, 778.)

(Syllabi by the court.)

Murphy &amp; Duggan, for the appellant.

Frich &amp; Kelly, for the respondent.

327 FISK, J. Plaintiff had judgment in the court below pursuant to a verdict directed by the court, and this appeal is from such judgment and from an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial.

The facts are not seriously in dispute, and are substantially as follows: Plaintiff, being the owner of certain household goods, a list of which appears in the complaint, had the same taken from his home in Minneapolis by Boyd Storage and Transfer Company, and by them packed and crated for ship-



ment and shipped to him at Tolna, North Dakota. He paid them a lump sum of twenty-three dollars for packing, hauling, shipping and freight charges. The storage company's drayman delivered the goods to the Minneapolis freight-house of the defendant for shipment to Hanson at Tolna. The goods were weighed, weighing fifteen hundred and forty pounds as packed. Anderson, the teamster for the Boyd company, caused the shipment to be made in the name of Boyd Transfer and Storage Company, as consignor, to T. M. Hanson, as consignee. At that time the regular freight rate on goods of this class from Minneapolis to Tolna was one and one-half times first class, or one dollar and forty-one cents per one hundred pounds. Defendant also had a special western rate, called the "emigrants' movable rate," from Minneapolis and other specified points to North Dakota, on household goods of intending settlers, when the shipment is made at the <sup>328</sup> owner's risk, and at a declared valuation of five dollars per one hundred pounds; this rate being only thirty-five cents per one hundred pounds. The goods were shipped at the declared valuation of five dollars per one hundred pounds, and at the rate of thirty-five cents per hundred-weight. In addition to the ordinary freight receipt, a special contract was prepared by defendant's agent and executed by Anderson, the drayman, which special contract is hereafter set out in full. Plaintiff proved a failure on defendant's part to deliver the goods, and seeks to recover for breach of the contract of shipment, alleging the value of the goods to be seven hundred and eighty-two dollars and sixty-seven cents instead of seventy-seven dollars, the value declared in the special contract. At the close of the trial, defendant tendered judgment for seventy-seven dollars, and the trial court, on plaintiff's motion, directed a verdict for seven hundred and fifty-nine dollars and seventy-seven cents, being the actual value testified to by plaintiff.

Appellant's counsel have assigned numerous alleged errors of law which they ask this court to review, but it will not be necessary to notice them in detail. As we view the questions involved, they may be classified into three propositions, as follows: (1) Is plaintiff legally bound by the action of the Boyd Transfer and Storage Company through its employee, Anderson, in entering into the special contract limiting the common carrier's liability? (2) Conceding Anderson's implied authority to make the same, is said special contract valid? (3) Under the facts, has defendant forfeited its right to rely upon and enforce the provisions of such special contract?

If the second proposition is decided in the negative, such decision will obviate the necessity of passing upon the other

propositions. Hence, we will proceed to consider the validity of this special contract. The same was entered into in the state of Minnesota, and, under the weight of authority, is governed by the law of that state: *Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. Rep. 469, 32 L. ed. 788, and numerous other cases cited in note on pages 125, 126, 88 Am. St. Rep. Notwithstanding this fact, however, we understand the rule to be that the same will not be given effect in the courts of this state if it is against the established public policy here: 11 Current Law, 529, citing *Carter v. Southern R. Co.*, 3 Ga. App. 34, 59 S. E. 209; *Atlanta etc. R. Co. v. Broome*, 3 Ga. App. 641, 60 S. E. 355; *International etc. R. Co. v. Van Devanter*, 48 Tex. Civ. App. 366, 107 S. W. 560. It does not appear that a statute exists in Minnesota relating to the right of a common carrier to limit its common-law liability in case of loss or damage to property in its custody. <sup>329</sup> Hence it is presumed that the common-law rule is in force there: Rev. Codes 1905, sec. 7317, subd. 41. What is the public policy in North Dakota with reference to such contracts?

In many jurisdictions it is necessary to look to the decisions of the courts to ascertain its public policy, as they have no legislative declaration with reference thereto. Not so here, as the legislature has seen fit to settle the question by express statute: See chapter 59 of the Civil Code, being sections 5672 to 5701, inclusive, Revised Codes of 1905. Section 5677 provides: "The obligation of a common carrier cannot be limited by general notice on his part but may be limited by special contract." The next section provides: "A common carrier cannot be exonerated by any agreement made in anticipation thereof from liability for the gross negligence, fraud or willful wrong of himself or his servant." This section was amended in 1907 by eliminating the word "gross": See Laws 1907, c. 57, p. 83. Such amendment is not material, however, as plaintiff's cause of action arose prior to its enactment. And the following section provides: "A passenger, consignor or consignee by accepting his ticket, bill of lading or written contract for carriage with knowledge of its terms, assents to the rate of hire, the time, place and manner of delivery therein stated. But his assent to any other modification of the carrier's rights or obligations contained in such instrument can only be manifested by his signature to the same." These sections were taken from the original Field Civil Code, and were intended to provide a settled rule of construction upon this subject, the decisions respecting which were theretofore apparently in hopeless conflict. As said by Chief Justice Tripp in *Hartwell v. Northern P. E. Co.*, 5 Dak. 473, 41 N. W. 735, 3 L. R. A. 342: "The decisions of the courts

have varied, and are now conflicting, as to whether the common-law liability of the carrier may be limited: (1) By notice brought home to the party; (2) by special acceptance of goods for carriage; (3) by express contract between the parties. There is much diversity of opinion of the courts how far such liability may be restricted or limited on grounds of public policy. Our statute has aimed to settle these conflicting decisions." After quoting the foregoing sections, the opinion continues: Section 1263 (section 5679, Revised Codes of 1905), *supra*, supplements and makes clear section 1261 (section 5677, Revised Codes of 1905). Section 1261 is founded upon the common-law doctrine as announced by Justices Bronson and Cowan in *Hollister v. Nowlen*, <sup>330</sup> 19 Wend. 234, 32 Am. Dec. 455, and *Cole v. Goodwin*, 19 Wend. 251, 32 Am. Dec. 470, and denies the right of a common carrier to limit his liability by a general notice. It adopts the decision of *Dorr v. New Jersey S. Nav. Co.*, 11 N. Y. 485, 62 Am. Dec. 125, in so far as it promulgates the rule of allowing the carrier to limit his liability by special contract; but it limits and qualifies that case in so far as it applies to a case of bill of lading accepted by the shipper by providing in section 1263 that the shipper who does not sign the bill of lading or contract of carriage consents only, by accepting it, to the rate of hire, time, place and manner of delivery. If the carrier desires him to assent to any modification of his common-law liabilities contained in such instrument beyond this, he must require it to be signed by the shipper; in other words, passenger tickets, bills of lading, and written contracts for carriage are not 'special contracts' within the meaning of section 1261, that can limit the obligations of the common carrier, unless they are signed by the passenger, consignor, or consignee. These two sections prescribe the manner in which the liability of the common carrier may be limited, and section 1262 (section 5678, Revised Codes of 1905), prescribes the extent to which that liability may be limited. It limits the right of parties in advance of carriage to agree to exonerate from liability for gross negligence, fraud, or willful wrong of the carrier or his servant. All contracts to relieve from gross negligence, fraud or willful wrong on the part of the carrier or his servants are, by the terms of this statute, expressly prohibited. The object of this section is obvious. They settle for this territory the conflicting decisions of the common law. They make unnecessary any discussion of the better rule, worked out by the learned decisions, to meet a fancied necessity for modification of that laid down by the older cases."

We have thus quoted at length from the foregoing opinion as the same clearly sets forth our views as to the proper con-

struction of the provisions of our code, *supra*, and nothing need be added by us. The state of California has similar statutory provisions, and the supreme court of that state, in the very recent decision of *Donlan Bros. v. Southern Pac. Co.*, 151 Cal. 763, 91 Pac. 603, 11 L. R. A., N. S., 811, 12 Ann. Cas. 1118, gave expression to the same views. We quote: "At common law a common carrier might make any other contract relative to the carriage of property intrusted to it, save one exempting it from liability for any kind of negligence. This rule was <sup>231</sup> founded upon considerations of public policy; it being deemed derogatory thereto to allow a common carrier to contract against its own negligence, because to permit this had a tendency to promote negligence. But, as far as ordinary negligence is concerned, the rule at common law has been abrogated by our Civil Code (section 2174) to the extent that the shipper and carrier may make a contract for the purpose of limiting the liability of the latter therefor. The prohibition of the common law against a carrier limiting his liability for any kind of negligence is declared in this state by section 2175 only to apply to the limitation for gross negligence; but, in so declaring, our statute has added nothing to the restrictive force of the common-law rule. Declaring the same rule as it existed at common law, and nothing more, the section should not be construed as restricting the right of contract to any narrower compass than the common law restricted it." The court then holds that section 2175 of the California Civil Code, which is the same as section 5678 of the Revised Code to this state for 1905, should not be construed as restricting the right of contract as to an agreed valuation of property for the purpose of fixing responsibility any further than it was restricted under the rule at common law, and that at common law such agreed valuation was not considered a limitation of liability for either ordinary or gross negligence. Upon this question it is said: "In jurisdictions in this country, where the common-law rule obtains, it is the prevailing doctrine that there is a wide distinction between a contract by a carrier providing for exemption from liability for its negligence, and a contract fairly entered into whereby, in consideration of a reduced rate of compensation for the transportation, the shipper and carrier agree upon a fixed valuation therefor under which the responsibility of the carrier in case of loss shall be measured." Numerous authorities are cited and reviewed by the court, but we deem it unnecessary to collate them in this opinion.

The contract in question, therefore, in so far as it does not attempt to limit defendant's liability for loss or damage occasioned by gross negligence, fraud or willful wrong of itself or its servants, is not contrary to the public policy of

this state as expressed in the provisions of the Code above cited; but to the extent, if any, that it attempts otherwise to limit such liability, the same will not be enforced by the courts of this state. The so-called "special contract" is as follows: "Property Release. Consignee and destination, Theo. M. Hanson, Tolna, N. D. Description of Articles. 1 ~~332~~ lot H. H. goods O. R. Val. Rel. to \$5.00 per cwt. In consideration of the Great Northern Railway Company having received the above property from Boyd Trf. & Stg. Co., consigned to Theo. M. Hanson for transportation on their line from Mpls. station to Tolna, N. D. I do hereby release the said company, . . . . from all liability from . . . . loss or damage of whatever kind except such as may occur from negligence of the company by collision of trains or by cars being thrown from the tract in course of transportation. And for the further consideration of the lower rate hereby secured I do declare the value of all property and goods shipped under this contract to be \$5.00 per cwt., said lower rate being given by the G. N. Ry. Co. solely upon the basis of said valuation. And in consideration of said reduced rate, I further agree that, in case of loss or damage to said property, or to any part thereof, my recovery for such loss or damage shall not exceed the above valuation. I do also release said company from all loss or damage that may occur to any freight shipped by me, above entered, after it has been unloaded from the cars at Tolna station on their line. [Signed] Boyd Transfer Co., by Anderson."

It is entirely clear that the first paragraph of said contract, which attempts to exonerate the company from all liability for loss or damage of every kind, except such as may occur from negligence of the company by collision of trains or by cars being thrown from the track, is void both under the common-law rule and the statute of this state, and this is also true with reference to the third paragraph. It remains to consider the validity of that portion of the contract whereby a declared valuation of five dollars per hundred-weight of the goods in question is set forth, with the agreement that in case of loss or damage to said property a recovery therefor shall not exceed such declared valuation.

Respecting the validity of such agreed valuation stipulations, there is much diversity of opinion among the courts of this country; but by the weight of authority such stipulations are upheld, provided the same are reasonable in the eyes of the law, and are fairly and honestly made as a basis for the carrier's charges and responsibility, even where the loss is caused by the negligence of the common carrier; the theory of such decisions being that such a stipulation or agreement is a just and reasonable mode of securing a due

proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant <sup>333</sup> and fanciful valuations. It is said that such limitations of value in no way exempt the carrier from or limit his liability for negligence; their only effect being to liquidate the amount for which the carrier in case of loss shall be answerable, whether through his negligence or otherwise. The leading case upon this subject is *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331, 5 Sup. Ct. Rep. 151, 28 L. ed. 717, in which Mr. Justice Blachford used the following language: "There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to an agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage if there is no loss, and the effect of disregarding the agreement after a loss is to expose the carrier to a greater risk than the parties intended he should assume." The other authorities following the rule of the federal court are too numerous to cite. The following are a few of them: *Cau v. Texas Pac. R. Co.*, 194 U. S. 427, 24 Sup. Ct. Rep. 663, 48 L. ed. 1053; *Donlon Bros. v. Southern Pac. Co.*, 151 Cal. 763, 91 Pac. 603, 11 L. R. A., N. S., 811, 12 Ann. Cas. 1118; *Coupland v. Housatonic R. Co.*, 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534; *Central R. Co. v. Murphey*, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720; *Rosenfeld v. Peoria etc. Ry. Co.*, 103 Ind. 121, 53 Am. Rep. 500, 2 N. E. 344; *Pacific Express Co. v. Foley*, 46 Kan. 457, 26 Am. St. Rep. 107, 26 Pac. 665, 12 L. R. A. 799; *Hill v. Boston etc. R. Co.*, 144 Mass. 284, 10 N. E. 836; *Graves v. Adams' Exp. Co.*, 176 Mass. 280, 57 N. E. 462; *Smith v. American Exp. Co.*, 108 Mich. 572, 66 N. W. 479; *Alair v. Northern P. R. Co.*, 53 Minn. 160, 39 Am. St. Rep. 588, 54 N. W. 1072, 19 L. R. A. 764; *Murphy v. Wells-Fargo & Co. Exp.*, 99 Minn. 230, 108 N. W. 1070; *Starnes v. Louisville etc. R. R. Co.*, 91 Tenn. 516, 19 S. W. 675; *Richmond & D. R. Co. v. Payne*, 86 Va. 481, 10 S. E. 749, 6 L. R. A. 849; *Ullman v. Chicago etc. Ry. Co.*, 112 Wis. 15, 88 Am. St. Rep. 949, 88 N. W. 41. The rule is announced in many of said authorities that such limitations, in order to be valid, must be made with reference to a value to which the charges and responsibilities of the carrier shall be proportioned. Mere arbitrary limitations or stipulations are not upheld. If it appears that the object of such stipulations is to secure a fair and reasonable value upon <sup>334</sup> which to base the terms of the contract of shipment, they will be sustained; but, on the contrary, if it appears that the purpose was merely to place a limit to the



carrier's liability in case of loss or damage to the goods, the same will be held void. Such agreements entered into for the former purpose are held reasonable, but unreasonable if for the latter purpose. The latter is a mere attempt on the part of the carrier to limit his liability for losses caused by his own negligence, and as to losses so caused, such agreements are held unreasonable and void on account of such attempted limitation of liability: *Alair v. Northern P. Ry. Co.*, 53 Minn. 160, 39 Am. St. Rep. 588, 54 N. W. 1072, 19 L. R. A. 764; *Ullman v. Chicago etc. Ry. Co.*, 112 Wis. 15, 88 Am. St. Rep. 949, 88 N. W. 41; *Donlon Bros. v. Southern Pac. Co.*, 151 Cal. 763, 91 Pac. 603, 11 L. R. A., N. S., 811, 12 Ann. Cas. 1118. See, also, *Chicago N. W. Ry. Co. v. Chapman*, 133 Ill. 96, 23 Am. St. Rep. 587, 24 N. E. 417, 8 L. R. A. 508; *Rosenfeld v. Peoria etc. Ry. Co.*, 103 Ind. 121, 53 Am. Rep. 500, 2 N. E. 344; *Gardner v. Southern Ry. Co.*, 127 N. C. 293, 37 S. E. 328.

The courts are not agreed regarding the test to be applied in determining the validity of such contracts or stipulations; some holding a stipulation void which merely fixes a maximum value on the property limiting recovery in case of loss to the sum not exceeding such amount, upon the ground that a stipulation of this kind is a mere attempt to limit the carrier's liability, and hence is solely in the interest of such carrier. Other courts hold that there is no distinction on principle between such a stipulation and one by which the parties expressly agree to a certain fixed valuation. Among those holding to the former rule are *Conover v. Pacific Exp. Co.*, 40 Mo. App. 31; *Kellerman v. Kansas City etc. Co.*, 68 Mo. App. 255; *Louisville & N. R. Co. v. Sowell*, 90 Tenn. 17, 15 S. W. 837; *Eells v. St. Louis Ry. Co.*, 52 Fed. 903. Among those holding to the latter rule are *Alair v. Northern P. R. Co.*, 53 Minn. 160, 39 Am. St. Rep. 588, 54 N. W. 1072, 19 L. R. A. 764; *Ullman v. Chicago etc. Ry. Co.*, 112 Wis. 15, 88 Am. St. Rep. 949, 88 N. W. 41.

While there is some contrariety of opinion also on the question of the validity of such stipulations depending upon whether the value is fixed by the shipper himself or inserted by the carrier under the prevailing rule, no such distinction is drawn. The true test seems to be whether the stipulation was inserted and agreed to in the interest of the carrier for the mere purpose of limiting his liability in case of loss or damage, or whether it was inserted for the purpose <sup>335</sup> of fixing the rate of compensation for the carriage of the property and the proportionate responsibility of the carrier in the performance of the contract of carriage. The Alabama court has adopted another test as to the validity of such stipulations, which is that the value stipulated or agreed upon must not be disproportionate to the actual value of the property. Speaking upon this question in the recent case of *Southern Ry. Co.*

v. Jones, 132 Ala. 437, 31 South. 501, Chief Justice McClellan says: "In determining whether a stipulation is void as being against public policy, there is no room for inquiry into the knowledge, information, or intention of the parties. The question is not what the parties knew or intended, but what is the effect of the stipulation; not whether the parties intended evil or knew their act was hurtful to the public, but whether to allow and uphold such contracts would be fraught with wrong and injury to the people of a character from which it is the province and the duty of the government to protect them. So it is immaterial, when a carrier has stipulated for the limitation of damages resulting from his negligence to a greatly disproportionately small valuation of the property carried, whether he knew or was informed of its real value or not. It is against the public good in respect of a governmental concern that he should be allowed to make such stipulation under any circumstances, and to allow it to stand in any instance or upon any consideration would be to emasculate the principle of public policy obtaining in the premises, and to leave the public exposed to all the uncertainties incident to inquiries into what carriers intended, or knew or had been informed as to the real value of the property transported by them." See, also, to the same effect, the very recent case of Southern Exp. Co. v. Owens, 146 Ala. 412, 119 Am. St. Rep. 41, 41 South. 752, 8 L. R. A., N. S., 369, 9 Ann. Cas. 1143, where the same court reviews the authorities at length and announces the better doctrine to be that a carrier cannot, by a contract fixing the value of the property carried in relation to the amount of freight paid, limit its liability pro tanto for losses caused by its own negligence.

The doctrine thus announced, however, seems to be opposed to the weight of authority, and we think the sounder rule is that announced in *Alair v. Northern P. R. Co.*, 53 Minn. 160, 39 Am. St. Rep. 588, 54 N. W. 1072, 19 L. R. A. 764, *Donlon Bros. v. Southern Pac. Co.*, 151 Cal. 763, 91 Pac. 603, 11 L. R. A., N. S., 811, 12 Ann. Cas. 1118, and other cases above cited, holding in effect that a mere difference between <sup>336</sup> the value as agreed upon and the actual value of the property, however wide such difference may be, is not a controlling test as to the validity of such stipulations, and that the true test is whether the stipulation was fairly entered into and is "just and reasonable in the eye of the law." The fixing of a mere arbitrary sum, without any reference to the real value, and merely for the purpose of fixing the limit of the carrier's liability, will not ordinarily be held to be "just and reasonable in the eye of the law." The facts in each case must be looked to to determine whether the object of such stipulation was merely to place a limit on the carrier's liability, and therefore invalid, or whether the object was, as before stated, to fairly



and honestly fix a value as a basis of the carrier's charges and responsibility, and hence valid as a "reasonable mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

Another line of very respectable authorities adheres to the rule that the carrier will not be permitted by any contract with the shipper to limit his liability for loss caused by his negligence to anything less in amount than the actual damage suffered by the shipper. Among the courts so holding are Illinois, Kentucky, Mississippi, Nebraska, Ohio, Pennsylvania, Tennessee and Texas. The following are a few of the cases: *Chicago etc. Ry. Co. v. Chapman*, 133 Ill. 96, 23 Am. St. Rep. 587, 24 N. E. 417, 8 L. R. A. 508; *Chicago etc. Ry. Co. v. Calumet Stock Farm*, 194 Ill. 9, 88 Am. St. Rep. 68, 61 N. E. 1095 (containing a very valuable and exhaustive note covering every phase of the subject of the limitation of a carrier's liability); *Chicago etc. Ry. Co. v. Witty*, 32 Neb. 275, 29 Am. St. Rep. 436, 49 N. W. 183; *United States Exp. Co. v. Blackman*, 28 Ohio St. 144; *Adams Exp. Co. v. Holmes* (Pa.), 9 Atl. 166; *Houston etc. Ry. Co. v. Davis*, 11 Tex. Civ. App. 24, 31 S. W. 308. For other cases so holding, see above note in 88 Am. St. Rep., at page 112.

We are not required in the case at bar, to express our views as to which rule announced by the foregoing two lines of authorities is the sounder, for we are agreed that, applying the test adopted by the courts holding to the first rule above stated, the stipulation in question is not "just and reasonable in the eye of the law," and hence is not only contrary to the public policy of this state, but is also contrary to the well-established rule of the common law, and <sup>337</sup> will not be enforced. In the *Hart* case (112 U. S. 331, 5 Sup. Ct. Rep. 151, 28 L. ed. 717), it was said: "The agreement as to value in this case stands as if the carrier had asked the value of the horse, and had been told by the shipper the sum inserted in the contract." When tested by the rule announced in the *Hart* case and other cases holding to the same doctrine, it is apparent that the contract in question cannot be sustained. In the first place, the property consists of household goods, and there is not a scintilla of testimony in the record tending to show their actual value, aside from the plaintiff's testimony at the trial. The cartman in the employ of the storage and transfer company is not shown to have possessed any knowledge of their value whatsoever, nor does it appear that his employer or any of the members of the storage company possessed any such knowledge. It is not contended that either of the parties who were instrumental in making or causing such special contract to be made had any knowledge whatso-

ever upon the subject of the actual or supposed or the approximate value of the property. The carrier's servant who prepared said contract inserted a mere arbitrary sum of five dollars per hundred-weight as the value without any inquiry from anyone, or without any investigation with the view of determining the approximate value thereof. It cannot be said respecting household goods, as was said by Judge Mitchell in the Minnesota case (*Alair v. Northern P. R. Co.*, 53 Minn. 160, 39 Am. St. Rep. 588, 54 N. W. 1072, 19 L. R. A. 764), regarding horses, that "everyone may be presumed to know approximately the average value." We cannot say, as was said by Judge Mitchell in said case, that we are justified in taking judicial notice of the fact that the maximum value placed by this contract upon these goods is approximately that of average household goods. In view of these facts, how can it be contended that such stipulation is "just and reasonable in the eye of the law"? The most that can be said of it is that it is a mere arbitrary fixing of value by the carrier's servant acquiesced in by the transfer company's drayman, who had no knowledge as to the value nor any specific instructions from his employer with reference to fixing value—facts which were, or should have been, within the knowledge of the defendant's servant.

Our conclusion is that such special contract, under the facts in the case at bar, is void in its entirety, both at common law and under the established rule of public policy of this state, and hence the same cannot avail defendant as a defense to plaintiff's cause of <sup>338</sup> action. This being true, we are not required to notice the other questions raised by appellant.

The judgment and order appealed from are correct, and are, accordingly, affirmed.

All concur.

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*As to What Law Governs a Stipulation Limiting a Carrier's Liability*, see the note to *Chicago etc. Ry. Co. v. Calumet etc. Farm*, 88 Am. St. Rep. 125; and the subsequent cases of *Southern Express Co. v. Hanaw*, 134 Ga. 445, 137 Am. St. Rep. 227; *Southern Express Co. v. Gibbs*, 155 Ala. 303, 130 Am. St. Rep. 24. If a contract containing a stipulation limiting liability for negligence by a common carrier is laid in one state, but with a view to its performance by transportation through or into one or more other states, it must be construed in accordance with the law of the state where its negligent breach, causing injury, occurs. Such contract, though valid in the state where made, must be declared void in the state where the injury occurs, if contrary to the policy of the law of the latter state: *Hughes v. Pennsylvania R. R. Co.*, 202 Pa. 222, 97 Am. St. Rep. 713.

*The Limitation of a Carrier's Liability* in bills of lading is the subject of a note to *Chicago etc. Ry. Co. v. Calumet etc. Farm*, 88 Am. St. Rep. 74. A carrier may, by express contract, limit its liability for the loss of goods or damage to property consigned to it for transportation, where such contract is just, fair and reasonable: *Benson v. Oregon Short Line R. R. Co.*, 35 Utah, 241, 136 Am. St. Rep. 1052;

Summerlin v. Seaboard Air Line Ry., 56 Fla. 687, 131 Am. St. Rep. 164; Pacific Express Co. v. Foley, 46 Kan. 457, 26 Am. St. Rep. 107.

*A Carrier may Limit Its Liability on a Value Basis of the Property Carried.* But, while a bona fide agreement may be made as to the value of property to be transported, as a basis for fixing the charges, and may be valid, yet a common carrier cannot, even by express contract, put an arbitrary limitation upon its liability for damages arising from negligence of its agents. Such a contract is contrary to public policy: Ullman v. Chicago etc. Ry. Co., 112 Wis. 150, 88 Am. St. Rep. 949; Southern Express Co. v. Hanaw, 134 Ga. 445, 137 Am. St. Rep. 227. As to when a contract or stipulation fixing the value of goods shipped is valid, see Alair v. Northern Pac. R. R. Co., 53 Minn. 160, 39 Am. St. Rep. 588; and when invalid, see Southern Express Co. v. Owens, 146 Ala. 412, 119 Am. St. Rep. 41; Southern Express Co. v. Marks, 87 Miss. 656, 112 Am. St. Rep. 466. The power of a common carrier to limit the amount of his liability, in the event of loss, to a sum less than the injury sustained, is the subject of a note to Chicago etc. Ry. Co. v. Chapman, 23 Am. St. Rep. 593.

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## RISING v. DICKINSON.

[18 N. D. 478, 121 N. W. 616.]

**REGISTER OF DEEDS—Negligence in Failing to Keep Index.** Under sections 2452, 2453, Revised Codes of 1905, it is made the duty of the register of deeds of each county to keep a numerical index in his office in which shall be noted, opposite the description of each tract, the volume and page of each mortgage or other instrument affecting the title thereto. Held, that defendant's failure for over two months after a mortgage was duly recorded to note the same in such numerical index is negligence per se, rendering him liable to one who, in reliance on such index, purchases the property and sustains damage as the necessary and proximate result of such official neglect. (pp. 781, 782.)

**REGISTER OF DEEDS—Failure to Keep Index—Contributory Negligence.**—It is essential to a recovery for such negligence that plaintiff be free from contributory negligence, but it was not contributory negligence on plaintiff's part in failing to examine the grantor and grantee index wherein such mortgage was noted. (p. 781.)

**REGISTER OF DEEDS—Liability in Damages.**—The register of deeds is a ministerial officer, and as such is liable at common law, in the absence of an express statute, to an action for damages caused by his failure or neglect to perform the duties of his office, or for their negligent or illegal performance. (p. 782.)

**REGISTER OF DEEDS—Action Against for Negligence.**—The action was tried on the theory, and it is, in effect, conceded that it was essential to a recovery, however, that plaintiff should prove that one S., the mortgagor, and the person from whom he purchased the premises, and who gave him a warranty deed containing a covenant against encumbrances, was insolvent, and hence unable to pay the mortgage indebtedness or to respond in damages for the breach of her covenant. Evidence examined, and held insufficient, for reasons stated in the opinion, to establish such fact. (pp. 783, 784.)

Lindstrom & Sinnes and Burke & Middaugh, for the appellant.

McClory & Barnett, for the respondent.

**479 FISK, J.** Plaintiff Rising recovered a judgment in the court below against defendant for damages for the alleged negligence of the latter, who was register of deeds of Benson county, in failing and neglecting to note in the numerical index a certain mortgage filed and recorded in his office on September 20, 1901.

The facts necessary to a correct understanding of the law points involved are as follows: On September 20, 1901, one Julia Solvey, who was the owner of the real property described in the complaint, gave a mortgage thereon on the Advance Thresher Company. Such mortgage, as above stated, was filed in defendant's office on September 20th, and recorded in book 18 of Mortgages, at page 445, and thereafter entered in the grantor and grantee's index of mortgages, but the same was not noted on the numerical index of mortgages until after December 5th following. On the latter date plaintiff Rising purchased the premises covered by such mortgage from Julia Solvey, taking from her a warranty deed of the premises with the usual covenant warranting the same to be free from all encumbrances, except a mortgage for four hundred dollars and one for sixty dollars in favor of other parties. The proof shows that prior to such purchase the plaintiff Rising examined the reception book required to be kept by defendant as such register of deeds, covering entries for the period of about two months immediately prior thereto, and also the numerical index, and failed to find the mortgage to the Advance Thresher Company in either of such records, and he claims to have made such purchase without any notice of any kind of the existence of such last-named mortgage. Subsequently, and prior to the commencement of this action, the holder of the Advance Thresher Company mortgage foreclosed the same by action, which resulted in a judgment decreeing that there was due thereon the sum of four hundred and ninety-two dollars and thirty cents, and directing a sale of the premises to satisfy such sum. Plaintiff Rising appeared as an intervener in such foreclosure proceedings, but, failing in his defense, he thereafter was required to and did pay to protect his title the sum aforesaid, which is one of the items of damage claimed to have been suffered by him by reason of defendant's said negligence. At the conclusion of the trial both parties moved for a directed verdict, whereupon the learned trial court excused the jury, and thereafter findings of fact and conclusions of law were made and judgment ordered in favor of the plaintiff F. C. Rising and against the defendant for four hundred and ninety-two dollars and thirty

cents, with interest, together with the costs and disbursements of the action. <sup>480</sup> A motion for a new trial was thereafter made and denied, and this appeal is both from the judgment and order aforesaid.

Among other things, appellant contends, in effect, that plaintiff was himself guilty of contributory negligence barring a recovery, because he neglected to make a proper and diligent search of the records, and that, if he had done so, he would have discovered the Advance Thresher Company mortgage. It is a conceded fact that this mortgage was duly noted both in the reception book and the grantor and grantee index, and that the same was recorded in mortgage book 18, on page 445, but was not noted in the numerical index, and that plaintiff Rising merely examined the reception book and the latter index. It is no doubt true that plaintiff by searching a little further back in the reception book, or by examining the grantor and grantee index, would have discovered such mortgage, but we think he was not bound at his peril to do so.

The law required defendant to keep a numerical or tract index, in which should be noted opposite the description of each tract the volume and page where each mortgage or other instrument affecting the same is recorded, and plaintiff had a right to assume that defendant had performed his duty in this regard. While it is true that such notation could not be made until after the instrument was recorded, or rather until its recordation is commenced, for the reason, as contended by appellant's counsel, that the officer until such time does not know the page upon which the record commences, still the undisputed evidence discloses that this mortgage was actually recorded over two months prior to the date plaintiff made the examination aforesaid, and we think it must be held as a matter of law that defendant was negligent in failing to note such instrument upon the numerical index within such time after the same was recorded. Wisconsin has a statute very similar to the statute of this state regarding the records including indexes to be kept by the register of deeds, and the case of *Johnson v. Brice*, 102 Wis. 575, 78 N. W. 1086, we think fully sustains us in these views. In that case the plaintiff relied solely upon the tract index, and it was there expressly held that plaintiff had a right to rely on such index, and his recovery was sustained upon the theory of defendant's negligence in failing to note a certain mortgage in such index. We think the statute requiring such numerical index to be kept clearly contemplates that immediately, or at least within a reasonable time after each instrument is recorded, it shall be noted on such index. The performance <sup>481</sup> of such duty requires but a brief period of time, and we are agreed that, under the facts in the case at bar, defendant was unquestionably guilty of actionable negligence per se in fail-

ing to note this mortgage upon said index prior to December 5, 1901.

Appellant's counsel call attention to the fact that in the Wisconsin case above cited the action was based upon an express statute fixing liability; but it is clear that, in the absence of such a statute, there is a common-law liability on defendant's part to respond in damages to any person who has been injured as the proximate result of his negligent performance of official duty. The register of deeds is a ministerial officer, and as such is answerable in damages for nonfeasance, misfeasance or malfeasance. As stated in 23 American and English Encyclopedia of Law, second edition, 377: "He is liable in a civil action for the failure or refusal to perform the duties of his office, or for their negligent or illegal performance." See, also, the numerous cases cited therein. To the same effect, see Throop on Public Officers, sec. 743; also, State v. Ruth, 9 S. D. 84, 68 N. W. 189, wherein it was held that "an officer who, without legal excuse, fails to perform a ministerial duty, is liable for the proximate results of his failure to any person to whom he owes performance of such duty." That such is the law seems to us too plain for serious debate, and we pass this point without further comment.

This brings us to a consideration of appellant's exceptions to certain findings of the trial court. It is asserted that finding No. 8, in so far as it finds that plaintiff Rising relied upon the numerical index, has no support in the evidence, and that finding No. 14, to the effect that Julia Solvey, the mortgagor and plaintiff's grantor, was insolvent, is likewise without support in the evidence. The case was tried upon the theory, and it is, in effect, conceded, that if either of these contentions are correct, reversal must follow, as both of such findings are essential to plaintiff's recovery. If plaintiff did not rely in purchasing said property upon the numerical index, or if he was not damaged in the eye of the law because of the fact that Julia Solvey was solvent and able to respond in damages for the breach of the covenant in her deed against encumbrances other than those mentioned, or financially able to pay the note secured by such mortgage, then plaintiff has no cause of action against defendant, at least for anything other than nominal damages. We have examined the record carefully, and failed to find any evidence to the effect that plaintiff in purchasing this land relied wholly upon the <sup>482</sup> numerical index with reference to existing encumbrances. It is true plaintiff testified that, before purchasing the land, he examined the numerical index, and also the reception book, and failed to find said mortgage noted upon either, and that he had no knowledge of the existence of such mortgage. For all that appears from the record plaintiff may have relied as much or more upon the covenant in his grantor's deed as upon



the numerical index in question. Conceding, however, that the evidence upon this issue was sufficient to go to the jury, and hence the finding of the court will not be disturbed, we are entirely clear that the evidence is wholly insufficient to sustain the finding that Julia Solvey was insolvent. The only testimony upon this point is that of the witness Stewart, who testified: "I am acquainted with Julia Solvey. I have known her ever since I have been in the county, till she left. She has gone to Canada. She is not a resident of this county or state at the present time, and has no property here. I have been acquainted for some time with her business affairs, and have had collections against her. I think I returned them to the M. M. Osborne Company. I was not able to collect anything on them. From my knowledge as to the state of her financial affairs and these collections I would state that Julia Solvey is at this time insolvent." The above testimony was given at the trial which commenced on November 22, 1906, whereas the transaction out of which plaintiff's cause of action arises took place in the early part of December, 1901, nearly five years prior thereto. How, then, can it be argued that the foregoing testimony in any manner tends to prove that Julia Solvey in December, 1901, and for a long time thereafter, was not perfectly solvent? But such testimony is wholly insufficient to prove her insolvency for another reason. It purports to give the mere opinion and conclusion of the witness without stating any facts as a basis therefor, and hence is entitled to no probative weight. The fact that the witness had collections against her and in favor of the M. M. Osborne Company which he was unable to collect tends to prove nothing. She may have declined payment of the same for perfectly valid reasons. He does not swear that these claims were reduced to judgment, and execution was issued and returned unsatisfied, nor does he state what knowledge, if any, he had relative to the assets and liabilities of Julia Solvey. For all that his testimony discloses, she may not have owed a dollar to anyone, and she may have owned property worth millions of dollars. Moreover, the testimony <sup>483</sup> of this witness fails to state when Julia Solvey went to Canada or when she ceased to own property in Benson county or in North Dakota. It may be from anything that appears in his testimony that she continued to reside and to own property here for several years after the plaintiff purchased said property, and after he acquired knowledge of the existence of such mortgage. As before stated, and for the reasons above stated, we are convinced that plaintiff signally failed to establish the fact of Julia Solvey's financial inability to respond in damages to plaintiff for the breach of her covenant aforesaid, and proof of such fact was essential to plaintiff's

recovery. As to the proper method of proving insolvency, see Abbott's Trial Evidence, second edition, 777-779.

Entertaining these views, it follows that the judgment and order appealed from must be reversed, and it is so ordered.

All concur, except Morgan, C. J., not participating.

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*A Register of Deeds is Liable for His Failure to Keep an Index of instruments recorded: Note to Worden v. Witt, 95 Am. St. Rep. 86, discussing the liability of ministerial officers to private individuals for the nonperformance and misperformance of official duties.*

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### POWER v. KING.

[18 N. D. 600, 120 N. W. 543.]

**DEEDS—Intoxication of Grantor as Invalidating Deed.**—Before a deed or other contract will be set aside on the ground of the intoxication of the grantor or maker when the same was executed, the evidence must show that the grantor was in such a degree of intoxication at the time as to render him entirely incapable of understanding the nature and effect of the transaction. (p. 786.)

**ATTORNEY FEES—Equitable Action.**—It is Error to Tax an attorney's fee in an equitable action under section 7179, Revised Codes of 1905. (p. 786.)

**DEEDS—Intoxication of Grantor as Rendering Him Incompetent.**—Evidence considered, and held to show that plaintiff was not rendered incompetent to enter into the contract involved in this action by reason of his intoxication. (p. 786.)

(Syllabi by the court.)

Bosard & Ryerson, for the appellant.

John E. Greene, Gray & Gray and Ben E. Combs, for the respondent.

600 MORGAN, C. J. This is an action to set aside a deed, a contract for the purchase of one hundred and sixty acres of land, and a promissory note executed by the plaintiff on the twentieth day of May, 1907. The facts, as shown by the record, are the following in substance: On the twentieth day of May, 1907, the plaintiff and defendant met at Donnybrook, Ward county, North Dakota, and, after certain preliminary negotiations, agreed that the plaintiff would purchase one hundred and sixty acres of land from the defendant, and that the defendant would purchase two lots in Donnybrook from the plaintiff. The consideration agreed upon for the land was the sum of two thousand dollars. The plaintiff was to convey to the defendant the two lots at the agreed price of five hundred dollars, and the plaintiff was to execute a promissory note for the sum of fifteen hundred dollars, and deliver



the same to the defendant, and this note was to be secured by a mortgage to be executed by the plaintiff and his wife upon one hundred and sixty acres of land. These papers were all signed by the plaintiff, and <sup>601</sup> were turned over to one Freeman, who sent them to a bank at Mohall, where the signature of the plaintiff's wife was to be procured to the mortgage and to the deed of the lots in Donnybrook. After these papers were sent to the bank at Mohall, and when the attention of the plaintiff was called to the fact that his wife's signature was to be procured, he repudiated the transaction entirely and refused to permit his wife to sign the same. Within a few days he brought this action to cancel and annul the deed and contract that had been signed by him, and to have them surrendered to him. After a trial the district court made findings of fact and conclusions of law in favor of the defendant, and refused to cancel the deed and other contracts, and granted the affirmative relief asked by the defendant for the specific performance of the contract that was entered into between the plaintiff and the defendant on Monday, May 20th. The plaintiff has appealed from the judgment of the district court, and asks for a review of the entire evidence under section 7229, Revised Codes of 1905.

The sole issue is whether the plaintiff was in such a state of intoxication at the time of the execution of these papers that he was incapable of understanding the nature and effect of the contract entered into at that time. The record shows, and it may be conceded, that Mr. Power had been drinking excessively on the Sunday prior to the making of the contract; but that fact does not alone warrant the setting aside of the contract executed by him about 10 o'clock of Monday morning. The evidence does not show that he drank anything prior to the signing of the papers on Monday. There is ample evidence that he drank heavily on that day after he left the bank where the contract was closed, so far as it was possible for him to close it on that day. The fact that he became intoxicated later in the day has no direct bearing on the issue as to his condition when he executed the note, deed and contract for the purchase of the one hundred and sixty acres of land. The evidence of the plaintiff shows that he began to drink whisky on Saturday about 7 o'clock P. M. at Minot. He left Minot for Donnybrook some time during Saturday night and arrived at Donnybrook early Sunday morning. Some time after his arrival there he procured a pint or half pint of whisky and drank some of it. After drinking this whisky he testifies that he had no definite recollection of anything that transpired in Donnybrook until Wednesday morning. He has no recollection whatever of being in the bank where the papers were executed, or having talked with, or of doing any business with, the <sup>602</sup> defendant there. The defendant, the cashier of the bank,

the keeper of the hotel where plaintiff stayed, and some of the boarders at the hotel were witnesses at the trial, and testified to his condition as to intoxication on Monday before and after the signing of the deed and other papers. From the testimony of these witnesses it is evident that he drank whisky excessively on Sunday up to midnight, and on Monday afternoon and Tuesday. From this testimony, so far as facts are related, and not as conclusions, we think that it was clearly shown that he was not incompetent at that time to transact business, that he did transact by reason of having been under the influence of strong drink on the previous night.

In *Spoonheim v. Spoonheim*, 14 N. D. 380, 104 N. W. 845, the rule was laid down that, before a deed executed by a person while in a state of intoxication would be set aside on that ground, it must be shown that the grantor was so intoxicated as to be incapable of understanding the nature and effect of the transaction. In that case the following rule as laid down in 17 American and English Encyclopedia of Law, page 401, was adopted: "Where a person seeks to avoid responsibility for a contract on the ground of intoxication alone, it must appear that the drunkenness was so excessive that he was utterly deprived of the use of his reason and understanding, and was altogether incapable of knowing the effect of what he was doing. Any degree of intoxication which falls short of this will furnish no ground for release, in the absence of fraud on the part of the other contracting party." Tested by this rule, we deem it clearly shown that the plaintiff was competent to execute the papers, and did fully understand their legal character and effect.

There is no claim of fraud or imposition against the defendant. The evidence is conflicting as to the value of the land and as to the value of the lots. The plaintiff claims that the lots are worth more than five hundred dollars—the price agreed upon by him in the trade—and that the land is worth less than the price fixed. The trial court found the lots to be of the value of three hundred dollars and the land of the value of seventeen hundred dollars. These findings are sustained by the evidence, and accord with our conclusions as to the value of the property after a careful perusal of the evidence.

The trial court ordered the costs and disbursements of the action to be taxed in favor of the defendant, and an attorney's fee of seventy-five dollars was ordered taxed against the plaintiff in addition to the costs and disbursements. This was error. There is no provision in the <sup>608</sup> statute authorizing the taxation of an attorney's fee in a case of this kind. Under section 7179, Revised Codes of 1905, the costs might have been taxed against the plaintiff in the discretion of the court. This identical question has been recently decided by this court in *Engholm v. Ekrem*, 18 N. D. 185, 119 N. W. 35.

The judgment will be ordered modified by striking therefrom the seventy-five dollars allowed as attorney's fees, and, as modified, the judgment is affirmed, with costs against the appellant.

All concur.

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*Contracts of Intoxicated Persons* are discussed in the subject of a note to *Cameron-Barkley Co. v. Thornton etc. Co.*, 107 Am. St. Rep. 536, wherein is shown the degree of drunkenness which will afford ground for avoiding a contract.

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## STATE v. SCHOOL DISTRICT No. 50.

[18 N. D. 616, 120 N. W. 555.]

**APPEAL—Specification of Error.**—When the Settled Statement of case in an action properly triable to a jury contains no proper specifications of errors as required by Revised Codes of 1905, section 7058, the same must be disregarded by this court, as said section expressly provides that: "If no such specification is made, the statement shall be disregarded on motion for a new trial, and on appeal." No proper specification being found in the settled statement in this case, this court is restricted to a review of such errors, if any, as appear upon the face of the judgment-roll proper. (p. 789.)

**SCHOOL BONDS—When Void.**—The Municipal Bonds of defendant school district which are sued upon in this case were issued without first submitting to the electors of the school district the question of their issuance, and, furthermore, the school district had no power to issue the same by the express provisions of the act under which it is claimed they were issued as there were not twenty-five legal votes cast in such district at the preceding annual school election therein. Chapter 11, page 39, Laws of 1887, under which plaintiff contends such bonds were issued, is printed upon the back of the bonds, and section 9 thereof expressly provides that the question of refunding prior indebtedness shall be first submitted to a vote of the qualified electors of the district after giving certain notice therein prescribed of an election for such purpose, and that the proposition to issue such bonds must receive the affirmative votes of at least two-thirds of all the votes cast; also, that no school district in which less than twenty-five legal votes were cast at the annual school election next preceding the issuance of such bonds shall avail itself of the provisions of this act. Held, for these reasons, that such bonds are void. (pp. 790, 791.)

**SCHOOL BONDS—Recitals—Estoppel—Innocent Purchaser.**—The bonds in suit contain a recital to the effect that they are issued for the purpose of refunding present indebtedness "as authorized by act of the legislative assembly approved March 11, 1887" (Laws 1887, p. 39, c. 11), entitled "An act to provide for refunding the outstanding indebtedness which existed prior to July 30, 1886, of any incorporated board of education or school district in the territory of Dakota." Held, that such recital does not estop the school district from urging the defense, even as against an innocent purchaser, that such bonds were illegally issued. (pp. 791-793.)

**MUNICIPAL BONDS—Recitals—Estoppel—Bona Fide Purchasers.**—Every purchaser of municipal bonds acquires and holds them charged with full notice of the possession, or absence, of power in the first instance on the part of the public corporation to issue them; and the question of the authority of a public corporation to issue negotiable bonds cannot be concluded by mere recitals, even as against innocent purchasers thereof. (pp. 791-793.)

**SCHOOL BONDS—Authority to Issue—Submission to Voters.** The school district possessed no implied authority to issue such bonds on account of the fact that they were refunding bonds and issued in lieu of presumably valid obligations of the district, because by the express provisions of section 9 aforesaid, their issuance was prohibited because of the fact that less than twenty-five legal votes were cast at the preceding annual school election. (p. 793.)

(Syllabi by the court.)

T. F. McCue, attorney general, and Andrew Miller, assistant attorney general, for the state.

Turner & Wright, for the respondent.

¶18 FISK, J. This litigation arose in the district court of Barnes county, and plaintiff's cause of action is based upon thirteen alleged negotiable bonds claimed to have been issued by defendant school district on June 28, 1892, aggregating the sum of five thousand seven hundred dollars, payable to one Miller, or bearer, and purchased before maturity for value by plaintiff, which bonds it is claimed, were issued in accordance with the provisions of an act of the legislative assembly of the territory of Dakota, approved March 11, 1887 (Laws 1887, p. 39, c. 11), entitled "An act to provide for the refunding of the outstanding indebtedness which existed prior to July 30, 1886, for any incorporated board of education or school district in the territory of Dakota," a copy of such act being printed on the back of such bonds. Among other defenses relied upon, defendant denies that the alleged bonds were issued to refund outstanding indebtedness ¶19 of the defendant, and alleges that they were signed by the president of the defendant, and by another person pretending to be the clerk thereof, fraudulently and unlawfully, and with no consideration whatever received by the defendant school district therefor. The answer further alleges that no election was had for the purpose of determining the question of the issuance of said bonds, and that the same were signed and delivered without the authority either of the voters of the district as expressed at an election or by resolution or other expression of the board of directors of the district, and it is further alleged by defendant that it was wholly without authority to issue said bonds for the reason that at the annual school election next preceding the pretended issuance thereof less than twenty-five legal votes were cast. A jury was waived, and, at the close of the testimony, the trial court, among other things, found as a fact the following: "That each of said

bonds purports on its face to have been issued by School District No. 50, Barnes county, state of North Dakota, for the purpose of redeeming present indebtedness as authorized by act of the legislative assembly approved March 18, 1887, entitled 'An act to provide for refunding the outstanding indebtedness which existed prior to July 30, 1886, of any incorporated board of education or school district in the territory of Dakota.' That a copy of said act is printed in full on the back of each of said bonds. The court further finds as a matter of fact that at the time of the purported execution of the bonds, to wit, on January 28, 1892, James E. Walks, who signed his name to said bonds as clerk of the defendant, did not reside within the territorial limits of the defendant, and did not at any time, either before or subsequent to that date, reside within the territorial limits of the defendant school district. . . . The court further finds that the question of issuing said bonds or of refunding the then existing indebtedness of the defendant school district, if any, was never submitted to a vote of the qualified electors of said school district. The court finds that less than twenty-five legal votes were cast at the annual school election next preceding the issuance of said bonds, and that less than twenty-five legal votes were cast at every school election held in said school district prior to the twenty-eighth day of January, 1892."

The trial court also made conclusions of law as follows:

620 "(1) The court holds as a matter of law that the above-named James E. Walks was not the clerk of the defendant nor authorized to act as such at the time of the purported issuance of said bonds, nor at any time theretofore or thereafter.

"(2) That said bonds are wholly void as against the defendant upon the ground that the question of their issuance or of refunding the indebtedness of the district was not submitted to a vote of the qualified electors, and upon the further ground that the said school district was wholly without authority to issue said bonds in any event because of the fact that less than twenty-five legal votes were cast at the preceding annual election held therein."

Pursuant to such findings and conclusions judgment was ordered and entered in defendant's favor dismissing the action and for costs. In due time a statement of case was settled and a motion for a new trial was made and denied, and this appeal is from the judgment and also from the order denying such motion.

In disposing of this appeal, we are not at liberty to review any alleged error, unless it appears upon the face of the judgment-roll proper. The statement of the case as settled contains no proper specification of errors of law occurring at the trial nor of the particulars in which it is claimed that the evidence is sufficient to sustain the findings. That such omission

is fatal has repeatedly been held by this court. The statute (Rev. Codes 1905, sec. 7058) is explicit in requiring such specification of particulars to be incorporated in the statement, and that, "if no such specification is made, the statement shall be disregarded on motion for a new trial and on appeal." Furthermore, the notice of intention to move for a new trial contains no designation of the statutory grounds upon which the same will be made as required by section 7065, Revised Codes of 1905, and this omission is also fatal, and precludes us from examining the evidence.

From a careful examination of the judgment-roll proper we fail to discover any reversible error therein. By the findings of the trial court, which must be accepted as final, such bonds had printed thereon the act in full under which it was claimed they were authorized to be issued as aforesaid. By section 9 of the act it is expressly provided that the question of refunding prior indebtedness shall be first submitted to a vote of the qualified electors of the district after giving certain notice therein prescribed of an election for such purpose, and that the proposition to issue such bonds must <sup>621</sup> receive the affirmative votes of at least two-thirds of all the votes cast. It is also expressly provided in said section that no school district in which less than twenty-five legal votes were cast at the annual school election next preceding the election therein provided for shall avail itself of the provisions of such act. Turning to the trial court's findings it appears that the question of issuing such bonds was never submitted to a vote of the electors of the district, and it further appears therefrom that less than twenty-five legal votes were cast at the annual school election next preceding the issuance of such bonds. The conclusion inevitably follows, therefore, that such bonds were issued in direct violation of the act under which it is claimed they were issued, and hence they are null and void, and no recovery can be had thereon unless the plaintiff can successfully invoke the doctrine of estoppel as against the defendant. Appellant's counsel contend that plaintiff, as an innocent purchaser, had a right in purchasing such bonds to rely upon the presumption that all the conditions precedent to the issuance of bonds had been done and performed, and that defendant is estopped by the recitals in the bonds to urge their invalidity. The fallacy of such contention is laid bare by an examination of the facts as found by the lower court, from which it appears that no recitals are contained in the bonds upon which an estoppel can be predicated. The only recital contained in the bond is, in effect, that they are issued for the purpose of refunding present indebtedness as authorized by the act therein referred to. There is no recital of any acts nor is the recital equivalent to a statement that such bonds are issued "in accordance with" or "in conformity to" or "in



pursuance of'' the act therein referred to. Regarding a similar case the supreme court of the United States in upholding a defense similar to the one here urged said: "We do not think the plaintiff in error is precluded from raising this question by any recitals in the bonds. They contain no statement of any election called or held, or of the vote by which the issue of such bonds was authorized. They do not embody even a general statement that the bonds were issued in pursuance of the statutes referred to. The utmost effect that can be given to them is that of a statement that a subscription to the capital stock of the railroad company was authorized by the statutes mentioned, and that the sum mentioned in the bonds was part of it. They serve simply to point out the particular laws under which the transaction may lawfully have taken place. They say <sup>622</sup> nothing whatever as to any compliance with the requirements of the statute in respect to which the board of supervisors were authorized and appointed to determine and certify. They do not, therefore, within the rule of decision, acted on by this court, constitute an estoppel which prevents inquiry into the alleged invalidity of the bonds." The same court in a later case, in commenting upon the prior case of *Knox County v. Aspinwall*, 21 How. 539, 16 L. ed. 208, relied on by appellants' counsel in the case at bar, took occasion to say: "In the first case dealing with this question (*Knox County v. Aspinwall*) it was said that a purchaser of such bonds had the right to assume that the conditions of their issue had been complied with merely from the facts of the subscription and issue. But in this case there was a recital, and subsequent cases have limited the adjudication to the precise point necessarily decided: *Citizens' Sav. etc. Assn. v. Perry County*, 156 U. S. 692, 15 Sup. Ct. Rep. 547, 39 L. ed. 585"; *Quinlan v. Green County*, 205 U. S. 410, 27 Sup. Ct. Rep. 505, 51 L. ed. 860.

The general, and we believe the correct, rule regarding the binding effect of recitals in bonds is well stated in 1 Abbott's *Municipal Corporations*, section 209, as follows: "The doctrine as applied to recitals is substantially this: That where legislative authority has been given a public corporation or its officials the power to issue bonds upon the performance of some precedent condition, such as a particular manner of holding an election or the existence of some fact, and where it may be gathered from the legislative enactment that certain officials of the corporation are invested with the power to decide whether the conditions precedent have been complied with or such acts existed, their recitals or statement in the bonds issued by them that they have been so complied with, or that certain conditions exist, is conclusive of the fact and binding upon the corporation; for, as said by the supreme court of the United States: 'The recital is itself a decision of the fact by

the appointed tribunal.' Such a recital or decision, as it is termed, is conclusive upon the corporation as to bonds in the hands of a bona fide holder, who, it is held, as to such matters is not bound to look for further evidence of a compliance with the conditions of issue. The recitals or statements work no estoppel, however, except when made by those officials or that tribunal either as specially designated or having the general power to perform such acts. If not made by those having authority to decide and assert the facts <sup>623</sup> which constitute the conditions precedent to a legal issue of bonds, the recitals will not be accepted as a substitute for proof." In the following three sections the same author says: "The principle of estoppel does not apply, however, to recitals of authority, for in this respect it is held every purchaser of bonds acquires and holds them charged with full knowledge of the possession of power in the first instance on the part of the public corporation to issue them. The question of legislative authority in a public corporation to issue negotiable bonds cannot be concluded by mere recitals, even when the bonds have come into the hands of bona fide holders for value. The doctrine of recitals . . . has never been carried to the extreme of holding that such officials can by their recitals or decisions create a power on the part of the public corporation to issue bonds where none existed. . . . Where negotiable bonds are issued containing no recitals of authority, it is quite generally held that they are not unimpeachable in the hands of the bona fide holders." In speaking upon this question in *Flagg v. School District*, 4 N. D. 30, 58 N. W. 499, 25 L. R. A. 363, Judge Corliss, among other things, said: "Some cases appear to hold that a mere recital that the bond was issued in pursuance of a particular statute is a sufficient recital of performance of all the conditions precedent prescribed by the statute: See *Bernard's Tp. v. Morrison*, 133 U. S. 523, 10 Sup. Ct. Rep. 333, 33 L. ed. 726; *Montclair v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. Rep. 391, 27 L. ed. 431; *Knox Co. v. Aspinwall*, 21 How. 539, 16 L. ed. 208. We used language in *Coler v. School Tp.*, 3 N. D. 249, 55 N. W. 587, 28 L. R. A. 649, indicating that such a recital would be sufficient to estop the municipality. What was said there was not necessary to the decision of the case, and the writer of this opinion in fact intended to say that a recital that the bond was issued in conformity with a particular statute would be a sufficient recital that all the terms of the statute had been complied with, so far as the officer making the statement had power to pass upon such questions. It might with much force be urged that a bare recital that the bond was issued in pursuance of a particular act would constitute no more than a mere reference to the law under which the bond was issued, and not a declaration that the terms of that law had been complied with. If



such construction were to be placed upon these conditions, there would be nothing to estop the municipality, except the mere <sup>624</sup> fact of issuing the bonds. This is not sufficient to render the municipality liable against proof that the conditions of the statute have not been complied with"; citing *Lake Co. v. Graham*, 130 U. S. 674, 9 Sup. Ct. Rep. 654, 32 L. ed. 1065; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 138; *Carroll County v. Smith*, 111 U. S. 556, 4 Sup. Ct. Rep. 539, 28 L. ed. 517; *Marsh v. Fulton County*, 10 Wall. 676, 19 L. ed. 1040. Tested by the foregoing rules, it is entirely clear that the recital in the bonds in the case at bar is insufficient upon which to predicate an estoppel against the school district. Not only is this true, but under the statute under which the bonds are claimed to have been issued there was no power in the district to issue the same; hence no recital of its officers could operate to estop the district from urging such defense. "There can be no estoppel by conduct or ratification where there is a want of power": 6 Current Law, 712, citing *Wichman v. Placerville*, 147 Cal. 162, 81 Pac. 537.

Respondent's counsel, in their printed brief, contend that chapter 11, page 39, Laws of 1887, was not in force at the date of the issuance of these bonds, as the same was impliedly repealed by chapter 62, page 177, Laws of 1890, and that under the latter act the bonds were clearly illegal under the decision of this court in case of *Flagg v. School District*, 4 N. D. 30, 58 N. W. 499, 25 L. R. A. 363, as well as numerous other authorities cited by them. It is unnecessary for us to determine this question in view of the conclusions above reached. If the act of 1890 aforesaid was in force, the bonds were clearly void, even in the hands of an innocent purchaser, as no election was held for the purpose of submitting to the electors of the district the question of the issuance thereof, and no certificate of the county auditor was placed upon the back of such bonds as required by said statute. On the oral argument counsel for appellant contended that notwithstanding the fact that defendant district was without power to issue the bonds in suit, yet having, presumably with authority, issued the original bonds, it had implied authority independent of any statute authorizing their issuance to issue refunding bonds in lieu of the original ones. The trouble with this argument is that it runs counter to the express provisions of the statute, which, in effect, prohibited the defendant district from issuing such refunding bonds for the reason that there were not twenty-five legal votes cast in said district at the preceding election therein. In the face of this express statutory inhibition, <sup>625</sup> there could be no implied authority for the issuance of said bonds.

It follows from what we have above said the judgment and order appealed from must be affirmed.

All concur.

*Municipal Bonds and Defenses Thereto* are considered in the note to *De Voss v. City of Richmond*, 98 Am. Dec. 664, showing all the essentials to a valid municipal bond. If a municipality is already indebted on valid obligations, it may take measures to refund such indebtedness: Note to *Beard v. City of Hopkinsville*, 44 Am. St. Rep. 240. Want of power is always a defense to an action upon municipal bonds: Note to *De Voss v. City of Richmond*, 98 Am. Dec. 686.

*Municipal Bonds Issued Without Prior Valid Election are Void*, where such election is a condition precedent to their issuance: Note to *Jones v. City of Camden*, 51 Am. St. Rep. 844, 845.

*Municipal Bonds in the Hands of Bona Fide Holders* is the subject of discussion in the note to *Jones v. City of Camden*, 51 Am. St. Rep. 822. See, also, *Gibbs v. School District*, 88 Mich. 334, 26 Am. St. Rep. 295; *Greene v. Village of Rienzi*, 87 Miss. 463, 112 Am. St. Rep. 449.

*The Effect of Recitals in Municipal Bonds* is shown in the notes to *De Voss v. City of Richmond*, 98 Am. Dec. 684; *Beard v. City of Hopkinsville*, 44 Am. St. Rep. 242; *Jones v. City of Camden*, 51 Am. St. Rep. 835.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**OKLAHOMA.**

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**GOLDSBOROUGH v. HEWITT.**

[23 Okl. 66, 99 Pac. 907.]

**HOMESTEAD.**—The Separate Deed of a Married Man, the head of a family, to the homestead, is void. (p. 796.)

**DIVORCE**—Homestead not Disposed of by Decree.—In a divorce proceeding it is competent for the court, in the decree, to set aside the homestead to either party; but where the same makes no disposition thereof, the homestead remains to the husband, as the head of the family, discharged of all homestead rights or claims of the other party. (p. 797.)

**RES JUDICATA.**—A Judgment Sustaining a Demurrer for misjoinder of causes of action is not available to establish the plea of res judicata. (p. 802.)

(Syllabi by the court.)

Spencer E. Sanders and F. W. Jacobs, for the plaintiffs in error.

W. A. McCartney and Lee M. Gray, for the defendant in error.

**67 TURNER, J.** On March 23, 1904, William H. Goldsborough and Louisa Caldwell, plaintiffs in error, plaintiffs below, brought suit against Robert Hewitt, defendant in error, defendant below, in the district court of Kingfisher county, Oklahoma Territory, and for cause of action, in substance, stated that on and for some time after February 18, 1897, they were husband and wife; that as such at that time they had living with them, and still have, three children born of said marriage; that they were the owners in fee and in possession of a certain tract of land in said county, occupied and acquired by them as their homestead in compliance with the homestead laws of the United States and the territory of Oklahoma; that in March, 1896, the plaintiff Louisa Caldwell, then Goldsborough, took the youngest child and left the territory  
(795),

on business, with intent to return, leaving her then husband, William H. Goldsborough, and the two other children living on their said homestead; that during her absence said William H. Goldsborough, on February 18, 1897, without her knowledge or consent, and without consideration, executed to defendant a quitclaim deed to said homestead, and put him in possession thereof, which he has since retained and refuses to surrender on demand; that there is due plaintiffs for the use and occupation thereof two thousand one hundred dollars, for which they pray judgment, and that said deed be set aside, and for costs. On December 1, 1905, an amended answer was filed, which was in effect, a general denial and a plea of *res adjudicata* as to William H. Goldsborough. On February 19, 1906, plaintiff filed a general denial by way of reply, a jury was waived and the cause went to trial to the court. There was judgment for defendant, and, after motion for a new trial filed and overruled, plaintiffs prosecuted the cause by petition in error and case-made to the supreme court of the territory of Oklahoma, and the same is now before us for review by virtue of the terms of the enabling act (Act June 16, 1906, c. 3335, 34 Stat. 267).

<sup>68</sup> The only assignment of error necessary for us to consider is that the judgment is not supported by the evidence and is contrary to law.

The facts are undisputed. They are: That in March, 1896, plaintiffs were living as husband and wife on their homestead in Kingfisher county; that there were living with them their three children; that about that time the plaintiff, then Louisa Goldsborough, now Louisa Caldwell, took the youngest child and went to Kansas to secure employment; that while gone, without her knowledge, consent or joinder, and without consideration, to wit, on February 18, 1897, her coplaintiff, then her husband, made, executed and delivered to defendant a quitclaim deed to their said homestead, and put him in possession, which he has since retained.

At that time the law provided (Okl. Stats. 1893, sec. 2844): "The following property shall be reserved to the head of every family residing in the territory exempt from attachment or execution, and every other species of forced sale for the payment of debts, except as hereinafter provided: First, the homestead of the family."

<sup>69</sup> Section 1627: "All instruments conveying or affecting the title to the homestead exempted by law to the head of a family, shall be void unless the husband and wife sign and acknowledge one and the same joint instrument conveying the same."

This conveyance was therefore void: *Hall v. Powell*, 8 Okl. 276, 57 Pac. 168; *Moore v. Reaves*, 15 Kan. 150; *Chambers v. Cox*, 23 Kan. 393; *Ott v. Sprague*, 27 Kan. 620; *Hill v. Alexander*, 2 Kan. App. 251, 41 Pac. 1066; *Locke v. Redmond*,

6 Kan. App. 76, 49 Pac. 670; Schermerhorn v. Mahaffie, 34 Kan. 108, 8 Pac. 199.

In *Chambers v. Cox*, 23 Kan. 393, Brewer, J., speaking for the court, said: "The separate deed of a married man to the homestead is void; it does not divest him of title, nor estop him from recovering the land. The question is not, who will inherit from him, but, has his title been divested? And the constitution says that his title to the homestead shall not pass unless his wife joins in the deed. While the legislature may regulate the matter of inheritance, it cannot avoid or limit the constitutional provision for the protection of homesteads. The constitution forbids the alienation without the joint consent of husband and wife. It does not add, 'providing they are living together and occupying the homestead,' nor, 'providing that both are residents of the state'; but the prohibition against separate alienation is absolute, when the relation of husband and wife exists."

This would seem to be conclusive of the question, and would be were it not contended in support of the judgment that Louisa Caldwell, being divorced from William H. Goldsborough, has no interest in the subject matter of this suit, and the alleged rights of William H. Goldsborough to the land in controversy have heretofore been decided by the court adversely to him in the case of *William H. Goldsborough v. Robert Hewitt*, and are, therefore, *res adjudicata*.

We think the first point well taken. The undisputed facts are, in addition to those already stated, that after making the 70<sup>th</sup> deed to defendant, and while his wife was gone, as stated, William H. Goldsborough brought suit for divorce against her by publication, on July 12, 1897, and obtained a decree, October 30, 1897, while she was still absent from the territory. At the time of the rendition of that decree, the chancellor, undoubtedly, had the right, under Wilson's Revised and Annotated Statutes of Oklahoma of 1893, section 4839, to set aside the homestead to either plaintiff or defendant; but the decree being silent on the subject, we are constrained to hold that she retained no right therein, but that the same remained in the husband. In *Brandon v. Brandon*, 14 Kan. 342, Brewer, J., in speaking of the power of the chancellor in the premises, under Laws of 1870, page 180, chapter 87, section 27, which confers power similar to those conferred by section 4839, *supra*, said: "In so far as it is a homestead, it is the homestead of each, and upon a divorce the court has the power to assign it to either. The statute expressly gives the court the power in case of a divorce, whether granted for the fault of the wife, or the husband, to give to her such share of her husband's real or personal estate as shall be just and reasonable." See, also, *Blankenship v. Blankenship*, 19 Kan. 159.

That she retained no right to the homestead is by reason of the fact that the statute expressly reserves it to the head of the family, which was William H. Goldsborough. By the decree she ceased to be a member of the family the same as if dead, and thereby lost all claim upon or right to it as a homestead. A citation of authority would seem unnecessary in support of this position, but it has a number of times been so expressly held.

In *Burns v. Lewis*, 86 Ga. 591, 13 S. E. 123, the court said: "That the dissolution of the marriage severed Mrs. Lewis from the family, and she was no longer a beneficiary of the homestead. But by the constitution of 1868, her husband, as the head of a family, had the right to a homestead, of which the sole beneficiaries were the members of his family: Code 1873, sec. 5135. . . . A total divorce severs the wife from the family as effectually as death itself. She ceases to be a beneficiary of the homestead provision, and her relation to it thenceforth is the same as if she had never been a member of the family. The provision <sup>71</sup> which the law contemplates for a divorced wife is alimony, or such an interest in the property as the jury rendering the final verdict shall award to her. In this instance, the jury thought proper to declare in express terms that no alimony was to be set apart for her support. We have already seen that the effect of this was to leave the title to the property now in question in Lewis. If her interest in it as a homestead was destroyed by the dissolution of the marriage, and the verdict conferred upon her no new interest, she was left altogether without right to use or occupy the premises, and consequently, when Lewis brought his action against her in 1874, both title and the right of possession were in him."

In *Rosholt v. Mehus*, 3 N. D. 513, 57 N. W. 783, 23 L. R. A. 239, numerous authorities are cited in support of this position. In that case, section 2 of the syllabus reads: "In divorce proceedings, it is competent for the court to assign the homestead to the innocent party, either absolutely or for a limited period; but where the decree in the divorce proceedings is silent upon the question, the homestead will, upon the dissolution of the marriage, remain in possession of the party holding the legal title thereto, discharged of all homestead rights or claims of the other party."

In *Stahl v. Stahl*, 114 Ill. 375, 2 N. E. 160, the first section of the syllabus reads: "Where a wife procures a divorce from her husband, the court is authorized to make disposition as to the homestead; but if the court fails to do this, the relation of husband and wife being severed by the decree of divorce, the latter loses all claim to a homestead, so that the husband may sell the premises without her release of homestead right." See, also, *Heaton v. Sawyer*, 60 Vt. 495, 15 Atl.

166; Redfern v. Redfern, 38 Ill. 509; Wiggin v. Buzzell, 58 N. H. 329.

In Brady v. Kreuger, 8 S. D. 464, 59 Am. St. Rep. 771, 66 N. W. 1083, Kipp and Overby on April 11, 1893, were partners in business as Kipp & Overby. Kipp and his family and Overby occupied the second story of the business building as a residence. On that date Overby conveyed his interest in the real and personal property of the partnership to Brady, and the business continued to be carried on under the firm name of <sup>72</sup>Kipp & Overby until November, 1893, when Brady bought Kipp's interest in the partnership property. At the time Kipp sold his interest to Brady, Kipp and his family still occupied the second story of the store building, but the deed to the real property was not signed by Mrs. Kipp. In December, 1893, a decree of divorce was granted dissolving the marriage between Mr. and Mrs. Kipp; but she continued to occupy the second story as aforesaid until March, 1894, when she went on a visit and put defendant Kreuger in possession of the rooms to occupy them for her, which he was doing at the time the action of ejectment commenced. At the close of the evidence, the court directed a verdict in favor of plaintiff, and from the judgment entered thereon defendants appealed. Mrs. Kipp sought to set up a homestead in the property conveyed by her husband without her joinder, but the supreme court, in affirming the judgment of the lower court, held that she was not entitled to a homestead therein. The supreme court affirmed the judgment of the lower court, and, in passing, said:

“There is, however, another and perhaps more satisfactory ground upon which the ruling of the court can be sustained, and that is that the defendant Minnie Nidrow, formerly Minnie Kipp, having been divorced from her husband in the fall of 1893, ceased to have any right to the occupancy of the homestead property, admitting that there could have been such a right in copartnership property, after she ceased to be the wife of Kipp, who had the legal title to the property at the time he transferred the same to the plaintiff. The only evidence of the divorce was the admission of Minnie Nidrow, when on the witness-stand as a witness. She stated in December, 1893, there were divorce proceedings between her and her husband, and that a divorce was granted, and that her name was Minnie Nidrow, but was formerly Minnie Kipp. This evidence was admitted without objection and prima facie established the divorce; and, as her evidence was not controverted or disputed, we must assume that a divorce was properly granted. Appellants contend that this court will presume, in the absence of evidence to the contrary, that the decree gave her the right to retain possession of the homestead. But this we cannot do.



“Courts will sometimes indulge in presumptions to support <sup>73</sup> a judgment of a court, but never to reverse it. In the absence, therefore, of any proof as to the contents of the decree of divorce, we cannot presume it contained anything favorable to the defendants. The relation of husband and wife having terminated, the wife ceased to have any claim upon or right in the husband's property, whether homestead or otherwise, unless such rights were preserved by the decree of the court. If the decree of the court preserved her rights to the homestead, or conferred upon her any other privileges in, or interest in or to, the property of the husband, the burden was upon her to establish such rights by the decree, as she clearly would have no right to the possession of the homestead after a decree of divorce had been granted, unless saved by the decree.

“ . . . . As the wife, upon a dissolution of the marriage, ceases to be the wife, and can never be the widow of her divorced husband, her claims upon his property, necessarily, also cease and terminate upon the divorce: *Rosholt v. Mehus*, 3 N. D. 513, 57 N. W. 783, 23 L. R. A. 239. It was undoubtedly for these reasons that the legislature of this state has conferred upon the courts in which a decree of divorce may be obtained such comprehensive powers for regulating the rights of the wife in the property of the husband: *Comp. Laws*, secs. 2581–2585. The rights of the wife, therefore, in her husband's estate, after a divorce is granted, are regulated and determined exclusively by the provision of the decree of divorce, unless there is some valid contract between the husband and wife. When a wife, after the divorce, seeks to assert any claim to any part of the husband's property, homestead or otherwise, she must establish that right by the decree, or by a valid contract between herself and husband. In the case at bar, the defendant failed to show any such right. Neither Mrs. Kipp nor Kreuger presented any valid defense to plaintiff's claim for the possession of the property, and hence the plaintiff was entitled to a verdict as a matter of law. . . . . A conveyance of the homestead, not executed by both husband and wife, the statutes declare shall be of no validity: *Comp. Laws*, sec. 2451, amended by *Laws 1891*, cc. 76, 77, pp. 190, 191.”

We are therefore of the opinion that Louisa Caldwell had no interest in the subject matter of this suit, and that the court did not err in so holding.

But are the rights of William H. Goldsborough *res adjudicata*? <sup>74</sup> The trial court, in effect, thus held, but therein we think was error. The testimony discloses that before bringing this suit, to wit, on December 29, 1903, Goldsborough brought suit against defendant in the district court of Kingfisher county, and in the first count of his petition declared



in ejectment for the land in controversy and for damages, and for rents and profits, and in the second count embodied the allegations in the first count, and further, in substance, stated that at the time he made the quitclaim deed aforesaid he was the owner of the property, the same being his homestead by virtue of a homestead title, under patent from the United States; that said deed was procured from him by defendant through fraud; that at the time he had pending a divorce suit against his wife; that in order to keep her from having any of said property, and that the same might inure to himself and children, he made said deed to defendant in trust with the understanding and agreement that the same should be reconveyed to him when the matters in litigation in that suit were fully settled; that the same were settled; that he had made demand on defendant for said reconveyance; that he had refused to do so; that the quitclaim deed and possession given defendant thereunder were without consideration; and prayed, in effect, that the title of the land be revested in him by decree of the court, and for two thousand dollars for mesne profits and for general relief, thereby attempting to join two different classes of action, contrary to Wilson's Revised and Annotated Statutes of Oklahoma of 1903, section 4287, subsections 6, 7. The evidence further discloses that to this petition defendant demurred, upon the ground that it failed to state facts sufficient to constitute a cause of action, and upon the further ground that there was a misjoinder of causes of action; that it was sustained by the court, and the petition dismissed.

It is well settled that, where a demurrer runs to the merits of the case, the judgment of the court sustaining it and dismissing the bill is a judgment upon the merits of the controversy, and is a bar to any subsequent suit between the said parties upon the same cause of action: *Brown v. Kirkbride*, 19 Kan. 588; *Am. 7<sup>th</sup> & Eng. Ency. of Law*, 2d ed., 789. But the demurrer did not run to, nor did the court in passing upon it decide upon, the merits of the case. The demurrer was general and to the petition as a whole, and stated two grounds—misjoinder of actions, and failure to state facts sufficient to constitute a cause of action. As the record fails to disclose upon which of these grounds it was sustained, and as we cannot presume error, we are forced to conclude that it was sustained upon the ground of misjoinder of causes, as that was the only proper ground upon which it could have been sustained. We say this for the reason that, as the first count stated a good cause of action in ejectment, the court would have erred in sustaining upon the second ground, for the reason that a general demurrer to the whole petition should be overruled where the petition contains a statement of

two causes of action, one of which is good: *Hanenkratt v. Hamil*, 10 Okl. 219, 61 Pac. 1050.

The record further discloses that after sustaining the demurrer generally, the court "further finds that the said cause is without equity, and said petition is therefore dismissed." This the court had no right to do. No ground whatever existed at that time for dismissing the petition. Upon sustaining the demurrer, the court should have permitted plaintiff to separate his causes of action, pursuant to section 92 of chapter 66 of the Code of Civil Procedure (Okl. Stats. 1893), which reads: "When a demurrer is sustained, on the ground of misjoinder of several causes of action, the court, on motion of the plaintiff, shall allow him, with or without costs, in its discretion, to file several petitions, each including such of said causes of action as might have been joined; and an action shall be docketed for each of said petitions, and the same shall be proceeded in without further service."

Failing in which, the court would then, and not till then, have, and only for that reason, the right to dismiss the petition. For the reason that we do not regard this summary and wrongful dismissal, nor the sustaining of the demurrer for misjoinder of causes, an adjudication on the merits, the judgment of the court <sup>76</sup> in that cause cannot be successfully invoked to establish the plea of *res judicata*. 24 American and English Encyclopedia of Law, 798, says: "A judgment upon a demurrer, which is based upon a formal or technical defect of pleading, a lack of jurisdiction, a misjoinder of parties, or the like, as it does not involve the merits of the controversy, cannot be made available as *res judicata*."

We are therefore of the opinion that the judgment of the trial court is not sustained by the evidence, and is contrary to law, and for that reason the cause is reversed and remanded for a new trial.

Williams, C. J., and Dunn and Hayes, JJ., concur; Kane, J., disqualified.

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*Conveyance by the Husband Alone of a Homestead is Usually Held Void*: *Gillam v. Wright*, 246 Ill. 398, ante, p. 243, and cases cited in the cross-reference note thereto. The effect of a conveyance or encumbrance of the homestead by one only of the spouses is the subject of a note to *Jerdee v. Furbush*, 95 Am. St. Rep. 909.

*Division of Property in Divorce Cases*.—Under a statute authorizing a division of certain classes of property in divorce cases, the court has jurisdiction to determine what property belongs to the husband and to divide it between him and his wife: *Carnahan v. Carnahan*, 143 Mich. 390, 114 Am. St. Rep. 660. See, also, *Singer v. Singer*, 165 Ala. 144, ante, p. 19, and cases cited in the cross-reference note thereto.

*An Order Sustaining a Demurrer on the Merits is conclusive as res judicata*: *Dohs v. Holbert*, 103 Minn. 283, 123 Am. St. Rep. 329.

**McNINCH v. NORTHWEST THRESHER COMPANY.**

[23 Okl. 386, 100 Pac. 524.]

**EVIDENCE—Parol Affecting Writing.**—The execution of a contract in writing supersedes all the oral negotiations or stipulations concerning its terms and subject matter which preceded or accompanied the execution of the instrument, in the absence of accident, fraud, or mistake of fact; and any representation made prior to or contemporaneous with the execution of the written contract is inadmissible to contradict, change, or add to the terms plainly incorporated into and made a part of the written contract. (p. 805.)

**EVIDENCE—Parol Affecting Writing.**—Where by the terms of a written contract it is specifically stated that it is executed and delivered for and in consideration of the credit granted by one of the parties to a third person on the purchase price of certain machinery bought of said party by said third person, such provision in relation to the consideration binds the parties within the rules applicable to written contracts and can no more be altered or varied by oral evidence than any other part of the contract, in the absence of fraud, accident, or mistake. (pp. 806, 807.)

**CONTRACT—Signature Procured by Misrepresentation.**—If a party is induced to sign a contract by fraud, he can, of course, avoid it for that reason. It is, however, clear that merely falsely representing to a man in possession of his faculties and able to read that a writing embodies their verbal understanding is not the fraud the law means. (p. 808.)

**PLEADING—Motion to Strike Amended Answer.**—Where a motion to make an answer more definite and certain is sustained, and the amended answer measurably complies with the order of the court by making the answer more definite and certain in the particulars thereby required, it is error to sustain a motion to strike such amended answer from the files, although it may not state facts sufficient to constitute a defense. (pp. 809, 810.)

(Syllabi by the court.)

James L. Brown and Gustave A. Erixon, for the plaintiff in error.

M. D. Libby, for the defendant in error.

<sup>387</sup> KANE, C. J. This was an action commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, upon a certain written instrument, of which the following is a copy:

“\$150.00.

Piedmont, O. T., June 10, 1905.

“For value received, on or before the first day of August, 1905, I promise to pay to the order of Northwest Thresher Company, Stillwater, Minnesota, one hundred fifty dollars, at Piedmont State Bank, of Piedmont, O. T., with interest from maturity until fully paid at the rate of eight per cent per annum, interest payable annually. This note is executed and delivered by me to the Northwest Thresher Company, for and in consideration of the credit granted by said company, on the purchase price of threshing machinery bought of

said company by J. R. McClung of Piedmont, county of Canadian, territory of Okla.

“W. R. McNINCH.

“Witness: GEORGE GILL.

“MINNIE McNINCH.”

The defendant by his answer admitted the execution of the instrument and sought to justify nonpayment and nonliability by allegations of affirmative matter separated into two paragraphs or <sup>388</sup> defenses. To the first defense a general demurrer was interposed, and to the second a motion to make more definite and certain. Both the demurrer and motion were sustained, and the defendant took leave to amend. The amended answer admitted the execution of the instrument and amplified to some extent the defense as previously stated. A general demurrer was sustained to the first defense, and the plaintiff moved the court to strike the second from the files for failure to comply with the order to make more definite and certain, which was also sustained. The defendant elected to stand upon his pleadings as amended, and thereupon judgment was rendered in favor of the plaintiff, and the defendant seeks to review these rulings of the court below by petition in error.

The first defense set up in the amended answer was based upon two theories: (1) A failure of consideration other than that stipulated in the writing; and (2) that by fraud and mistake of fact the written agreement stipulates for a particular consideration which was not the true consideration and that the true consideration failed. This defense was stated in words and figures as follows:

“(1) This defendant alleges the fact to be that, at the time the said note was signed, this defendant was the owner of a certain growing wheat crop in Canadian county, and the plaintiff was then engaged in the business of selling threshing-machines and threshing outfits and engines. At the time said note was executed, plaintiff was seeking to sell one of their machines and outfits to one J. B. McClung, and the plaintiff was acting by one George Gill, in trying to sell said machine and outfit, and also in the matters hereinafter stated. (2) Plaintiff so acting by the said George Gill, who was then acting as the agent of the plaintiff, came to this defendant and verbally proffered to him, if he, this defendant, would agree to engage his threshing to them for that season, the plaintiff would sell one of its machines to the said McClung, and that they would do the threshing of the defendant that year for the usual price therefor, and that one-half of the proceeds of said threshing should be given to the plaintiff for the estimate value of said work, and the other half should be by the defendant paid to McClung, and that this defendant should execute <sup>389</sup> his note to plaintiff in advance for one-

half of the value of said threshing so estimated. This defendant accepted said offer, and agreed thereto, and the plaintiff, acting by said Gill, agreed to the same. (3) Thereupon the said Gill produced the blank form on which said note was signed and filled out the same; but by fraud on his part, and by accident and oversight of this defendant and by his mistake, and by the intentional fraud of the said Gill, the consideration named in said note was not erased from said blank, and the true consideration inserted therein. (4) The words, 'the consideration for said note was credit extended to the said McClung,' are wholly untrue, and do not express the contract of the plaintiff and the defendant then and there made, and this wrong statement was so intentionally made by the said Gill, for the plaintiff, and with the fraudulent intent to then and there cheat and defraud this defendant, by getting from him a note on the false pretended consideration that it was being executed and given in consideration of credit being extended to the said McClung by the said plaintiff, and he deceiving the defendant and not expressing in said note the true consideration therefor, and by getting from him a written expression and declaration of the consideration for said note, to the end that a false consideration might appear in said writing, and that the plaintiff might thereby stop the defendant from proving the real and true facts and true consideration for said note. (5) That this defendant by mistake did not discover that the consideration was so wrongly stated in said note, but, relying on the verbal contract before set out, and by reason thereof, signed said note. (6) That this defendant was deceived in said manner into signing said note. (7) And the only consideration for his so signing said note was the verbal consideration and promise of the plaintiff that the said McClung should and would for plaintiff and for the said McClung so thresh the wheat of this defendant as aforesaid. (8) And by reason of said promise and verbal agreement this defendant signed said note. (9) And had he detected the fraud so being practiced on him at that time, and not made the mistake above set out, he would not have signed the said note. (10) Neither the plaintiff nor the said McClung threshed the wheat of defendant as agreed, or any part thereof, but wholly and entirely failed so to do, whereby the consideration for said note wholly and entirely failed."

We think the demurrer to this paragraph of the answer was properly sustained. The execution of a contract in writing supersedes <sup>290</sup> all the oral negotiations or stipulations concerning its terms and subject matter which preceded or accompanied the execution of the instrument, in the absence of accident, fraud, or mistake of facts; and any representation made prior to or contemporaneous with the execution of the written contract is inadmissible to contradict, change, or

add to the terms plainly incorporated into and made a part of the written contract: Liverpool etc. Ins. Co. v. T. M. Richardson Lumber Co., 11 Okl. 579, 69 Pac. 936; Guthrie & W. R. Co. v. Rhodes, 19 Okl. 21, 91 Pac. 1119, 21 L. R. A., N. S., 490; Garrison v. Kress, 19 Okl. 433, 91 Pac. 1130. The answer of the defendants does not allege facts sufficient to constitute accident, fraud, or mistake of facts. Taking the answer in connection with defendant's brief, it is obvious that fraud on the part of the agent of the plaintiff was the defense upon which he relied in the court below. In the third paragraph of his first defense it is alleged that "Gill produced the blank form on which said note was signed and filled out the same." This is followed by the statement that "by the intentional fraud of the said Gill, the consideration named in said note was not erased from said blank, and the true consideration inserted therein." By "intentional fraud," as used in this allegation, he undoubtedly meant that Gill, who wrote the note by filling in the blank spaces on the form, intentionally refrained from inserting therein a statement of the true consideration. This is an immaterial allegation, as it is nowhere alleged that there was any agreement between the plaintiff and the defendant that the consideration of the note should be inserted therein. There is a further allegation to the effect that Gill intentionally refrained from erasing, or having erased, from said blank form, certain printed matter expressing a consideration different from the true consideration, in that it did not state the full consideration. The answer further alleges that this failure was due to accident and oversight of the defendant, and by his mistake it was not erased. It is difficult to tell what accident or what mistake brought about this condition. If it was mistake, it certainly was not mutual, <sup>391</sup> and, as to accident, it means no more here than an allegation or admission of negligence on the part of the defendant. The answer further alleges, in substance, that by mistake the defendant did not discover that the consideration was so wrongly stated in said note, but relying on the verbal contract before set out, and by reason thereof, signed said note. It does not appear from the answer that the defendant could not read, or that he did not know that the note he signed contained the stipulation which expressly provided that the note was executed and delivered by the defendant to the Northwest Thresher Company for and in consideration of credit granted by said company on the purchase price of the threshing machinery bought of said company by J. R. McClung.

The rule seems to be that where, by the terms of a written contract, it is specifically stated that it is executed and delivered for and in consideration of the credit granted by one of the parties to a third person on the purchase price of certain



machinery bought of said party by said third person, such provision in relation to the consideration binds the parties within the rules applicable to written contracts and can no more be altered or varied by oral evidence than any other part of the contract, in the absence of fraud, accident or mistake: *Jackson v. Chicago etc. R. R. Co.*, 54 Mo. App. 636. It is well settled by the authorities that whenever the statement of the consideration leaves the field of mere recital and enters into that of contract, as shown by the intention of the parties to be gathered from the instrument, it is no longer open to contradiction by parol evidence.

“Where the recital involves a contract, it estops; if it does not involve a contract, it operates only as a unilateral general admission, and is open to explanation”: 2 Wharton’s Law of Evidence, 3d ed., sec. 1040.

In the case of *Guthrie & W. Ry. Co. v. Rhodes*, 19 Okl. 21, 91 Pac. 1119, 21 L. R. A., N. S., 490, Mr. Justice Irwin, who delivered the opinion of the court, says: “We take it the rule is well established that, in the absence of any evidence of incapacity to read, or any trick or artifice resorted to to prevent his reading it, a party signing a written instrument that is plain and unequivocal in its terms is bound <sup>392</sup> by its express terms and conditions therein contained, and that he cannot set up his own carelessness and his own indolence as a defense, and, because he failed to make use of the faculties possessed by him for determining its conditions, be heard to say that its terms or conditions should be other or different from what they are.”

The court in the above case cites *Mullen v. Beach Grove D. Park*, 64 Ind. 202, and quotes therefrom as follows: “An answer admitting the execution of the subscription sued upon, but alleging that the person procuring his signature had misrepresented the contents of the subscription and the extent of the liability the defendant would incur by signing it, is insufficient.”

Chancellor Kent, in volume 2, page 485, is also quoted as follows: “The common law affords to everyone reasonable protection against fraud in dealing; but it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or an indifference to the ordinary and accessible means of information.”

In *Mower Harwood Creamery & Dairy Supply Co. v. Hill*, 135 Iowa, 600, 113 N. W. 466, the first paragraph of the syllabus reads as follows: “Where one who can read signs a contract without reading it or having it read to him, he is bound by it, although its provisions are different than he supposed.”

To the same effect are *Reed v. Coughran*, 21 S. D. 257, 111 N. W. 559; *Grieve v. Grieve*, 15 Wyo. 358, 89 Pac. 569, 9

L. R. A., N. S., 1211, 11 Ann. Cas. 1162; Wood v. Wack, 31 Ind. App. 252, 67 N. E. 562.

In Farlow v. Chambers, 21 S. D. 128, 110 N. W. 94, Presiding Judge Fuller uses the following language: "In Magee v. Verity, 97 Mo. App. 486, 71 S. W. 472, a decree in equity canceling a note and trust deed for the reasons here urged was reversed on appeal, and, in the course of the opinion, the court said: 'Plaintiff cannot be allowed to show that the written paper signed by him does not contain the contract. If a party is induced to sign a contract by fraud, he can, of course, avoid it for that reason. It is, however, clear that merely falsely ~~say~~ representing to a man in possession of his faculties and able to read that a writing embodies their verbal understanding is not the fraud the law means.' From the case of Bostwick v. Mutual Life Ins. Co., 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, 67 L. R. A. 705, we quote: 'It does not militate, as counsel for respondent seem to think, against the maxim that a person cannot take advantage of his own wrong, but enforces that other one, which is quite as well established, that the court will not constitute itself the guardian of persons of mature age and ordinary intelligence, protecting them against the results of their own negligence; that it will not furnish a person a remedy for a wrong where he cannot prove a legal claim for damages without showing that his own negligence intervened between the act of the alleged wrongdoer and the result complained of, and was the real, efficient, producing cause of his injury; that in such a case it will be conclusively presumed that he voluntarily accepted the situation, because, if he had used ordinary care, the injury complained of would have been prevented.'"

There is no allegation in the answer stating that the defendant signed the written instrument in reliance upon or assurance from the plaintiff that it contained the true contract. On the contrary, it appears that he signed the writing without any assurance from, or reliance upon, anybody as to what it contained. We therefore hold that there were no allegations supporting the charge of accident, fraud or mistake of fact.

The remaining assignment of error is that the court erred in sustaining the motion to strike out the second defense in the amended answer. On this ground the judgment of the court below must be reversed. The paragraph of the original answer to which a motion to make more definite and certain was sustained was in words and figures as follows: "As a further defense to plaintiff's action herein, defendant alleges that the indebtedness owed to the plaintiff by the said J. R. McClung hereinbefore mentioned has been fully paid and satisfied by the said plaintiff taking back from the said J. R. McClung the threshing-machine and outfit, by plaintiff sold to the said



J. R. McClung, and the debt so paid is the same debt evidenced by the note in suit, and which was to be credited by any and all payments on the note in suit."

<sup>394</sup> The order sustaining the motion to make more definite and certain required the defendant to make said defense more definite and certain: First, by stating when the plaintiff took back from said J. R. McClung the threshing-machine and outfit mentioned in said second defense; and, second, by stating the contract or terms and conditions upon which the plaintiff took back the said machine and outfit from said J. R. McClung. The amended paragraph filed in pursuance of this order read as follows: "The defendant hereby refers to his first defense before set out, and by such reference makes the statements thereof a part of this defense, and in addition thereto alleges that the plaintiff sold a threshing-machine and outfit to the said McClung, part of the purchase thereof being paid to plaintiff in cash, and the balance represented by notes, but just how much cash was paid, and how much was represented by notes, this defendant does not know, and hence cannot state. To secure the unpaid part of the purchase price of said machine, the said McClung gave to plaintiff a chattel mortgage on said machine and outfit, and the debt so secured by said chattel mortgage and secured by it was and is the same debt represented in part by the note of defendant here sued upon in this action. About six weeks after said machine and outfit were delivered to the said McClung, and while said machine was worth the price for which it was originally sold to the said McClung by the plaintiff, the plaintiff seized the machine and outfit under said chattel mortgage and taken back by the plaintiff without sale, whereby the said debt was fully paid, and the note herein sued upon fully satisfied."

The motion to strike this paragraph from the files was sustained upon the theory that the allegations of the amended answer did not comply with the order of the court, either in form or in substance, and that it was no compliance to allege entirely new matter. We think the amended paragraph complies to a measurable extent with the order of the court. It is evident that by the term "taking back," as alleged in the original answer, the defendant meant that the plaintiff seized the machinery and outfit under the chattel mortgage, and that such seizure occurred about six weeks after said machinery and outfit were delivered to said McClung, while said machinery was worth the price for <sup>395</sup> which it was originally sold. The amended answer aimed to state in detail what acts constituted the "taking back" and when the "taking back" took place. This is what the order of court required. We do not believe this allegation states facts sufficient to constitute a defense to the action, but it was error

under the circumstances to sustain a motion to strike it from the files.

In *Columbus v. Reinhard*, 1 Ohio C. C. 289, it was held that a motion for judgment because of the insufficiency of the answer is not good practice, but that a demurrer so that an amendment can be allowed is the proper pleading. We believe that this rule is applicable to the case at bar. If a demurrer had been filed and sustained, the defendant would have been given an opportunity to amend if he saw fit, and this he was entitled to under the law.

In *Ellis v. Reddin*, 12 Kan. 306, it was held error for the court to treat a motion to make more definite and certain as a demurrer and to sustain it as such. Mr. Justice Valentine, who delivered the opinion of the court, in discussing this proposition, says: "The defendant made a motion in the court below to require the plaintiff to make his petition more definite and certain in certain particulars. The court overruled the motion as a motion, and then treated it as a demurrer, and sustained it as a demurrer, to which ruling the plaintiff excepted. The ruling was evidently erroneous, and the error was material. There is a vast difference between a motion to make more definite and certain and a demurrer; and even if the petition would have been held insufficient on demurrer, if a demurrer had been interposed, still, as the defendant did not choose to interpose a demurrer, the court should not have done so for him. The petition, it is true, was defective; but whether it should have been held insufficient if a demurrer had been interposed, it is not now necessary to determine. It was such that if the parties had gone to trial upon it, without objection, and a judgment had been rendered thereon in favor of the plaintiff, the judgment would have been valid and would not have been disturbed on petition in error."

We think this reasoning is applicable to the question now under discussion, and for that reason the judgment of the court <sup>396</sup> below must be reversed, and the cause remanded, with directions to take such further action in the matter, not inconsistent with this opinion, as may be proper.

All the justices concur.

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#### **SIGNING CONTRACTS IN IGNORANCE OF THEIR CONTENTS.**

##### **I. By Persons Who are Guilty of Negligence.**

###### **a. Persons Who can Read, 810.**

###### **b. Persons Who cannot Read, 813.**

##### **II. By Persons Who are not Guilty of Negligence, 814.**

###### **I. By Persons Who are Guilty of Negligence.**

**a. Persons Who can Read.**—"It will not do," says Mr. Justice Hunt, in the case of *Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203, "for a man to enter into a contract and, when called upon to respond

to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and if he will not read what he signs, he alone is responsible for his omission."

And Mr. Justice Sanborn, who delivered the opinion of the court, in the case of Chicago etc. Ry. Co. v. Belliwith, 83 Fed. 437, 28 C. C. A. 358, says: "A written contract is the highest evidence of the terms of an agreement between the parties to it, and it is the duty of every contracting party to learn and know its contents before he signs and delivers it. He owes this duty to the other party to the contract, because the latter may, and probably will, pay his money and shape his action in reliance upon the agreement. He owes it to the public, which, as a matter of public policy, treats the written contract as a conclusive answer to the question, What was the agreement? If one can read his contract, his failure to do so is such gross negligence that it will estop him from denying it, unless he has been dissuaded from reading it by some trick or artifice practiced by the opposite party. . . . This is a just and salutary rule, because the other contracting party universally acts and changes his position on the faith of the contract."

The rule is well established that, in the absence of any evidence of incapacity to read, or any trick, fraud or artifice resorted to to prevent his reading it, a party signing a written instrument that is plain and unequivocal in its terms is bound by its express terms and conditions therein contained, and that he cannot set up his own carelessness, negligence, ignorance or idolence as a defense, and, because he failed to make use of his faculties possessed by him for determining its conditions, be heard to say that its terms or conditions should be other or different from what they are: Kennon v. McCrea, 2 Port. (Ala.) 389; Swift v. Fitzhugh, 9 Port. (Ala.) 39; Goetter v. Pickett, 61 Ala. 387; Campbell v. Larmore, 84 Ala. 499, 4 South. 593; Martin v. Smith, 116 Ala. 639, 22 South. 917; Birmingham Ry. etc. Co. v. Jordan (Ala.), 54 South. 280; Pratt & Co. v. Metzger, 78 Ark. 177, 95 S. W. 451; Kimmell v. Skelly, 130 Cal. 555, 62 Pac. 1067; Kilbourn v. King, 6 D. C. 310; Georgia Medicine Co. v. Hyman & Co., 117 Ga. 851, 45 S. E. 328; Harrison & Garrett v. Wilson Lumber Co., 119 Ga. 6, 45 S. E. 730; Wheeler etc. Co. v. Long, 8 Ill. App. 463; Linington v. Strong, 107 Ill. 295; Black v. Wabash etc. R. Co., 111 Ill. 351, 53 Am. Rep. 628; Beist v. Sipe, 16 Ind. App. 4, 44 N. E. 762; Rogers v. Place, 29 Ind. 577; Wood v. Wack, 31 Ind. App. 252, 67 N. E. 562; Mullen v. Beech Grove etc. Park, 64 Ind. 202; American Ins. Co. v. McWhorter, 78 Ind. 136; Robinson v. Glass, 94 Ind. 211; Keller v. Orr, 106 Ind. 406, 7 N. E. 195; Zenor v. Johnson, 107 Ind. 69, 7 N. E. 751; Gullihier v. Chicago etc. R. Co., 59 Iowa, 416, 13 N. W. 429; McKinney v. Herrick, 66 Iowa, 414, 23 N. W. 767; Sheneberger v. Union Central L. Ins. Co., 114 Iowa, 578, 87 N. W. 493, 55 L. R. A. 269; Mower Harwood Creamery etc. Supply Co. v. Hill, 135 Iowa, 600, 113 N. W. 466; Roach v. Karr, 18 Kan. 529, 26 Am. Rep. 788; Gaither v. Daugherty, 18 Ky. Law Rep. 709, 38 S. W. 2; J. I. Case Thrashing Machine Co. v. Mattingly, 142 Ky. 581, 134 S. W. 1131; Barker v. Banks, 15 La. 453; Watson v. Planters' Bank, 22 La. Ann. 14; Allen v. Whet-

stone, 35 La. Ann. 846; Jackson v. Lemle, 35 La. Ann. 855; Metcalf v. Metcalf, 85 Me. 473, 27 Atl. 457; Eldridge v. Dexter etc. R. Co., 88 Me. 191, 33 Atl. 974; Jackson v. Olney, 140 Mass. 195, 4 N. E. 225; Pettyplace v. Groton Bridge Co., 103 Mich. 155, 61 N. W. 266; Sanborn v. Sanborn, 104 Mich. 180, 62 N. W. 371; Quimby v. Shearer, 56 Minn. 534, 58 N. W. 155; Gwin v. Waggoner, 98 Mo. 315, 11 S. W. 227; Magee v. Verity, 97 Mo. App. 486, 71 S. W. 472; Johnston v. Covenant M. Ins. Co., 93 Mo. App. 580; Paris Mfg. etc. Co. v. Carle, 116 Mo. App. 581, 92 S. W. 748; Alexander v. Ferguson, 73 N. J. L. 479, 63 Atl. 998; Breese v. United States Tel. Co., 48 N. Y. 132, 8 Am. Rep. 526, and note; Germania F. Ins. Co. v. Memphis etc. R. Co., 72 N. Y. 90, 28 Am. Rep. 113, and footnote; Hill v. Syracuse etc. R. Co., 73 N. Y. 351, 29 Am. Rep. 163, and note; Dellinger v. Gillespie, 118 N. C. 737, 24 S. E. 538; Harris v. Murphy, 119 N. C. 34, 56 Am. St. Rep. 656, 25 S. E. 708; Little v. Little, 2 N. D. 175, 49 N. W. 736; Johnston v. Patterson, 114 Pa. 398, 6 Atl. 746; Kraus v. Stein, 173 Pa. 221, 33 Atl. 1031; Sloan v. Courtney, 54 S. C. 314, 32 S. E. 431; Farlow v. Chambers, 21 S. D. 128, 110 N. W. 94; Bishop v. Allen, 55 Vt. 423; Albrecht v. Milwaukee etc. R. Co., 87 Wis. 105, 41 Am. St. Rep. 30, and note, 58 N. W. 72; Bostwick v. Mutual L. Ins. Co., judgment in 116 Wis. 392, 89 N. W. 538, 67 L. R. A. 705, modified in 92 N. W. 246; Muller v. Kelly, 116 Fed. 545; Upton v. Tribilcock, 91 U. S. 45, 23 L. ed. 203.

In *Brown v. Levy*, 29 Tex. Civ. App. 389, 69 S. W. 255, the plaintiff made an offer to erect a building for the sum of sixty-four thousand dollars, and the defendant accepted it. Shortly after the contract was signed the plaintiff discovered that in his haste in adding up the several items in his offer, he made a mistake of ten thousand dollars in his addition. It was decided that, inasmuch as the defendant was in no wise responsible for the mistake, the contract was binding, and it was of no consequence, in so far as the validity of the contract was concerned, that the plaintiff had made a miscalculation in forming his estimates.

In *Crim v. Crim*, 162 Mo. 544, 85 Am. St. Rep. 521, 63 S. W. 489, 54 L. R. A. 502, it appeared that plaintiff and defendant lived in Ohio. That the defendant was indebted to the plaintiff, and the former was about to remove to Missouri. Plaintiff demanded a settlement, and the defendant gave his note for the amount. The note contained a clause authorizing any attorney at law to appear in any court of the United States, waive process, enter appearance, and confess judgment against defendant for the amount due on the note, including interest and costs, and to release all errors. Pursuant to the terms of the note, an attorney confessed judgment, and subsequently the plaintiff instituted suit on the judgment. The defendant admitted that he signed the note, understanding it was only a promissory note, and not knowing that it contained a provision authorizing a confession of judgment. "It may be true," says the court, "the defendant did not read it before he signed it, but he was *sui juris*, had full opportunity to read it, and deliberately signed it. The law presumes he knew its contents, and he cannot be permitted now to take advantage of his own fault or negligence. . . . To permit a party, when sued on a written contract, to admit that he signed it, but to deny that it expresses the agreement he made, or to allow him to admit that he signed it, but did not read it or know

its stipulations, would absolutely destroy the value of all contracts and negotiable instruments. The reason underlying the rule is to give stability to written agreements, and to remove the temptation and possibility of perjury, which would be afforded if parol evidence was admissible."

**b. Persons Who cannot Read.**—The care and diligence of a prudent man in the transaction of his business would demand an examination of the instrument before signing, either by himself or by someone for him in whom he had a right to place confidence. The fact that a person is illiterate, and can read manuscript only with difficulty, does not render this precaution less necessary: *Hawkins v. Hawkins*, 50 Cal. 558.

If a person cannot read the instrument, it is as much his duty to procure some reliable person to read and explain it to him, before he signs it, as it would be to read it before he signed it if he were able to do so, and his failure to obtain a reading and explanation of it is such gross negligence as will estop him from avoiding it on the ground that he was ignorant of its contents. This is a just and salutary rule, because the other contracting party almost universally acts and changes his position on the faith of the contract; and it would be a gross fraud upon him to permit one who has received the benefit of the agreement in silence, to escape from its burdens by proof that he did not know and did not inquire what these burdens were when he assumed them: *Chicago etc. Ry. Co. v. Belliwith*, 83 Fed. 437, 28 C. C. A. 358; *Muller v. Kelly*, 116 Fed. 545.

In *Deering v. Hoeft*, 111 Wis. 339, 87 N. W. 298, it appeared that the defendant signed an order for the purchase of an Ideal binder, manufactured by the plaintiff. The written order contained a clause that the defendant was to have one day to give the binder a trial, and if it did not work well, it was to be returned. The defendant contended that he could not read English, and that plaintiff's agent told him that he could return the binder at any time if not satisfactory. The plaintiff's agent testified that he read the order at length to the defendant, and the defendant admitted that the whole order was read to him. The agent also testified that he read the order correctly; but the defendant claimed to have been deceived as to the contents of the order signed. "His testimony," says the court, "as to the fact of deception is very meager and unsatisfactory. He does not claim that he misunderstood what was read to him. . . . On the one side we have a solemn written instrument, setting out at length the exact engagement of the parties. We have the testimony of the agent that he read the entire order to the defendant, who understood English, and who could talk with some degree of volubility; that he read it correctly and as written. We have also the admission of the defendant that the order was read to him, and no claim on his part that he did not understand what was read to him. Opposed to this we have merely the meager and unsatisfactory statement of the defendant. . . . In absence of fraud or imposition, a man cannot relieve himself from the obligation of a written agreement by saying he did not read it when he signed it, or did not know what it contained. . . . Here it was claimed there was fraud and imposition, but it is based upon testimony of such loose and flimsy character as that, if the written order stood alone, one would hesitate to turn the scale in defendant's favor. The evidence of

plaintiff's agent, although a somewhat interested party, is entitled to some weight. . . . His only claim is that the agent told him that their verbal talk was embodied in the written order. The general rule is that fraud and imposition must be shown by clear and satisfactory evidence. The amount or weight of proof sufficient to show it is not a matter of exact legal definition. The proof, however, must be so strong and cogent as to satisfy a man of sound judgment of the truth of the claim."

A wife signed a mortgage on a homestead as security for a note made by herself and her husband. She could read print but a little, and that only by spelling; she could not write nor read writing. She inquired of her husband the nature of the papers before putting her mark to them, and he told her "it was none of her business, it did not amount to a row of pins, it was not a note"; and she signed the mortgage, without requiring it to be read to her, but believing it was a note. It was held that she was negligent, and if deceived, could not assert it against an innocent mortgagee: *Roach v. Karr*, 18 Kan. 529, 26 Am. Rep. 788.

In *Hurt v. Wallace* (Tex. Civ. App.), 49 S. W. 675, the court says: "When a sane man knowingly and without constraint delivers to another, for a valuable consideration, his obligation in writing for the doing or the refraining from doing any certain thing, he cannot be heard to say afterward that he was deceived, and by reason thereof did not know the purport of such instrument."

In *Weller's Appeal*, 103 Pa. 599, it appeared that when Weller signed a note it had attached to it the names of Keener and Miller as makers. In point of fact Keener was the payee and Miller was the principal, and Weller signed his name as surety. Keener's name at the bottom of the note as maker was signed by mistake. In an action on the note by Keener against Miller and Weller, Weller alleged that he signed the note on the strength of Keener's name, knowing him to be responsible. Weller also alleged illiteracy and that he was only able to read or write English very imperfectly, being a German. "That the appellant was an illiterate man and understands the English language imperfectly does not affect the case, in the absence of any fraud practiced upon him. No one is bound to sign an instrument which he does not understand. If, however, he does sign it without asking to have it read or explained to him, he is bound by it: *Thoroughgood's Case*, 2 Rep. 9b, cited in *Schuylkill Co. v. Copley*, 67 Pa. 389, [5 Am. Rep. 441]. The courts have gone far enough in relieving men from their obligations upon the plea of ignorance. The appellant intended to become bail for Miller. He might have known, and would have known, if he had asked the question, that the money was to come from Keener. This would have made it clear that the signature of the latter as maker was a blunder."

## II. By Persons Who are not Guilty of Negligence.

In *Bean v. Western N. C. R. Co.*, 107 N. C. 731, 12 S. E. 600, the court says: "We are of opinion that there was evidence of mistake, surprise and undue advantage taken of the plaintiff, under such circumstances as ought to avoid the release relied upon by the defendant, if the allegations of the reply were true, as the jury found them to be. The release was executed within a few days



after the plaintiff sustained the injuries, at the instance of the defendant, through its agent, while he was suffering great bodily pain and mental anxiety occasioned by such injuries, when he was unable to comprehend the meaning and effects of the release. He was ignorant, unable to write, and he did not understand or comprehend the purport of such instrument. The defendant owed him wages; and he believed, when he executed the release, that he was giving a receipt for a part of the sum due him for wages. The jury so find by their verdict in response to the pertinent issues submitted to them. The evidence tended to prove that the defendant's agent at Hot Springs, within a few days after the plaintiff sustained the injury, sent him on its road to Salisbury—a distance of one hundred and fifty miles or more—where, at the office of the defendant, its agent took the release in question, paying as the consideration therefor, thirty dollars. The evidence also tended to show that the damages so sustained were greatly in excess of that sum. There was evidence tending to prove the substance of the allegations of the reply in respect to the release. It was in evidence for the defendant that its agent took the release. He testified that the release—its purpose—was explained to the plaintiff. It did not appear that the plaintiff had counsel or any friend to advise him, other than the agents of the defendant. Granting that there was no positive fraud on the part of the defendant or its agents—none was alleged—there was evidence to prove, and the jury found, under appropriate instructions from the court not objected to, that the plaintiff executed the release by mistake, occasioned by his ignorance, physical pain, mental anxiety, and lack of capacity, under the circumstances, to understand or comprehend the nature and purpose of such release. The court of equity will grant relief where only the party complaining makes mistake, when the facts and circumstances give rise to the presumption that there has been some undue influence, misapprehension, imposition, mental imbecility, surprise or confidence abused. Mere ignorance, mere inadequacy of consideration, mere weakness of mind, mere mistake on the part of one party, will not entitle that party to relief. But it is otherwise when there is a combination of such things to prejudice the party. In such case, in good faith and fair dealing, the adverse party ought to see and know, and must be presumed to know, that the complaining party was not fit or in such mental condition as to bind himself by contract. A court of equity will interfere, when called upon, to relieve a party against his mistake, made under a combination of such adverse circumstances as certainly destroy his capacity to know the nature of the contract or engagement to which he becomes a party. . . . He alleges such a combination of facts and circumstances, and produces evidence to prove the same, as show such mistake and surprise on his part as entitles him to have the release declared inoperative and void."

In *Union Pacific Ry. Co. v. Harris*, 158 U. S. 326, 15 Sup. Ct. Rep. 843, 39 L. ed. 1003, 12 C. C. A. 598, 601, 27 U. S. App. 450, 455. and 63 Fed. 800, 803, it appeared that the injuries to the defendant in error (plaintiff below) were of the most serious character and permanent. He was unconscious for many hours after the accident, and when he recovered consciousness the pain from his injuries were so severe that he was compelled to take narcotics, which had their customary effect. While they deadened the sensibilities for the time

being, they also deadened and dulled his senses. This treatment was continued for two weeks or more. Three or four days after the accident, while the treatment was going on, and while his arms were suspended over a rope stretched across his bed in order to relieve the pressure upon his injured spine, and while he was tortured and racked with physical pain, the company's agents found their way into his sickroom, from which his friends and all others, except the nurses, were excluded, by order of the physician, on account of the serious character of the injuries, and procured his signature to the release. There was evidence tending to prove that the defendant in error did not and could not read the release, and that it was not read to him, and that he signed it relying upon the truth of the representations as to its contents made by the company's agents. The issue as to whether the release was procured by fraud was submitted to the jury, and the courts refused to disturb their verdict in favor of the defendant in error (plaintiff below).

In *Grimsley v. Singletary*, 133 Ga. 56, 134 Am. St. Rep. 196, 65 S. E. 92, it is held that where an illiterate person, unable to read, signs a written instrument in ignorance of its character or contents, believing it to be an instrument of a different nature, and is induced to do so by the misrepresentations of the other party, whose good faith he has no ground to reasonably suspect, as to the nature or contents of such writing, he is not bound thereby, although he does not request the opposite party or anyone else to read the paper to him before he signs it.

One is not guilty of negligence in failing to read a contract before signing it, where it is read over to him by one in whom he has confidence and upon whom he has a right to rely, and is assured by such person that the paper is in accordance with the agreement: *Meyer v. Haas*, 126 Cal. 560, 58 Pac. 1042; *Koons v. Blanton*, 129 Ind. 383, 27 N. E. 334; *Elliott v. Sackett*, 108 U. S. 132, 135, 2 Sup. Ct. Rep. 375, 27 L. ed. 678.

In *Cole v. Williams*, 12 Neb. 440, 11 N. W. 875, the court says: "What contract did the plaintiff and defendants, through their agent, House, make in regard to the lightning rods? It is admitted that the plaintiff signed his name at the foot of a paper which contained a statement of the price of the rods at thirty-seven and one-half cents per foot, etc. If he did this knowingly, or carelessly and negligently, and free from any act of bad faith or deception on the part of the defendants or their agent, he would be bound by it. In one point of view the signing of a written instrument without reading it, because of the temporary loss of one's spectacles, where the use of another pair could have been procured without much effort, or in such case relying upon an interested party on the other side to read it, when one's own friends or employees were near at hand, would be regarded as negligence and the want of due diligence in case it turned out that the paper signed was of a different character and import from that purporting to have been read and intended to be signed. But in this case the defendants are in no position to suggest the carelessness or want of diligence on the part of the plaintiff in relying on the good faith and truthful reading of their agent, even had his eyesight been perfect or his spectacles at hand."

In *Walker v. Egbert*, 29 Wis. 194, 9 Am. Rep. 548, the plaintiff sued on a promissory note as holder for value before maturity. De-



fendant answered that he was a German, and unable to read or write English; that the payees of the supposed note procured his signature thereto by falsely and fraudulently representing to him that the paper which they wished him to sign was a contract appointing him agent for the sale of a certain patented machine, regulating his percentage of profits on his sales, and embracing the terms thereof, verbally agreed upon between them; and that he, believing it to be so, signed it. It is held that the party whose signature to such paper is obtained by fraud as to the character of the paper itself, who is ignorant of such character, and has no intention of signing it, and who is not guilty of negligence in affixing his signature, or in not ascertaining the character of the instrument, is no more bound by it than if it were a total forgery, the signature included.

In *Williams v. Hamilton*, 104 Iowa, 423, 65 Am. St. Rep. 475, 73 N. W. 1029, it is held that an illiterate party is not negligent in signing a contract without informing himself as to its contents or legal effect, where he relies upon the other party to properly express the terms of their oral agreement in a writing, and upon the latter's representation that he has done so.

In *Dryer v. Security Fire Ins. Co. (Iowa)*, 82 N. W. 494, it appeared that the plaintiff was a German, unable to read the English language. That one named Adams, who was a soliciting agent for the defendant, wrote an application for a fire insurance policy. "In this case," says the court, "it will be observed that the statements written in the application by Adams were all true, and in this respect it differs from the cases wherein soliciting agents made false statements in the applications. . . . But is an insurance company whose soliciting agent fails to do a positive duty—one which he has undertaken to do, one which he may do under his authority—in any better position than when he performs the same duty wrongfully? We think not. Adams was authorized by the defendant to solicit insurance, and to take written applications therefor. He knew that plaintiff would not insure unless the policy covered the property in any part of the county. Any condition which might legitimately become a part of the application was within the scope of his authority as agent. And as to all such matters, notice to him was notice to his principal. The application became a part of the contract of insurance, and if Adams failed to embody therein the conditions upon which it was agreed a policy would be accepted, it affected the entire contract, and the defendant was charged with notice thereof. Nor can it be said in this case that plaintiff is bound by the terms of the policy sent him. He could not read English, and this fact was known to Adams, and constructively to the company. He did not know at the time but what the application was the policy. When the policy came, he had a right to presume, and rest upon the presumption, that the policy was in accordance with the terms of the application. . . . If the defendant was misled by the acts of its agent, it surely should bear the consequences of such act, and not be permitted to shift the burden to the plaintiff."

In *Nicol v. Young*, 68 Mo. App. 448, it was decided that one is not negligent in failing to read a contract before signing it, even though he is able to read, when he has confidence in his attorney and relies on his reading and expounding of the terms of the agreement.

**MOFFITT v. GARRETT.**

[23 Okl. 398, 100 Pac. 533.]

**ATTACHMENT—Liability on Bond Given to Discharge.**—An obligor on a bond to discharge an attachment, under the provisions of section 4404, Wilson's Revised and Annotated Statutes of Oklahoma of 1903, conditioned that the defendant will perform the judgment of the court in the action in which the attachment is issued, is absolutely liable in an action against him on the bond for the amount recovered in the action in which the bond was given, without reference to the question whether the attachment was rightfully or wrongfully issued, and the defendant is precluded by such bond from controverting the grounds of the attachment. (pp. 821, 822.)

(Syllabus by the court.)

John L. Jenkins, for the plaintiff in error.

J. L. Brown, for the defendant in error.

<sup>398</sup> WILLIAMS, J. On the twenty-eighth day of July, A. D. 1906, the defendant in error, as plaintiff, instituted his action in the probate court of Oklahoma county, territory of Oklahoma, against the plaintiff in error, C. L. Moffitt and L. R. Moffitt, as defendants, to recover the sum of one hundred and two dollars and fifty cents, alleged to be due on an award of arbitrators between the said I. D. Garrett and C. L. Moffitt, and on the same day filed proper affidavit for attachment against both of said defendants, and writ of attachment was issued and levied on a certain stock of goods. After said levy had been made, the defendant Carl L. Moffitt, with L. A. Fightmaster as surety, executed the following bond:

“Territory of Oklahoma,  
County of Oklahoma,—ss.:

“In the Probate Court in and for said County and Territory. I. D. Garrett, Plaintiff, v. C. L. Moffitt et al., Defendants. Undertaking to Discharge Attachment. Know all men by these presents, that we, the undersigned, are held and firmly bound unto I. D. Garrett, the plaintiff in the above-entitled action, in the penal sum of two hundred and five dollars (\$205.00), lawful money of the <sup>399</sup> United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally by these presents. The condition of the above obligation is such that whereas, the above-named plaintiff, I. D. Garrett, did on the 28th day of July, 1906, begin the above-entitled action against the above-named defendants, C. L. Moffitt and L. R. Moffitt, to recover the sum of one hundred two and 50/100 dollars (\$102.50), and caused an attachment to be issued and levied upon the property of said defendants, and this bond is given for the purpose of having said attachment discharged, now therefore, if the said de-

defendants shall perform the judgment of the court in the above-entitled action, and shall well and truly pay the amount of any judgment that shall be rendered against them in said action, then this obligation to be void, otherwise to remain in full force and effect.

“Witness our hands this 30th day of July, A. D. 1906.

“CARL L. MOFFITT.

“MRS. L. A. FIGHTMASTER.

“Taken and approved this 30th day of July, A. D. 1906.

“W. P. HARPER,

“Probate Judge.”

That after the approval of said bond said attachment was discharged, and the goods levied on thereunder delivered to and placed in possession of L. R. Moffitt, by and with the consent of the said defendant Carl L. Moffitt. The affidavit for said attachment was made before Wm. P. Harper, judge of the probate court, on the twenty-eighth day of July, A. D. 1906, and said officer in attesting said affidavit failed to affix the seal of said court thereto. On the twenty-eighth day of September, A. D. 1906, said cause was tried by a jury and verdict returned in favor of the plaintiff in the sum of one hundred and two dollars and fifty cents. Afterward judgment was entered in accordance with the verdict against the said defendant C. L. Moffitt, and in favor of the defendant L. R. Moffitt for his costs. Afterward, on the twentieth day of December, A. D. 1906, said plaintiff, I. D. Garrett, instituted his action in said court against said defendant Carl L. Moffitt, and his surety, L. A. Fightmaster, on said bond. On the twenty-eighth day of June, A. D. 1907, the cause came on for hearing before the court without a jury, at which time said findings were made, and also judgment was rendered against both of the defendants, Carl L. Moffitt and L. A. Fightmaster, for the amount <sup>400</sup> of said judgment, one hundred and two dollars and fifty cents, and costs and interest. The record recites that the court finds that prior to the beginning of said action, and the levying of said attachment ancillary thereto, the defendant C. L. Moffitt had sold the goods thus levied on to the said L. R. Moffitt, and at the time of said levy and the execution of said discharging bond they were the property of the said L. R. Moffitt. And, further, as conclusions of law, that the defendant L. A. Fightmaster, surety on said bond, was estopped to show that the allegations in said attachment affidavit were not true, or that the ownership of the property, at the time of the levying of the attachment and the giving of said bond, was in the said L. R. Moffitt. Motion for a new trial was made in due time, and an appeal prosecuted by petition in error to the supreme court of the territory of Oklahoma, and, by virtue of the provisions

of the enabling act and the schedule to the constitution, is now properly before this court for review.

Section 4404 (chapter 66, article 11, section 206), Wilson's Revised and Annotated Statutes of 1903, provides: "If the defendant, or other person on his behalf, at any time before judgment, causes an undertaking to be executed to the plaintiff, by one or more sureties, resident in the county, to be <sup>401</sup> approved by the court, in double the amount of the plaintiff's claim as stated in his affidavit, to the effect that the defendant shall perform the judgment of the court, the attachment in such action shall be discharged, and restitution made of any property taken under it or the proceeds thereof. Such undertaking shall, also, discharge the liability of a garnishee in such action, for any property of the defendant in his hands."

The bond upon which the action was brought in the lower court was made by virtue of said section, and the sole question involved in this record is whether or not the undertakers on such bond are bound to perform the judgment of the court, by paying such judgment, regardless of whether or not the attachment was rightfully brought, or the property seized belonged to the defendant in the attachment writ. Section 52 of the justice's act (Kan. Gen. Stats. 1868, p. 787, c. 81) is exactly the same as section 4404, *supra*. In the case of *Endress v. Ent*, 18 Kan. 236, Mr. Chief Justice Horton, in delivering the opinion of the court said: "It is insisted by the defendants that the undertaking was intended as a forthcoming bond, as described in section 33 of the justice's act (Gen. Stats. 1868, p. 782), and they cite the action of the justice in overruling the motion of *Ent* to discharge the attachment. The bond is very dissimilar from the undertaking required by section 33, and cannot by us be construed into an undertaking that the property attached in this action, or its appraised value in money, should be forthcoming to answer the judgment of the court. The constable did not take the bond in question, and no appraisal was had. It was approved by the justice, and filed by him, and thereupon the property was left with *Ent* by the order of the justice. At the time *Ent* made the motion to discharge the attachment, there was in fact no attachment in the case to be discharged; the attachment issued and levied having been previously discharged by virtue of the acceptance of the justice of the undertaking given by the defendants, and the release of all the property thereon to *Ent*. Upon the rendition of the judgment no order was made to sell the attached property, and this shows that the justice considered the undertaking conditioned for the payment of the judgment or its value in money, on the day of sale. Afterward the same justice rendered judgment on the undertaking in this action against the <sup>402</sup> defendants, thus

conclusively proving that he treated the undertaking as given in pursuance of said section 52, and not under section 33." See, also, *Winton v. Myers*, 8 Okl. 421, 58 Pac. 634.

Similar provisions to those contained in sections 4374, 4404, *Wilson's Revised and Annotated Statutes of 1903*, are found in the Ohio code. In *Myers v. Smith*, 29 Ohio St. 120, an attachment was issued, and the defendant executed a bond to the effect that he would perform the judgment of the court. It was held that the effect of the bond was to supersede all proceedings under the attachment, and to bind the sureties on the bond to perform the judgment that might be recovered against him in the action.

In *McAllister v. Eichengreen*, 34 Md. 54, the court of appeals of Maryland, under a similar bond, held to like effect. Also in *Austin v. Burgett*, 10 Iowa, 302, *Inman v. Strattan*, 4 Bush (Ky.), 445, and *Hazelrigg v. Donaldson*, 2 Met. (Ky.) 445, the courts have held to the same effect. New York, Illinois, Wisconsin, Missouri, Michigan, Minnesota, Texas, Arkansas, Washington, Rhode Island, California, Oregon, North Dakota and South Dakota have or have had statutes containing substantially the same provisions as are contained in sections 4374 and 4404, *supra*. The courts in these states have held that the execution of a bond under and in accordance with these statutes estops the defendant from controverting the attachment, and renders the obligors in the bond absolutely liable for the amount of any judgment the plaintiff recovers in the action, without reference to the question whether the attachment was rightfully or wrongfully sued out: *Haggart v. Morgan*, 5 N. Y. 422, 55 Am. Dec. 350; *Coleman v. Bean*, 32 How. 370; *Delany v. Brett*, 4 Rob. (N. Y.) 712; *Bildersee v. Aden*, 62 Barb. 175; *Dierolf v. Winterfield*, 24 Wis. 143; *Payne v. Snell*, 3 Mo. 409; *Paddock v. Matthews*, 3 Mich. 18; *Kennedy v. Morrison*, 31 Tex. 207; *Ferguson v. Glidewell*, 48 Ark. 195, 2 S. W. 711; *People v. Cameron*, 2 Gilm. (Ill.) 468; *Hill v. Harding*, 93 Ill. 77; *Sanger v. Hibbard*, 2 Ind. Ter. 547, 53 S. W. 330; *Rachelman v. Skinner*, 46 Minn. 196, 48 N. W. 776; *Brady v. Onffroy*, 37 Wash. 482, 79 Pac. 1004; *Easton v. Ormsby*, 18 R. I. 309, 27 Atl. 216; *Gardner v. Donnelly*, 86 Cal. 367, 24 Pac. 1072; *Bunneman v. Wagner*, 16 Or. 433, 8 Am. St. Rep. 306, 18 Pac. 841; *Fox v. Mackenzie*, 1 N. D. 298, 47 N. W. 386; *McLaughlin v. Wheeler*, 1 S. D. 497, 47 N. W. 816.

It is the theory of a great many of the adjudicated cases, under such statutory provisions, that the bond becomes an unconditional contract or promise to pay whatever judgment may be rendered against the defendant upon the merits of the case, and does not depend upon the regularity of the attachment branch of the case; that the consideration for the promise to pay the judgment is the immediate release of the attached

property; that the giving of the bond effects the immediate discharge of the attachment and the release of the property, and the bond then becomes security for any judgment that shall be rendered against the defendant. The following authorities appear to support the contrary rule, to wit: *Lehman v. Berdin*, 5 Dill. 340, Fed. Cas. No. 8215; *Bates v. Kilian*, 17 S. C. 553; *Love v. Voorhies*, 13 La. Ann. 549. But the overwhelming weight appears to be in favor of the rule that where, under a statute similar to section 4404, supra, a party causes a bond to be executed in order to have discharged from attachment property levied on under such writ, providing that the defendant shall perform the judgment of the court, where an affidavit and bond have been executed for the issuance of such writ, after judgment has been rendered against the defendant in such action, the obligors in the bond are precluded and estopped from traversing the truth of the allegations of the affidavit, or setting up that the defendant in the attachment was not the owner of the property levied on.

The judgment of the lower court is affirmed.

All the justices concur.

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*In an Action on an Attachment Bond the Parties are Estopped to question the regularity of the attachment: Olds v. City Trust etc. Co., 185 Mass. 500, 102 Am. St. Rep. 356, and cases cited in the cross-reference note thereto.*

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### PALMER v. HARRIS.

[23 Okl. 500, 101 Pac. 852.]

**APPEAL—Supersedeas or Stay of Judgment.**—In cases where the statute makes no provision for a supersedeas or a stay of the judgment or final order as a matter of right, the trial court may, in the exercise of its discretion, allow a supersedeas or stay on such terms as it may prescribe for the protection of the parties, pending an appeal to the appellate court, following *In re Epley*, 10 Okl. 631, 64 Pac. 18. (p. 826.)

**STARE DECISIS.**—A Well-settled Rule of Practice, which has been silently acquiesced in, will not be set aside where it would probably cause great inconvenience and confusion in the practice, and where it can easily be changed by the legislature, if there is any necessity therefor. (By the editor.) (p. 826.)

**ELECTION CONTEST—Supersedeas or Stay of Judgment.**—The trial court has jurisdiction, in the exercise of its discretion, to allow a supersedeas or stay of a judgment in an election contest, decreeing the contestant entitled to the office, and ousting the contestee from said office, and a writ of certiorari will not lie to review such order. (pp. 827, 830.)

(Syllabi by the court except when stated to be by the editor.)



C. A. Cook and A. A. Davidson, for the plaintiff.

Baker & Pursel and J. E. Wyand, for the defendant.

<sup>500</sup> HAYES, J. This is an original action for a writ of certiorari to the district court of Muskogee county, and grows out of an election contest filed in that court by plaintiff against defendant. Plaintiff alleges in his petition that, on the eighteenth day of July, 1908, he obtained judgment in said contest proceeding, whereby defendant was ousted from the office of commissioner for the first commissioner's district of Muskogee county, and plaintiff was declared to be entitled to said office, and to exercise the functions thereof, and was awarded judgment for his costs in the proceedings. He also alleges that the trial court, after awarding him said <sup>501</sup> judgment, upon overruling defendant's motion for a new trial, and upon defendant's praying an appeal to this court, allowed such appeal, and gave him forty days in which to make and serve a case-made, and allowed plaintiff fifteen days within which to suggest amendments thereto, and fifteen days thereafter in which to settle, sign, and file the case-made, and that the court further ordered that a supersedeas bond in the sum of two thousand dollars, to be approved by the clerk of the said court, be given within five days, and that the judgment be stayed for such time, and that upon giving and approval of said bond within said period of time, the ouster be stayed pending the decision of this court. Defendant filed with the clerk of the district court of Muskogee county within the time fixed by the court, his supersedeas bond, which was approved. Plaintiff alleges that by reason of the action of the court allowing the supersedeas, he has been denied the right and privileges of entering into and performing the duties of his office, and is deprived of the emoluments inuring therefrom. He prays for a writ of certiorari to remove said judgment and orders of the court to this court, and for a judgment of this court decreeing the order allowing the supersedeas to be void. Plaintiff attached to his petition certified copies of the final judgment of the trial court, and the order allowing supersedeas, and of the supersedeas bond filed therein, and approval thereof by that court. It is agreed by defendant that the certified copies of the record attached to plaintiff's petition are correct, and that, if we decide that the writ should issue, such record may be taken as a return to the writ, and the question plaintiff desires to have decided by this court upon the return of the writ may be decided without the issuance of the writ.

<sup>502</sup> The first question to be determined by this court is whether, upon the allegations of plaintiff's petition, the writ should issue. Writs of certiorari were abolished by section

4756 of Wilson's Revised and Annotated Statutes of 1903, and did not exist as a part of the jurisprudence of the territory of Oklahoma before the admission of the state; but this court is authorized, by section 2, article 7, of the constitution, to issue writs of certiorari. In *Baker v. Newton*, 22 Okl. 658, 98 Pac. 931, it was held that the power of the court under said section to issue writs of certiorari was to issue the common-law writ, and that such writ lies from this court to inferior courts, to bring to it the record in a case for investigation and review as to jurisdictional errors only. If the trial court in the case at bar was authorized to stay the judgment, and has not exceeded its jurisdictional power, the writ should not issue.

Section 4744 of Wilson's Revised and Annotated Statutes of 1903 provides that, in a proceeding to vacate or modify any final judgment or order rendered by the probate court or district court in the four classes of cases specified therein, the judgment or final order may be superseded upon the taking by the clerk of such court of a written undertaking executed by the plaintiff in error. The four classes of cases mentioned in said section are as follows: "First. When the judgment or final order sought to be reversed directs the payment of money. . . . Second. When it directs the execution of a conveyance or other instrument. Third. When it directs the sale or delivery of some real property. . . . Fourth. When it directs the assignment or delivery of documents."

The judgment in the case at bar belongs to none of these four classes, and it is contended by plaintiff that for that reason the trial court was without power to make the order permitting defendant to supersede the judgment.

<sup>503</sup> This section of the statutes and other sections herein-after mentioned were before the court for construction in *Re Epley*, 10 Okl. 631, 64 Pac. 18, and defendant relies upon the rule announced in that case. The petitioners in that case, Epley, Boyington and Riggs, composed the board of county commissioners of Garfield county, and Hatter was the clerk of said county, and ex-officio clerk of the board of canvassers of the election returns of said county. They had been directed, by mandamus issued by the district court of Garfield county, to reconvene and correctly canvass the votes as shown by the official returns of the election judges in two precincts in said county, cast at the election in 1900. From the order of the court granting the peremptory writ petitioners appealed to the supreme court of the territory, and obtained from one of the justices of that court an order staying the judgment of the trial court. But the trial court, upon refusal of the petitioners to obey the peremptory writ, proceeded to cite, hold, and imprison them for contempt of court. Thereupon peti-



tioners prayed the supreme court for a writ of habeas corpus. The respondents attacked the validity of the order of the associate justice of the supreme court, staying the order of the trial court in the mandamus proceedings, and that was the only question directly involved in the habeas corpus proceedings. The court held that section 4750, Wilson's Revised and Annotated Statutes, which is as follows: "Execution of the judgment or final order of any judicial tribunal, other than those enumerated in this article, may be stayed on such terms as may be prescribed by the court or a judge thereof, in which the proceedings in error are pending"—authorized the staying of the order in the mandamus proceeding. Mr. Justice Hainer, who delivered the opinion of the court, quoted at length the various provisions in our code authorizing the supreme court to review, on proceedings in error, judgment and final orders of the inferior courts of the territory, and authorizing such inferior courts and the appellate court to stay such judgment or order while being reviewed by the appellate <sup>504</sup> court. Speaking of the powers conferred upon the trial court by section 4744, Wilson's Revised and Annotated Statutes, Mr. Justice Hainer said: "It will thus be seen that section 569 enumerates the four classes of judgments or final orders which may be stayed or superseded as a matter of right, upon terms prescribed therein, when an appeal is taken to this court from the district court or the probate court."

In commenting upon the provisions of said section the justice, following a line of cases from Nebraska, held that, in all cases where the statute makes no provision for a supersedeas as a matter of right, the trial court may in its discretion allow supersedeas upon conditions which it may fix for the protection of the parties. The effect of the entire opinion is that, in all cases named in the four classes provided in said section 4744, the right to stay or supersede the judgment is one of right which the trial court cannot refuse; that in all other cases such right is in the discretion of the trial court, or may be granted by the supreme court, or any justice thereof, under the provisions of section 4750.

It is urged by plaintiff that that portion of the opinion which holds that, in all other cases than the four classes enumerated, the right to stay or supersede a judgment is in the discretion of the trial court is obiter dicta, and not binding upon this court, and is contrary to the weight of authorities. We think the criticism to the effect that it is obiter dicta is well founded. The power of the trial court to grant supersedeas in such cases was not involved in that case, but only the power of the supreme court, or a justice thereof, but it is clear that the justice delivering the opinion did not inadvert-

ently pass upon the power of the trial court in such cases, for in the syllabus of the case, which was by the entire court, is the following paragraph: "In cases where the statute makes no provision for a supersedeas or a stay of the judgment or final order as a matter of right, the trial court may, in the exercise of its discretion, allow a supersedeas or stay on such terms as it may prescribe for the protection of the parties pending an appeal to the appellate court."

<sup>505</sup> The rule of the court in this paragraph of the syllabus is well supported by a long line of Nebraska cases construing a similar statute, among which are the following: *Gandy v. State*, 10 Neb. 243, 4 N. W. 1019; *Cooperrider v. State*, 46 Neb. 84, 64 N. W. 372; *Penn Mut. Life Ins. Co. v. Creighton Theatre Bldg. Co.*, 51 Neb. 659, 71 N. W. 279; *Home Fire Ins. Co. v. Dutcher*, 48 Neb. 755, 67 N. W. 766; *Prante v. Lompe*, 74 Neb. 210, 104 N. W. 1150.

We are of the opinion that it was the intention and desire of the court in *Re Epley*, 10 Okl. 631, 64 Pac. 18, to determine and fix the practice governing, staying, and superseding judgments and final orders appealed from that led them to decide the question of the power of the trial court to supersede judgments not mentioned in the statute, which question is involved in this case, but was not directly involved in that case. The rule in that case was accepted and followed by the trial courts and appellate court of the territory of Oklahoma subsequent to its announcement, prior to the admission of the state, and, so far as we are informed, it has been generally followed by the trial courts of the state; and, while its correctness has never been brought to the attention of this court heretofore, it has been silently acquiesced in, and we think that it has become a too well-settled rule of practice in this state to justify this court in making an extensive examination to ascertain whether it is supported by the weight of authorities, since to set it aside at this time would probably cause great inconvenience and confusion in the practice, and it may easily be changed by an enactment of the legislature, if there is any necessity therefor: *Weaver v. Gardner*, 14 Kan. 348. We, therefore, in so far as the rule announced in that case is applicable to the case at bar, adopt and follow the same.

The language of the judgment disposing of the issues involved in the trial court is as follows: "It is therefore ordered, considered, and adjudged by the court that the defendant be ousted from the office of county commissioner of and for the first commissioner's district of Muskogee county, and that plaintiff be, and he is hereby, declared <sup>506</sup> entitled to said office, and to exercise the functions thereof, and that the plaintiff have and recover of and from said defendant all his costs of and about this suit laid out and expended, and

that execution may issue, to which ruling and judgment of the court the defendant at the time duly excepted."

The order of the court allowing the judgment to be stayed directs that the supersedeas bond shall be given within five days, and that the ouster shall not take effect until the expiration of that time, and that, upon the giving of the bond within said time, the ouster shall be stayed pending the decision of this court, and that defendant be required to file his petition in error within seventy-five days from the date of the judgment. The supersedeas bond filed is conditioned that plaintiff in error, defendant in this action, shall abide the decision of the supreme court, and vacate said office of commissioner and pay all costs in case judgment shall be adjudged against him. There can be no doubt that the order of the trial court, staying the judgment to the extent that it stays the execution for costs, is within the rule in *Re Epley*, but it is urged by plaintiff that said judgment of ouster, to the extent that it declares him to be the duly elected commissioner and ousts defendant, is self-executing, and cannot be stayed. The supreme court of the territory, in announcing the doctrine in *Re Epley*, 10 Okl. 631, 64 Pac. 18, that in all cases where the statute makes no provision for a supersedeas or stay of judgment, the trial court may, in the exercise of its discretion, allow a supersedeas or stay, followed and adopted the rule of the supreme court of Nebraska. The supreme court of that state in following this rule has recognized no distinction in the application thereof between judgments that are self-executing and those that are not self-executing. In fact the rule had its origin in that jurisdiction in a case in which the judgment appealed from was a self-executing judgment. The first pronouncement of that court upon that question is in *Gandy v. State*, 10 Neb. 243, 4 N. W. 1019, which was a proceeding in the nature of a quo warranto to oust from office one who was alleged to be disqualified by reason of having been convicted of a felony. The trial court rendered a judgment <sup>507</sup> of ouster, on appeal from which judgment it refused to grant a supersedeas, and this act of the court was included in one of the assignments of error in the appellate court. The appellate court held that appellant was not entitled, as a matter of right, to the supersedeas, but that it was in the province of the trial court in its discretion to grant it, and that the refusal to do so was not a subject for review.

In *Carson v. Jansen*, 65 Neb. 423, 91 N. W. 398, appellants had brought against defendants an action to set aside an assignment of a judgment from defendant M. to defendant J. as being in fraud of creditors, and to subject said judgment and its proceeds to the payment of a judgment which appellants held against M. The judgment of the trial court was

against plaintiff and in favor of the defendants. This judgment, in its very nature, was self-executing; no writ of execution was required to enforce it. The trial court allowed the same to be stayed, and by order fixed the amount of the supersedeas bond, but made no provision as to the conditions of the bond. Defendant J., the holder of the assigned judgment pending the appeal, was threatening to collect the judgment. Appellants brought their suit to enjoin her from doing so, and to maintain the status quo of the case pending the appeal. On appeal from the decree of the trial court in favor of the defendant J. the supreme court held that the district court had power in its discretion to supersede the judgment in the action by which appellants sought to have the assignment of the judgment set aside, but that said supersedeas was ineffectual for the reason that the court had failed to prescribe the conditions of the bond. The court in this case, however, as in *Gandy v. State*, 10 Neb. 243, 4 N. W. 1019, recognized and made no distinction in the application of the rule between self-executing judgments and those that are not self-executing.

Plaintiff has called our attention to *State v. Meeker*, 19 Neb. 444, 27 N. W. 427, and *State v. Mayor and City Council of Kearney*, 28 Neb. 103, 44 N. W. 90, and contends that the doctrine of those cases is in conflict with the doctrine and rule in *Gandy v. State*, but this contention is not well founded. In *State* <sup>508</sup> *v. Meeker*, 19 Neb. 444, 27 N. W. 427, the county board, upon complaint made to them, removed respondent from the office of district clerk, under a provision of the statute authorizing said board to remove officers for misconduct, and appoint the relator to fill such vacancy, whereupon respondent refused to surrender possession of the office, and mandamus proceedings were brought to obtain possession. The respondent, Meeker, appealed from the action of the county board removing him, and made application to said board to allow him a supersedeas, and presented to the board a bond in the sum of one thousand dollars for its approval, which the board refused to approve, whereupon such bond was presented to the clerk of the district court, to which the action was appealed, and was approved. It may be seen from this statement of the facts in that case that the question before the court therein was not the question before the court in *State v. Gandy* and in the case at bar. The effect of that case is that respondent, Meeker, was not entitled to a supersedeas bond under the provisions of the statute authorizing supersedeas in certain cases, but it does not hold that the trial court was without power in its discretion to grant supersedeas. That question was not before the appellate court, and there is no expression of the court thereon in the decision.

In *State v. Mayor*, 28 Neb. 103, 44 N. W. 90, the facts before the court were very similar to the facts in *State v. Meeker*, 19 Neb. 444, 27 N. W. 427. The supersedeas bond relied upon in that case, which was an election contest, was one that had been given under the provisions of the statute, without an order of the court allowing the same, and the effect of the opinion of the court in that case is that such bond is not authorized by the statute, but it does not decide that the trial court was without power in its discretion to grant such supersedeas. In neither of these cases is the case of *State v. Gandy* referred to, and we cannot think that the court intended to overrule the rule announced in *State v. Gandy*, when that question was not before the court in either of those cases, and no reference is made in either case to *State v. Gandy*. In *Sweeney v. Karsky*, 25 Nev. 197, 58 Pac. 813, it was held that a clause of a statute, which provided <sup>500</sup> that, in all cases not mentioned in preceding sections of the statute, providing the amount of undertaking necessary to stay the execution of a judgment, the court or judge thereof should by order fix the amount of the undertaking to stay the execution of the judgment, authorized the court to stay the judgment in an election contest. A like conclusion is announced in *Grelle v. Pinney*, 62 Conn. 478, 26 Atl. 1106, and in *Day v. Gunning*, 125 Cal. 527, 58 Pac. 172. See, also, *United States v. Addison*, 22 How. 174, 16 L. ed. 304.

We are not unmindful of the fact that it has been held in many jurisdictions that a self-executing judgment cannot be superseded, and that some of the cases in which it has been so held seem to be directly in point upon the question now before the court, and in conflict with the rule of the Nebraska court followed by the supreme court of the territory. Some of said cases are as follows: *Mayor etc. v. Shaw*, 14 Ga. 162; *Allen v. Robinson*, 17 Minn. 113 (Gil. 90); *Fylpaa v. Brown County*, 6 S. D. 634, 62 N. W. 962; *Honey v. Davis*, 38 Tex. 63; *Craig v. Woodson*, 128 Mo. 497, 31 S. W. 105; *Fawcett v. Superior Court*, 15 Wash. 342, 55 Am. St. Rep. 894, 46 Pac. 389; *State v. Poindexter*, 43 Wash. 147, 86 Pac. 176; *Jayne v. Drorbaugh*, 63 Iowa, 711, 17 N. W. 433; *Ewing v. Thompson*, 43 Pa. 372; *State v. Marion Co. Commissioners*, 14 Ohio St. 515. In some of the cases here cited the decisions of the courts that a self-executing judgment is not stayed by supersedeas is upon a state of facts resulting from the attempt to supersede such judgments under the general provisions of the statutes authorizing the execution of judgments in certain classes of cases to be stayed upon the execution of an undertaking, and do not arise upon facts wherein the power of the court to allow a stay independent of the statute is involved. The writer of this opinion, however, cannot say, after a careful investigation of the authorities, that he is not impressed

that the better reasoning and the weight of authorities is to the effect that self-executing judgments cannot be stayed unless especially authorized by statute. But, as before stated, the rule adopted by the supreme court of the territory in *Re Epley*, 10 Okl. 631, 64 Pac. 18, following the <sup>510</sup> rule of the Nebraska court, authorizes the trial court in their discretion to allow a supersedeas in any case. We do not feel that we would be justified in disturbing the rule of practice which the observance of the rule of that case by both the bench and bar in this jurisdiction for the past eight years has established. We therefore conclude that the trial court did not exceed its jurisdiction granting the order permitting its judgment to be superseded.

This conclusion against plaintiff's contention as to the jurisdiction of the trial court to make the order complained of is fatal to his right to the writ, and we shall not discuss whether, if such contention had been true, he had another adequate remedy, as neither party has noticed this question in his brief.

The writ is denied.

Kane, C. J., and Williams and Dunn, JJ., concur; Turner, J., dissents.

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*The Implied Power of Courts to Issue Writs of Supersedeas* is the subject of a note to *State v. Board of Education*, 19 Wash. 8, 67 Am. St. Rep. 714.

*The Staying of Executions* otherwise than by statutory proceedings is the subject of a note to *State v. Clements*, 127 Am. St. Rep. 707.

*Stare Decisis*.—*A Long-continued Practical Interpretation of a Law* by the courts of the state should be regarded as binding: *City of Detroit v. Detroit Ry. Co.*, 134 Mich. 11, 104 Am. St. Rep. 600. Limitations upon the doctrine of stare decisis is the subject of a note to *Truxton v. Fait & Slagle Co.*, 73 Am. St. Rep. 98. As to what decisions should be, and what should not be, overruled, see, also, *Pitecock v. State*, 91 Ark. 527, 134 Am. St. Rep. 88.

*That Discretionary Acts cannot be Reviewed by Certiorari*, see the note to *Wulzen v. Board of Supervisors*, 40 Am. St. Rep. 34.



**McMASTER v. CITY NATIONAL BANK OF LAWTON.**  
[23 Okl. 550, 101 Pac. 1103.]

**JOINT OBLIGORS—Effect of Judgment Against One.**—The common-law rule governing the enforcement of joint obligations, and making a judgment against one or more joint makers of a promissory note a bar to further proceedings against the other joint makers, has been so far modified by our statute as that obligations appearing to be joint will be presumed to be joint and several until such presumption is in some manner overcome; and, unless such presumption is overcome, any one or more of the joint makers of a promissory note may be proceeded against severally without prejudice to the rights of holder against other makers. (p. 832.)

**APPEAL—Review of Conflicting Evidence.**—When controverted questions of fact are submitted to a jury, and the evidence adduced is conflicting and contradictory, but there is competent evidence reasonably tending to support every material allegation necessary to uphold the verdict, and the trial court approves the verdict and renders judgment in accordance therewith, and a new trial is refused, this court will not disturb the verdict of the jury and the judgment of the court on the weight of such conflicting evidence. (p. 834.)

**INSTRUCTIONS—Sufficiency.**—Where the Instructions given by the court fairly and reasonably present for the consideration of the jury the issues joined by the pleadings and presented by the evidence, they are sufficient. (p. 834.)

(Syllabi by the court.)

Action by the City National Bank of Lawton against Frank McMaster. Judgment for plaintiff, and defendant brings error. Affirmed.

Frank McMaster, for the plaintiff in error.

Smith & Thomas, for the defendant in error.

550 DUNN, J. This proceeding is brought to reverse a judgment of the district court of Comanche county, and to secure a new 551 trial by Frank McMaster, defendant in the court below; the plaintiff, the City National Bank of Lawton, having secured a judgment against him on a note signed by himself and one Addison. The grounds relied upon by plaintiff in error for reversal may be briefly grouped under three heads: First, because the court overruled a motion of the defendant McMaster praying for an order requiring plaintiff to secure service upon and bring the defendant Addison into court; second, because the verdict and judgment were not sustained by sufficient evidence, and were contrary to law; third, on account of error committed by the court in the instructions. We will deal with them in the order stated.

The supreme court of the territory of Oklahoma in the case of Outcalt v. Collier, 8 Okl. 473, 58 Pac. 642, held in the syllabus as follows: "The common-law rule governing the enforcement of joint obligations, and making a judgment against one

or more joint makers of a promissory note a bar to further proceedings against the other joint makers, has been so far modified by our statute as that obligations appearing to be joint will be presumed to be joint and several until such presumption is in some manner overcome; and, unless such presumption is in some manner overcome, any one or more of the joint makers of a promissory note may be proceeded against severally without prejudice to the rights of holder against other makers."

In the consideration of this question, Chief Justice Burford, who wrote the opinion of the court, reviewed our statutes which have the effect of abrogating the common-law rule as to joint obligations, and under which persons liable upon the same may all or any of them be included in the same action at the option of plaintiff. What is there said in reference to the note then before the court is equally applicable to the facts as disclosed in the case at bar: "Construed by the rules of common law, the note sued on is a joint obligation, and not a joint and several one: Tiedeman on Commercial Paper, sec. 13; Randolph on Commercial Paper, sec. 149; *Mason v. Eldred*, 6 Wall. 238, 18 L. ed. 783. A judgment against one joint maker will discharge the others: Randolph on Commercial Paper, sec. 1830. In Daniel on <sup>552</sup> Negotiable Instruments, section 1296, the rule is stated as follows: 'A judgment against one or two joint promisors is a bar to an action against both jointly, and is also a bar to an action against the other one. The joint parties cannot be sued separately, for they have incurred no separate obligation, and they cannot be sued jointly, because judgment has already been recovered against one who would be subject to two suits for the same cause; but, when the liability is joint and several, a judgment against one does not preclude procedure against the other or others. though, after judgment against one, all cannot be sued jointly': *Mason v. Eldred*, 6 Wall. 238, 18 L. ed. 783; *Odell v. Carpenter*, 71 Ind. 463; *Candee v. Smith*, 93 N. Y. 349. The foregoing authorities establish the common-law rule, and such rule must control in this case, unless modified or abrogated by statute. Nearly all of the states have now statutes abrogating the distinction between joint and several obligations, and giving the holders of joint obligations the right to proceed against the joint obligors the same as if they were severally liable. Does our statute change the common-law rule? The following sections of the statutes of 1893 refer to and bear upon the subject under investigation. Section 3389: 'A promissory note is an instrument negotiable in form, whereby the signer promises to pay a specified sum of money.' Section 3283: 'A negotiable instrument is a written promise or request for the payment of a certain sum of money to order or bearer.' Section 851: 'Where all of the parties who unite in a promise re-



ceive some benefit from the consideration, whether past or present, their promise is supposed to be joint and several.' Section 3297: 'The signature of every drawer, acceptor, and indorser of a negotiable instrument is presumed to have been made for a valuable consideration, before the maturity of the instrument, and in the ordinary course of business.' Section 3911: 'Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and indorsers and guarantors, may all or any of them be included in the same action, at the option of the plaintiff.' Section 3957: 'Where the action is against two or more defendants, and one or more shall have been served, but not all of them, the plaintiff may proceed as follows: First. If the action be against defendants jointly indebted upon contract, he may proceed against the defendants served, unless the court otherwise direct, and if he recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint <sup>553</sup> property of all, and the separate property of the defendants served. Second. If the action be against defendants severally liable, he may, without prejudice to his rights against those not served, proceed against the defendants served in the same manner as if they were the only defendants.' Section 3958: 'Nothing in this code shall be so construed as to make a judgment against one or more defendants jointly or severally liable, a bar to another action against those not served.' Section 4287: 'In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment may be proper.' . . . . Section 2693 abrogates the rule of the common law that statutes in derogation thereof are to be strictly construed, and requires all statutes to be liberally construed, with a view to effect their objects, and to promote justice.' See, also, Symms Grocer Co. v. Burnham, 6 Okl. 618, 52 Pac. 918.

To his liability upon the note defendant made two defenses: First. That the same was given to take up two other notes which had, in fact, been paid in full, and hence there was no consideration for the note in suit. The second defense was that the signature of Mr. McMaster was obtained by virtue of fraudulent representations made to him by the officials of the bank at the time the same was signed, in which he stated it was agreed that he should not be held bound or liable at all events to pay this note, but only to the extent that would be covered by certain assets which he then held in his hand belonging to the principal obligor thereon. Both of these contentions on the part of the defendant were testified to by him, and were denied by the officials of the bank. The evidence on the part

of both parties having been fully presented to the jury under the conditions of this case, its verdict must be considered final, in accord with the rule frequently annunciated by this court that when controverted questions of fact are submitted to a jury and the evidence adduced is conflicting and contradictory, and there is competent evidence reasonably tending to support and uphold the verdict, and where the trial court approves the verdict and renders judgment in accordance therewith, and a new trial is refused, this court will not disturb <sup>554</sup> the verdict of the jury and the judgment of the court on the weight of such evidence: *Strickler v. Gitchel*, 14 Okl. 523, 78 Pac. 94; *Kuhl v. Supreme Lodge Select Knights and Ladies*, 18 Okl. 383, 89 Pac. 1126; *Everett v. Akins*, 8 Okl. 184, 56 Pac. 1062; *Archer v. United States*, 9 Okl. 569, 60 Pac. 268; *Kramer v. Ewing*, 10 Okl. 357, 61 Pac. 1064; *Wade v. Cornish*, 23 Okl. 40, 99 Pac. 643.

We have carefully considered the instructions which were refused by the court in connection with these which were given. In our judgment instructions 2 and 3 given by the court substantially covered the two which were requested by defendant, and the refusal of the court to give requested instruction No. 3 was not error by virtue of the statute covering the same proposition quoted above. The contentions of the defendant were set out in full by the court in the instructions given, and were so stated as to cover the issues raised by the pleadings and by the evidence, and in our judgment fairly presented to the jury for its consideration defendant's claims.

We have carefully gone over the entire record in the case, and to our minds there is no reversible error contained therein. Having reached this conclusion, it follows that the judgment of the lower court must be affirmed.

All the justices concur.

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#### **RELEASE OF ONE JOINT OR JOINT AND SEVERAL OBLIGOR.**

- I. General Rule That Release of One is Release of All, 834.**
- II. Essential Elements of a Release, 835.**
- III. Effect of Release of One With Consent of All, 836.**
- IV. Subject Matter of Instrument of Release, 836.**
- V. Operation of a Receipt as a Release, 836.**
- VI. Intention of Parties as Governing Construction of Instrument of Release, 837.**
- VII. Reservation of Rights Against Those not Released as Manifesting Intention, 839.**
- VIII. Seals and Their Effect upon Instruments of Release, 839.**
- IX. Statutory Modifications of Common-law Rule, 840.**

##### **I. General Rule That Release of One is Release of All.**

It is a well known and accepted rule of law that the release of one or more joint or joint and several obligors operates as a release of all the obligors. This is upon the theory that there is, in a joint

or joint and several obligation but one obligation, though there may be actions against the several joint obligors to enforce it. The release of one discharges or releases the obligation: *Johnson v. Collins*, 20 Ala. 435.

The rule is likewise based upon equitable grounds. The contract of the obligors among themselves is, that they will pay the obligation in common, each to contribute his pro rata part. Now, if one is released, that contract is violated. He cannot be held to contribute to a debt from which he has been released, and in order to obviate that injustice, all are held to be released by the release of one: *Carroll v. Corbitt*, 57 Ala. 579.

Were the law otherwise, it would work an injustice to the co-obligors not so released; their burden would be increased, and they would be obliged to pay more of the joint indebtedness than they had, by their contract among themselves, agreed to: *Mortland v. Himes*, 8 Pa. 265.

This rule and reasoning are readily appreciated in the case of principal and surety. The release of the principal releases the surety, but the release of the surety will not release the principal, for he cannot enforce contribution from the surety and is not damaged, nor is his burden of liability increased, by the release: *Blackburn v. Beall*, 21 Md. 208.

The rule is alike applicable to joint and several as well as to joint debtors or obligors: *Nabors v. Camp*, 14 Ala. 460; *Johnson v. Collins*, 20 Ala. 435; *Carroll v. Corbitt*, 57 Ala. 579; *Vandever v. Clark*, 16 Ark. 331; *Heckman v. Manning*, 4 Colo. 543; *Chamblee v. Davie*, 88 Ga. 205, 14 S. E. 195; *Clark v. Mallory*, 83 Ill. App. 488, affirming 185 Ill. 227, 56 N. E. 1099; *Kirby v. Cannon*, 9 Ind. 371; *Walls v. Baird*, 91 Ind. 429; *Gardner v. Baker*, 25 Iowa, 343; *Drake v. Hill*, 53 Iowa, 37, 3 N. W. 811, 5 N. W. 745; *Haney-Campbell Mfg. Co. v. Adaza Co-operative Creamery Co.*, 108 Iowa, 313, 79 N. W. 79; *Baldwin v. Gray*, 4 Mart. (La.), N. S., 192, 16 Am. Dec. 169; *Merritt v. Bucknam*, 90 Me. 146, 37 Atl. 885; *Booth v. Campbell*, 15 Md. 569; *Whitaker v. Salisbury*, 32 Mass. (15 Pick.) 534; *Winsor v. Savage*, 50 Mass. (9 Met.) 346; *Collier v. Field*, 2 Mont. 205; *Neligh v. Bradford*, 1 Neb. 451; *Young v. Currier*, 63 N. H. 419; *Saxton v. Dodge*, 46 How. Pr. 467; *Harbeck v. Pupin*, 145 N. Y. 70, 39 N. E. 722, affirming 73 Hun, 1, 25 N. Y. Supp. 952; *Dudley v. Bland*, 83 N. C. 220; *Woolsey v. Leely*, *Wright (Ohio)*, 360; *Crawford v. Roberts*, 8 Or. 324; *Mortland v. Himes*, 8 Pa. 265; *Brown v. Marsh*, 7 Vt. 320; *Brodek v. Farnum*, 11 Wash. 665, 40 Pac. 189; *Rutherford v. Rutherford*, 55 W. Va. 56, 47 S. E. 240; *Merrick v. Giddings*, 1 Mackey (D. C.), 394.

## II. Essential Elements of a Release.

The instrument purporting to release one must be a full release; it must not fall short of that; it must contain all the elements necessary for such a construction. It must be a present, complete release, not an agreement to release in the future or upon some contingency: *Chamblee v. Davis*, *supra*; *Shaw v. Pratt*, 39 Mass. (22 Pick.) 305; *Clifton v. Foster (Tex. Civ. App.)*, 20 S. W. 1005; *Brown's Admr. v. Johnson*, 13 Gratt. 644.

Mere indulgence to one joint obligor will not operate as a release of his co-obligors, and not even of him: *McAreavy v. Magril*, 123 Iowa, 605, 99 N. W. 193.

### III. Effect of Release of One With Consent of All.

A release of one co-obligor, with the consent of his fellow-obligors, will not operate as a release of all. The reason for the general rule is not then applicable, for that is invoked to prevent hardship and injustice, but no injustice can be done or hardship imposed upon those who consent to an act being done, that is, to a release being given to their co-obligor: *Marks v. Deposit Bank of Owensboro*, 21 Ky. Law Rep. 117, 50 S. W. 1103; *Campbell v. Booth*, 8 Md. 107. This is especially true where, by the terms of the obligation, each is to pay a certain definite part; a release given to one upon his paying his part will not release the others: *Wandelohr v. Logan*, 21 Ky. Law Rep. 1773, 56 S. W. 412. Nor will a release given to one joint obligor at the request of his co-obligors release them: *Drake v. Reed*, 4 Stew. & P. (Ala.) 192. An agreement whereby the creditor agrees to sue certain co-obligors, in order that liability may be established, and that if so established suits for contribution may be avoided, is not a release of those with whom the agreement is made, and consequently will not release the other obligors: *Carter v. Long*, 125 Ala. 280, 28 South. 74

### IV. Subject Matter of Instrument of Release.

The instrument of release will be construed to apply only to the particular obligation therein expressed, and to such other obligations, if any, as may from the terms of the instrument be fairly implied: *Walls v. Baird*, 91 Ind. 429. The release of an action, unintentionally brought, will not operate to discharge the debt on which the action was founded nor a codebtor thereof. While the action was discharged, the cause of action, on which the co-obligor was bound, was not released: *Nelson v. Thompson*, 61 Mass. (7 Cush.) 502.

If an undertaking is original and not merely a guaranty of another undertaking by someone else, though it is predicated upon it, a release of the primary one, or of those, or one of them, liable upon it, will not discharge the second or those liable upon it. An agreement, whereby the directors of a bank agreed that the bank should suffer no loss by reason of their acting beyond their authority in discounting a note, is not discharged, nor are they released, by a release given to one of the joint makers of the note; their undertaking is original, not a guaranty of the note: *Bank of Tennessee v. Barksdale*, 37 Tenn. (5 Sneed) 73.

While, as a general rule, the release of one partner for a partnership debt will operate as a release of the partnership (*Elliott v. Holbrook*, 33 Ala. 659), it has been held otherwise on the ground that the partnership obligation is a different undertaking: *Rice v. McMartin*, 39 Conn. 573; *Gardner v. Baker*, 25 Iowa, 343; *Philadelphia F. R. R. Co. v. Johnson*, 7 Watts & S. (Pa.) 317.

### V. Operation of a Receipt as a Release.

A receipt for money paid by one co-obligor is not a release, either where the amount paid is but a part of the debt and a partial receipt is given (*Rogers v. Hensted, Kirby* (Conn.), 44), or where a part is paid and a receipt in full given: *Pettigrew v. Harmon*, 45 Ark. 290; *Armstrong v. Hayward*, 6 Cal. 183; *Moore v. Galewood*, 5 Ky. Law

**Rep. 777; Rowley v. Stoddard, 7 Johns. 207; Buckingham v. Oliver, 3 B. D. Smith (N. Y.), 129.**

**VI. Intention of Parties as Governing Construction of the Instrument of Release.**

While the general proposition that the release of one will operate to release all the joint and several co-obligors is true, and true independently of statutory enactments, there are many apparent exceptions to the rule. Upon a careful examination of the cases in which the doctrine has been commented upon, it will appear that the rule has been tapered down, modified, or has exceptions; but whether this is true, or whether, as some courts have stated, where the intention of the parties, as found from the context of the instrument and gathered from the surrounding and attending circumstances, has been the execution of an instrument not having the effect of a release, and such intent is effected by construing the instrument as having the effect of a covenant not to sue or to discharge, the result is the same.

Some courts have held that the common-law rule that the release of one joint or joint and several obligor operated to release all the co-obligors, has exceptions, as do other rules of law, and that it is the policy of the courts to give effect to those exceptions; yet by far the greater number of authorities have stated the doctrine in a manner similar to that laid down in *Benton v. Mullen*, 61 N. H. 125, where it was said: "While formerly a more strict and technical rule prevailed, the weight of authority now is, even though apt and technical words of release are used, that if the parties, taking into consideration the circumstances of the case, their relation to each other, and construing the instrument as a whole, cannot reasonably be supposed to have intended a release of the whole debt, it will be construed as only an agreement not to charge the party to whom the release is given, and will not be permitted to have the effect of a technical release."

Almost all the cases state that a construction should be given to the instrument purporting to be a release that will best give effect to the intent of the parties, and that the intent as manifested shall be the basis from which the instrument shall be construed.

The weight of modern authority is in favor of a reasonable rule. Where the intent of the parties shows on the face of the instrument that it was not intended to operate as a release, such intent, as in other written instruments, should be carried out: *Parmelee v. Lawrence*, 44 Ill. 405; *Bonney v. Bonney*, 29 Iowa, 448; *Hancy & Campbell Mfg. Co. v. Adaza Co-operative Creamery Co.*, 108 Iowa, 313, 79 N. W. 79; *Southwick v. Hopkins*, 47 Me. 362; *Hale v. Spaulding*, 145 Mass. 482, 1 Am. St. Rep. 475, 14 N. E. 534; *Couch v. Mills*, 21 Wend. 424; *Russell v. Adderton*, 64 N. C. 417; *Evans v. Raper*, 74 N. C. 639; *Winslow v. Brown*, 7 R. I. 95, 80 Am. Dec. 638; *Bogert v. Phelps*, 14 Wis. 88 (95); *Merchants' Nat. Bank v. McAnulty* (Tex. Civ. App.), 31 S. W. 1091; *Hamilton v. Ritchie* (Tenn. Ch.), 53 S. W. 198; *Elgin City Banking Co. v. Self* (Tex. Civ. App.), 35 S. W. 953; *Joy v. Wurtz*, 2 Wash. C. C. 266, Fed. Cas. No. 7555; *Paret v. Bryson*, Fed. Cas. No. 10,710.

The doctrine of giving effect to the intent is an equitable one, for it is said in *Russell v. Adderton*, 64 N. C. 417, the "construction [of an instrument as a release] in most cases disappoints the intention of

the parties and carries the legal effect of the instrument beyond their meaning" (intention), and that intention should be given effect.

But the contrary view was held in *Milliken v. Brown*, 1 Rawle (Pa.), 391, where it was stated that the intent of the parties had no bearing upon the construction, if in fact they executed a release. The doctrine of intention has long been established in equity. Equity will not extend the operation of an instrument beyond the clear intention of the party and the justice of the case, but will limit it to the particular matter intended to be released: *Norris v. Ham*, B. M. Charl. (Ga.) 267; *Legrand v. Baker*, 22 Ky. (6 T. B. Mon.) 235; *McNeal's Admr. v. Blackburn*, 37 Ky. (7 Dana) 170; *Newcomb v. Newcomb*, 6 Ky. Law Rep. 668; *Clagett v. Salmon*, 5 Gill & J. (Md.) 314; *Kirby v. Taylor*, 6 Johns. Ch. 242; *Pierce v. Sweet*, 33 Pa. 151; *McLarren v. Robertson*, 20 Pa. 125; *Massey v. Brown*, 4 S. C. 85.

But as a foundation for such construction the intent must appear in the instrument itself: *Parmelee v. Lawrence*, 44 Ill. 405; *Merchants' Nat. Bank v. McAnulty* (Tex. Civ. App.), 31 S. W. 1091. The proposition has been stated in *Merritt v. Buckman*, 90 Me. 146, 37 Atl. 885: "A release may be given to one of several joint debtors and all rights be reserved against the others, but that was not done in this indenture; nor does the instrument show any intention . . . . to reserve rights against other joint debtors or promisors." And in *Hale v. Spaulding*, 145 Mass. 482, 1 Am. St. Rep. 475, 14 N. E. 534, "nothing in the instrument before us to show such contrary intention."

Were the intent permitted to be shown by parol, the rule of varying a written instrument by parol would be violated, but the intent appearing upon the face of the instrument, parol is admissible to explain it: *Parmelee v. Lawrence*, 44 Ill. 405; *Evans v. Raper*, 74 N. C. 639; 1 *Parsons on Contracts*, p. 27.

There are, however, cases which hold that the intention of the parties cannot be considered in the construction of an instrument that appears to be a release: *Rice v. Webster*, 18 Ill. (8 Peck) 331; *Milliken v. Brown*, 1 Rawle (Pa.), 391; *Bell v. Steel*, 21 Tenn. (2 Humph.) 148; *Joy v. Wurtz*, 2 Wash. C. C. 266, Fed. Cas. No. 7555. Though many of the courts, if not all that formerly held that doctrine, have reversed themselves: *Parmelee v. Lawrence*, 44 Ill. 405, reversing *Rice v. Webster*, 18 Ill. 331; and *Burke v. Noble*, 48 Pa. 168, reversing *Milliken v. Brown*, 1 Rawle (Pa.), 391.

The cases of intention governing must not be confused by the apparent holding of some cases that the intent has no bearing upon the construction. These cases are governed by the fact that by operation of law the act or omission of the obligee operates as a release despite his intent, and as it is a release of one, all are released thereby: *Munyan v. French*, 60 N. J. L. 12, 36 Atl. 771; *Sloan v. Courtenay*, 54 S. C. 314, 32 S. E. 431; *Bowman v. Rector* (Tenn. Ch.), 59 S. W. 389; *Connecticut Fire Ins. Co. v. Oldendorff*, 73 Fed. 88, 19 C. C. A. 379.

The doctrine of giving effect to the intention of the parties, as expressed in the instrument and gathered from the surrounding and attending circumstances, does not violate the contract of the obligors among themselves that they will pay the debt in common. Those not favored by the obligee cannot complain. Their liability has not been increased, no injustice has been done them, for the one so favored is not relieved from contribution, but only to the amount which in good conscience and equity he would have had to pay. It cannot be pleaded



as a release, even by him, though in some cases it may appear that it is so pleaded, but it is so only to avoid circuitry of action. The doctrine of intention has been provided for by statute in many states.

#### **VII. Reservation of Rights Against Those not Released as Manifesting Intention.**

What has been termed a release with reservations, that is, where the obligee releases one or more and reserves his rights against the others, is in reality no release at all: *Northern Ins. Co. v. Potter*, 63 Cal. 157; *McAllester v. Sprague*, 34 Me. 296; *Bradford v. Prescott*, 85 Me. 482, 27 Atl. 461. An instrument may, and often does, contain such a stipulation: *Yates v. Donaldson*, 5 Md. 389, 61 Am. Dec. 283; *Kenworthy v. Sawyer*, 125 Mass. 28; *Berry v. Gilles*, 17 N. H. 9, 43 Am. Dec. 584; *Rogers v. Hosack's Exrs.*, 18 Wend. 319; *Honegger v. Wettstein*, 47 N. Y. Sup. Ct. (15 Jones & S.) 125; *Goldbeck v. Kensington Nat. Bank*, 147 Pa. 267, 23 Atl. 565, affirming 10 Pa. Co. Ct. R. 97. Such words or phrases as "reserving my rights against all others," "but this shall not operate to discharge the others," and like expressions, are simply a means of expressing the intent of the parties that the instrument shall not operate as a release. Such intent will be given effect, independently of statute: *Northern Ins. Co. v. Potter*, 63 Cal. 157; *Clark v. Mallory*, 83 Ill. App. 488, 185 Ill. 227, 56 N. E. 1099; *McAllester v. Sprague*, 34 Me. 296; *Sohier v. Loring*, 60 Mass. (6 Cush.) 537; *Benton v. Mullen*, 61 N. H. 125. And as stated above, this will have the effect of construing an instrument, commonly designated a release, as a covenant not to sue: *Howard v. Yost*, 6 Kan. App. 394, 50 Pac. 1098. The word "release" in an instrument does not of itself give it the effect of a release. It is the substance, the manifested intention, that is to be looked to, not the mere formality.

#### **VIII. Seals and Their Effect upon Instruments of Release.**

The question of what bearing a seal has upon an instrument purporting to be a release depends largely upon whether or not seals and their effect have been abolished by statute. In those states, where they are abolished, in order that the instrument operate as a release, it must not show upon its face any contrary intention: *Evans v. Pigg*, 43 Tenn. (3 Cold.) 395. Under the old common law of England and in this country, it has generally been held that only a formal technical release under seal will operate to discharge the co-obligors or even to release the one to whom it was given. An instrument not under seal, or a sealed instrument purporting to be a release, where an intent that it operate as something other than a release appeared upon its face, could and would always be given the effect intended: *Evans v. Carey*, 29 Ala. 99; *Armstrong v. Hayward*, 6 Cal. 183; *McAllester v. Sprague*, 34 Me. 296; *Drinkwater v. Jordan*, 46 Me. 432; *Bradford v. Prescott*, 85 Me. 482, 29 Atl. 461; *Valley Savings Bank v. Mercer*, 97 Md. 458, 55 Atl. 435; *Ruggles v. Patten*, 8 Mass. 480; *Goodnow v. Smith*, 35 Mass. (18 Pick.) 414, 29 Am. Dec. 600; *Shaw v. Pratt*, 39 Mass. (22 Pick.) 305; *Wiggin v. Tudor*, 40 Mass. (23 Pick.) 434; *Pond v. Williams*, 67 Mass. (1 Gray) 630; *Hale v. Spaulding*, 145 Mass. 482, 1 Am. St. Rep. 475, 14 N. E. 534; *Seligman v. Pinet*, 78 Mich. 50, 43 N. W. 1091; *Line v. Nelson*, 38 N. J. L. (9 Vroom) 358; *Harrison v. Close*, 2 Johns. (N. Y.) 448, 3 Am. Dec. 444; *Rowley v. Stoddard*, 7 Johns. (N. Y.) 207; *Schemerhorn v. Loines*, 7 Johns. (N. Y.) 311; *Halsted v. Schmelzel*, 17

Johns. (N. Y.) 80; Dewey v. Derby, 20 Johns. (N. Y.) 462; De Zeng v. Bailey, 9 Wend. (N. Y.) 336; Hope v. Johnston, 11 Rich. (S. C.) 135; Harvey v. Sweasy, 23 Tenn. (4 Humph.) 449; Bridges v. Phillips, 17 Tex. 128; Lancaster v. Brown, 20 Tex. 154; Seely v. Spencer, 3 Vt. 334.

But it has been held that an instrument not under seal, purporting to release one of several joint obligors, could not be modified by showing that something else was intended, though such intent appeared upon its face: Milliken v. Brown, 1 Rawle (Pa.), 391.

It may be stated, as a general proposition, that in those jurisdictions where seals still exist, and this rule has long existed, that no instrument purporting to be a release will be construed as such unless it is technical and under seal, and that, even if sealed, a contrary intention may be shown.

### IX. Statutory Modifications of Common-law Rule.

Many states have enacted statutes which appear to have the effect of repealing the common-law rule as to the operation of a release. It is true that such statutes do modify the rule, by providing that the intent of the parties as manifested from the instrument shall govern its construction: Evans v. International Trust Co. (Tenn. Ch.), 59 S. W. 373; or by permitting the releasor to reserve his rights against those not favored with a release, or by stipulating, as in England, that only those specifically named are released. Such statutes provide that in an unconditional release those not released are to be held liable for their pro rata share. A partnership is released by a release given to one partner, and rights cannot be reserved unless the partnership is dissolved. This is true by statute in New York: French v. McCarthy, 125 Cal. 508, 58 Pac. 154; Seymour v. Butler, 8 Iowa, 304; Smith v. White, 73 Kan. 607, 85 Pac. 588; Southworth v. Parker, 41 Mich. 198, 1 N. W. 944; Badger Lumber Co. v. McColgin, 63 Mo. App. 470; Abbott v. Royce, 51 Hun, 637, 3 N. Y. Supp. 503; Hoffman v. Dunlop, 1 Barb. (N. Y.) 185; Bennett v. Buchan, 53 Barb. (N. Y.) 578; Booth Bros. & H. I. Granite Co. v. Baird, 83 App. Div. 495, 82 N. Y. Supp. 432; Harbeck v. Pupin, 123 N. Y. 119, 25 N. E. 312; Sprague v. Childs, 16 Ohio St. 107; Hatzel v. Moore, 120 Fed. 1015.

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## HOWE v. MARTIN.

[23 Okl. 561, 102 Pac. 128.]

**FRAUD—Representation Made Without Knowledge.**—A party is guilty of fraud and deceit where, with intent to induce another to enter into a contract, he makes a positive assertion, which is material, in a manner not warranted by his information, or where he is not shown to have reasonable grounds for believing it true, where the assertion so made is not true, even though believed by the party making it. In such a case the definite assertion as a fact of that which is untrue, concerning that which the party has no knowledge, is tantamount in its effects to the assertion of something which the party knows to be untrue. (pp. 846, 847.)

**AGENCY—Liability of Principal for Statements of Agent.**—A principal is responsible to third persons, not only for the statements



and acts of his agent acting within his actual authority, but also for such acts and statements as he may do and make acting within the apparent scope of the authority conferred. (pp. 844, 848.)

**EXCHANGE OF PROPERTY—Remedies in Case of Fraud.**—A person induced by false and fraudulent representations to purchase or exchange for property has three remedies. He may, first, upon discovery of the fraud, rescind the contract absolutely, and sue in an action at law, and recover the consideration parted with upon the fraudulent contract, and in such a case he must restore, or offer to restore, to the parties sued whatever he has received by virtue of the contract; or, second, he may bring an action in equity to rescind the contract, and in such a case it is sufficient for plaintiff to restore, or make offer in his petition to restore, everything of value which he has received under the contract; or, third, he may affirm the contract, retain that which he has received, and bring an action at law to recover the damages sustained by reason of his reliance upon the fraudulent representations. (p. 849.)

**VENDOR AND VENDEE—Effect of Offer to Return Deed.**—An offer to return a deed received does not divest grantee, or re-invest the grantor with title, nor is it a rescission of the contract by the grantee, nor sufficient to constitute an offer to rescind. (pp. 842, 848.)

**EXCHANGE OF PROPERTY—Fraud—Measure of Damages.**—A party who makes an exchange of properties is entitled to make as good a bargain as he can, provided only he deals honestly. He may place his own property at a high price and secure another's at a low one. To the benefit of his bargain he is entitled, and he should not lose this legitimate gain because the other party has been dishonest. The measure of damages, in a case of fraud and deceit on such an exchange, should be, and therefore is, the difference in value between the property conveyed to him and the value of that which would have been conveyed had such property been as represented and the actual contract honestly fulfilled. (pp. 849, 850.)

(Syllabi by the court.)

Chas. R. Alexander and Hoover & Swindall, for the plaintiffs in error.

A. M. Appelget, for the defendants in error.

<sup>562</sup> DUNN, J. This action was brought in the district court of Woodward county, and arises out of a controversy between plaintiffs in error, defendants below, and defendants in error, plaintiffs below, over an exchange of lands. The contention of plaintiffs, as shown by the petition and the evidence, is that by and through the fraud and deceit of defendants they were induced to exchange their farm, which was located in Woodward county, Oklahoma, for eighty acres of land in Texas county, Missouri. Aside from alleged <sup>563</sup> fraud in the inducement to make the exchange, plaintiffs claim that the defendants agreed to furnish them with a good and sufficient title, evidenced by warranty deed and a clear abstract of the Missouri land, and aver in their petition that the deed delivered did not convey the tract for which plaintiffs traded, and that the same was not such a deed as was contemplated, and that the abstract did not show title in the

defendants, and hence no title was conveyed plaintiffs by the deed delivered. In declaring upon this feature of the case plaintiffs, assuming that the papers delivered to them were nullities, pleaded a tender back of the same, and in open court on trial offered them to the defendants. In the prayer to the petition, however, plaintiffs prayed that the deed so made and delivered by the defendants be reformed, so that the same would be a deed of general warranty, and that when so reformed that plaintiff have and recover judgment for the damages suffered upon a breach of the warranties contained. To this defendants answered that, subsequent to the time of the original transfer of the properties, and prior to the commencement of the action, they tendered to plaintiffs a good and sufficient, complete and correct, abstract of the title to the said land in Missouri, showing that the same was clear and free from encumbrances, and that the defendants were the owners thereof in fee simple, and announced that they would in open court tender an abstract of title showing the same. On the trial of the cause the defendants tendered plaintiffs a correct abstract, showing title in them to the Missouri land, and also a deed of general warranty to the land. Defendants refused to accept the tender made by plaintiffs, and plaintiffs refused to accept the tender made in court of the corrected abstract and deed by defendants. The court found, and so instructed the jury, that the plaintiffs had not shown that the defendants were not the legal owners of the land in Missouri, and did not have the legal title thereto, and from the entire record we are satisfied this conclusion is correct. The prayer contained in plaintiff's petition for a reformation by the court of the deed received for the Missouri land was fully met <sup>564</sup> by defendants' acquiescence and tender of the corrected abstract and warranty deed above mentioned. All that the court could have accomplished by a judgment decreeing the reformation of this deed, the defendants effected in their voluntary execution and tender of the same. So it seems to us the question as to the title of the Missouri land is no longer involved. If it had been the only matter at issue in the case, a tender at the time it was made would have the effect of burdening defendants with the costs; but, as it was not, plaintiffs under their petition ought to have accepted it, and proceeded with the trial for damages prayed on account of fraud and deceit. The offer on the part of plaintiffs to return the deed and abstract to the defendants did not reinvest defendants with title, nor was it a rescission of the contract on the part of plaintiffs, nor in itself constitute an offer to rescind: 18 Ency. of Pl. & Pr., p. 838; Ahrens v. Adler, 33 Cal. 608; Jeffers v. Forbes, 28 Kan. 174. While the land was misdescribed in the deed, still as between the parties there can be no doubt grantee secured an equitable and

enforceable title to the same: *Fitch v. Gosser*, 54 Mo. 267; *Johnson v. Robinson*, 20 Minn. 189 (Gil. 169).

There is nothing in the record to induce us to believe that the defendants did not have title to the Missouri land, and in good faith intended to, and believed they were conveying, such title to the plaintiffs. But the complications which arose by virtue of the defect in the deed and the abstract created the woful spring from which flowed practically all of the uncertainties and errors in the procedure which followed. This being now out of the way, and plaintiffs, as we assume, being possessed of title to the Missouri land, there is left for our consideration but two propositions: First, whether or not the evidence introduced, viewing it in the light of the verdict, and giving to it the same weight and credit given it by the jury, was sufficient to sustain an action for fraud and deceit; and, second, whether or not the instruction on the measure of damages in such a case was correct. We will consider these in the order suggested.

<sup>565</sup> The case of plaintiffs rests almost entirely upon the evidence of J. W. Martin. The evidence shows that, at the time of the exchange of properties, he was about seventy-two years of age, residing on a farm in Woodward county, Oklahoma; that he was slightly acquainted with J. W. Carter, who lived in that vicinity, who approached him with a proposition to trade his farm in Woodward county for a tract of land of eighty acres, owned by the defendants, in Texas county, Missouri. Martin signified a willingness to make the exchange. Carter was acting as the agent for the Howes, and admitted that he had no personal knowledge of the character or grade of the Missouri land, and so informed Martin. He, however, as Martin testifies, described the land as being a nice smooth piece, and having a good-hewed log house on it, and a good stable and cornerib, and a good log chicken-house, and between thirty and thirty-five acres fenced with a good eight-rail stake and rider fence, a good orchard of six acres, and two good springs on it. He showed plaintiff a piece of paper that had all of the improvements marked down that he asserted were on the land, and told him that "Howe went down there a year ago this fall, and had a carload of apples picked off of the place, and had them shipped to Gage"; that he had bought them himself out of the car at Gage. It appears from the evidence that neither Martin, Carter, nor Howe had seen the land, but it does not appear, according to Martin's testimony, that he knew that Howe had not seen it. He testified that, from the way Carter spoke, he supposed that Howe had seen it, and that he supposed Howe had described it to him (Carter), although he (Carter) did not tell Martin this. The plat purporting to contain markings showing the location of the improvements on the land, taken in conjunc-

tion with this testimony of Martin's, was evidently an important piece of evidence, and doubtless exercised a potent influence on his mind. The origin of this plat is disclosed in the following cross-examination of Carter, the agent:

"Q. You had a piece of paper that the house and orchard were marked on that you showed Mr. Martin? Have you got that piece of paper? A. No, sir.

"Q. When did you see it last? A. Three or four days ago.

"Q. In whose possession was it at that <sup>546</sup> time? A. I think it is at this man's office.

"Q. Who brought it there? A. I had it myself.

"Q. You had it all the time? A. Yes, sir.

"Q. Now, you also had that letter that you received from Howe that you say you read to Martin? A. I don't know whether I had that letter or not.

"Q. This piece of paper that you had showed a house on it? A. Yes, sir.

"Q. And orchard? A. Yes, sir; where was it marked.

"Q. Just marked 'Orchard'? A. Yes, sir.

"Q. It showed the cultivated land on it? A. It didn't show that, that I know of.

"Q. Who prepared that plat? A. Howe.

"Q. And sent it to you? A. He sent it to me. I wrote him to give me a description of the land, and he sent it to me."

The land was shown to be practically devoid of improvements and of little value. In our judgment, taking the foregoing testimony as true, in conjunction with the fact that Martin, who made the trade, testified that he believed it and relied on it, and it is shown to be the only knowledge he had; that it was these representations presented to him by Carter which induced him to make the trade—all make out on his part, when shown to be false, a *prima facie* case, supporting an action for damages for deceit, when taken in conjunction with the fact that they were made for a principal by an agent on representations not warranted by his (the principal's) information, even though he may have believed them true. The burden in such a case to show justification for the statements is on the defendant after their falsity is established: *Griswold v. Gebbie*, 126 Pa. 353, 12 Am. St. Rep. 878, 17 Atl. 673. In such a case the assertions and representations of the agent are the representations of the principal, and, without reference to how honestly the agent may have acted, or to what extent he in good faith believed the information given him by his principal to be true, if the statements made to, relied upon, and believed by, the injured party were material, worked him detriment, and were false, then, within the scope of the rule above announced, the party for whom they were

made will be held to make them good, or be held liable for the damages incurred as a result thereof.

Our statute on this matter is clear and explicit. Section 14, <sup>567</sup> article 1, chapter 15 (paragraph 743), Wilson's Revised and Annotated Statutes of Oklahoma of 1903, provides, in part as follows: "Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: First. The suggestion as a fact of that which is not true, by one who does not believe it to be true. Second. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true."

Section 105, article 5, of the same chapter (paragraph 834), provides as follows: "One who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers."

Section 106, article 5, chapter 15 (paragraph 835), provides as follows: "A deceit, within the meaning of the last section, is either: First. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true. Second. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true."

It is under the provisions of the foregoing sections of our statute that plaintiffs on this branch of the case claim their right to recover. It will be observed that, in paragraph 834, *supra*, the language of the act is, "One who willfully deceives another with intent," etc., and our statute (section 767, article 59, chapter 25 [paragraph 2686]), provides: "The term 'willfully,' when applied to the intent [with] which an act is done or omitted, implies simply a purpose or willingness to commit the act or the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage."

Paragraph 743 is identical with section 1572 of the Civil Code of California, found at page 1283, 2 Kerr's Cyclopedic Codes of California. The other provisions are likewise counterparts of similar provisions of the California laws. It and they have received construction at the hands of the California supreme court <sup>568</sup> in numerous cases, of which attention is called to a few: *Groppengiesser v. Lake*, 103 Cal. 37, 36 Pac. 1036; *Muller v. Palmer*, 144 Cal. 305, 77 Pac. 954; *Mayer v. Salazar*, 84 Cal. 646, 24 Pac. 597; *Alvarez v. Brannan*, 7 Cal. 503, 68 Am. Dec. 274; *Hanscom v. Drullard*, 79 Cal. 234, 21 Pac. 736; *Barbour v. Flick*, 126 Cal. 628, 59 Pac. 122; *Estate of Johson*, 134 Cal. 662, 66 Pac. 847.

The case of *Groppengiesser v. Lake*, 103 Cal. 37, 36 Pac. 1036, was like the case at bar, one wherein there was involved

a question of fraud and deceit on the part of a vendor of land. In that case the seller of the land represented that he had never seen it. The only information possessed by the purchaser was such as the vendor gave him. The court said in the syllabus: "Upon a contract for the sale of land, where the statements of the vendor constituted all the knowledge possessed by the purchaser as to the subject matter of the sale, and such representations are false in material respects, the purchaser, acting promptly, may rescind the contract of purchase. Where the statements of the vendor constitute all the knowledge possessed by the purchaser as to the subject matter of the sale, it is immaterial that the vendor had not personally seen the land, or did not know that what he stated was untrue, or that he believed it to be true. It is actual fraud for a vendor to state as true that which he does not know to be true, intending that the purchaser should act upon it, and to enter into the contract knowing that the purchaser did so in reliance upon his statements, he not having other means of knowledge."

In the discussion of the case the court amplified the statements contained in the syllabus as follows: "He told plaintiff at the first interview that he [defendant] had never seen the land. This statement, being uncontradicted, may be taken as true. Upon these facts is defendant entitled to a new trial? That the representations were as to material matters, such as were calculated, and were plainly intended, to induce the plaintiff to purchase the land, there can be no doubt. Neither can there be any doubt that the representations did induce plaintiff to enter into the contract, and that defendant then knew that plaintiff relied solely upon his statements. Even upon defendant's own testimony this is so. The representations, according to plaintiff's testimony, were positive assertions as to matters <sup>569</sup> which are not mere matters of opinion. He was told, in effect, that nearly all of the land could be used, except two or three acres, which, on account of ravines, would be useless; that it was suitable for a fruit ranch, and was wooded all over as shown in the photographs. As those are not brought here, the presumption must be that they would tend, so far as possible, to support the judgment and order. These statements there was testimony tending to show were not true. But it is said the defendant informed plaintiff that he had never seen the land himself, and therefore plaintiff knew that he was only relating what he had heard from others. But there was a great show of care on the part of defendant to ascertain the facts. His employees had personally examined it, had surveyed it, and photographed portions of it; had even sent him some of the soil. Defendant does not say that he told plaintiff that his entire knowledge in reference to the tract was derived from the documents shown



him. If he had so stated, the effect would have been only to limit the representations to what appeared from these papers. It does not matter that defendant did not know that what he stated was untrue, or that he believed it to be true. According to the testimony, his statements constituted all the knowledge possessed by plaintiff as to the subject matter of the sale. As they were untrue in material respects, the plaintiff, acting promptly, may rescind: Civ. Code, sec. 1572; *Alvarez v. Brannan*, 7 Cal. 503, 68 Am. Dec. 274; *Bank of Woodland v. Hiatt*, 58 Cal. 234. See, also, 2 Pomeroy's *Equity Jurisprudence*, sec. 887."

In the consideration of the case of *Muller v. Palmer*, 144 Cal. 305, 77 Pac. 954, the court said: "Actual fraud is committed where one, with intent to induce another to enter into a contract, makes a positive assertion, in a manner not warranted by the information of such person, of that which is not true, even though he believes it to be true: Civ. Code, sec. 1572. One who gains a thing by fraud is, unless he has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of a person who would otherwise have had it: Civ. Code, sec. 2224. It was held in *Alvarez v. Brannan*, 7 Cal. 503, 68 Am. Dec. 274, that where a vendor, supposing himself to be the owner of a lot, represented that he was such owner, and sold the lot to the vendee for six thousand dollars, the vendee, upon discovering that the lot had been previously sold to another party, might rescind, and recover the money paid. It is said in the opinion: 'But it is equally true that, whether a party thus misrepresenting <sup>570</sup> a material fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial. If a party asserts that as true which he does not know to be true, it is a false representation. If he intends simply to state his belief upon information, then he should state it in that precise form so as to apprise the other party of the true grounds upon which his statement is made. A party will always be held to make good his statement in the form in which he makes it. If he states a thing as true in general terms without qualification, then he is presumed to do so upon his own knowledge, or at his own peril, and must make good his assertion.' And the same rule is laid down by all the authorities: 1 Story's *Equity Jurisprudence*, secs. 193, 193a, and note; 2 Pomeroy's *Equity Jurisprudence*, sec. 887. It is said by Pomeroy in the section cited: 'It is settled in equity, by an overwhelming array of authority, that where a person makes a statement of fact which is actually untrue, and he has at the time no knowledge whatever of the matter, he is chargeable with fraud, and his claim to have believed in the truth of his statement cannot be regarded as at all material. The definite assertion of something which is untrue concerning which the

party has no knowledge at all is tantamount in its effects to the assertion of something which the party knows to be untrue.' "

Hence, as we have heretofore said, and as we have seen, the statements made by Howe to his agent Carter, and at his instance by Carter to Martin, were made with intent to induce Martin to enter into the contract which he did; and, when Howe presented Carter, his agent, with the plat of the farm showing the purported improvements thereon, and authorized Carter to present this to the prospective customer as containing a showing of the condition of the land, which showing was in fact not true, if plaintiff possessed no other information, and relied and acted upon these positive representations to his detriment, then the maker thereof is liable, even though he may have believed them to be true, where it is not shown the statements made were warranted by the information possessed by the maker, or that he had reasonable ground for any such belief.

Exceptions are taken to the instructions given by the court on this subject, but we will not critically review or examine the <sup>571</sup> same, by reason of the fact that the case must be reversed upon another ground, and in our judgment what is here said in reference to the duty toward the plaintiff on the part of defendants will be sufficient, with the authorities cited, to obviate any difficulty in an instruction on this ground, should there be further trial of the cause.

Nor in our judgment were the plaintiffs precluded from recovery by virtue of the fact that they relied upon these statements, and failed, prior to making the trade, to travel to Missouri and inspect the land: *Stevens v. Allen*, 51 Kan. 144, 32 Pac. 922; *Matlack v. Shaffer*, 51 Kan. 208, 37 Am. St. Rep. 270, 32 Pac. 890.

We now come to the consideration of the instruction on the measure of damages, which the court, under that theory presented by plaintiff's petition of a repudiation and rescission of the trade, ruled was the value of plaintiff's homestead at the time of the exchange; but, in view of the conclusion to which we have arrived that no adequate tender or rescission was ever made, and in view of the prayer for reformation, consistent only with affirmation, the rule laid down for the measure of damages in such a case was erroneous. Plaintiffs' petition was filed by their counsel, with such light as he then possessed. As the case presented itself to him, defendants had no title to the Missouri land, and it appeared at least doubtful if they had safely conveyed it to plaintiffs, even if they possessed it. They had, prior to the date of the bringing of this action, disposed of plaintiffs' property, and there was the hazard of their being unable to respond to plaintiffs for its value. In the complication thus presented counsel



tried to hold onto what his clients had, if they had anything, fearing the insolvency of defendants, and yet the Missouri land was of such a character that plaintiffs did not want it at all if defendants could be compelled to respond in damages. Counsel's efforts to thus secure for his clients the benefits of all of these remedies, while commendable, yet, for reasons inherent in their nature, could not all succeed, for it is a truism that if a man successfully ride two <sup>572</sup> horses at the same time, both must travel the same, and not opposite, directions. Plaintiffs could not hold onto what they had, and at the same time release it. They must have elected which of these remedies they would invoke, and their election determined the measure of their damages.

The available alternatives presenting themselves to plaintiffs are well expressed in the syllabus to the case of *Vail v. Reynolds*, 118 N. Y. 297, 23 N. E. 301, wherein the highest court of that state said: "It seems a person induced by fraudulent representations to purchase property has three remedies. He may, upon discovery of the fraud, rescind the contract absolutely, and sue in an action at law to recover the consideration parted with upon the fraudulent contract, but he must first restore, or offer to restore, to the party sued whatever he has received by virtue of the contract. He may bring an action in equity to rescind the contract; and, as such action is not founded upon a rescission, but to obtain one, it is sufficient for the plaintiff to offer in his complaint to return what he has received, and make a tender of it on the trial. He may retain what he has received, and bring an action at law to recover the damages sustained, the measure of which is the difference between the value of the article sold and what it should be if as represented."

The rule of damages there laid down is the same as that annunciated in volume 3, eighth edition, section 1027, of *Sedgwick on Damages*: "In such actions, as in actions for fraud in the sale of chattels, it has usually been held that the measure of damages is the difference in value between the land as it would have been if as represented and as it actually was."

In this rule the author is sustained by an overwhelming weight of authority, of which we take note of the following cases: *Augor v. Smith*, 90 Tenn. 729, 18 S. W. 398; *Drew v. Beall*, 62 Ill. 164; *Nysewander v. Lowman*, 124 Ind. 584, 24 N. E. 355; *Gustafson v. Rustemeyer*, 70 Conn. 125, 66 Am. St. Rep. 92, 39 Atl. 104, 39 L. R. A. 644; *Krumm v. Beach*, 96 N. Y. 398; *Page v. Wells*, 37 Mich. 415; *Wright v. Roach*, 57 Me. 600; *Lynch v. Mercantile Trust Co.*, 5 McCrary, 623, 18 Fed. <sup>573</sup> 486; *Matlock v. Reppy*, 47 Ark. 148, 14 S. W. 546; *Herfort v. Cramer*, 7 Colo. 483, 4 Pac. 896; *Stiles v. White*, 11 Met. 356, 45 Am. Dec. 214; *Williams v. McFadden*, 23 Fla.

143, 11 Am. St. Rep. 345, 1 South. 618; *Barbour v. Flick*, 126 Cal. 628, 59 Pac. 122.

In further discussion of this rule the court of appeals of New York, in the case of *Krumm v. Beach*, 96 N. Y. 398, speaking through Justice Finch, said:

“The learned judge charged that the damages recoverable would be the difference between the value of the land conveyed and the value of that which would have passed had the representations been true. . . . The contention of the appellants is that the defrauded vendee had but one remedy, and that consisted of a rescission of the contract, and a recovery back of the consideration paid, after an offer to reconvey and a tender of what had been received. Doubtless this remedy existed, but the vendee was not compelled to adopt it. He had a right, instead of rescinding the contract, to stand upon it, and require of the vendor its complete performance, or such damages as would be the equivalent of that complete performance. The vendee, acting honestly on his own part, was entitled to the full fruit of his bargain, and could not be deprived of it without his consent by the fraud of the vendor. That such an action, proceeding upon an affirmance of the contract as actually made, founded upon actual fraud, and asking damages in the room of an impossible specific performance, can be maintained at law has been sufficiently adjudged: *Wardell v. Fosdick*, 13 Johns. 325, 7 Am. Dec. 383; *Culver v. Avery*, 7 Wend. 380, 22 Am. Dec. 586; *Whitney v. Allaire*, 1 N. Y. 305; *Clark v. Baird*, 9 N. Y. 183; *Graves v. Spier*, 58 Barb. 349. And that is so whether the representations relate to the title or to matters collateral to the land. The measure of damages in such a case is full indemnity to the injured party—the entire amount of his loss occasioned by the fraud: *Dimmick v. Lockwood*, 10 Wend. 142; *Wardell v. Fosdick*, 13 Johns. 325, 7 Am. Dec. 383; *Whitney v. Allaire*, 1 N. Y. 305. The first of these cases plainly points out the difference between actions for a breach of covenant and those founded upon fraud. In the former the damages are always bounded by the consideration and interest, which often fall short of full indemnity—a rule said to be founded ‘upon considerations of public policy, without reference to the actual damages sustained <sup>574</sup> by the party’ (*Whitney v. Allaire*, 1 N. Y. 305); but, where fraud is established, full and complete indemnity is awarded. That full indemnity may go beyond the consideration paid. The purchaser of land, as of other property, has a right to make a good bargain, if he can, provided only that he deals honestly. Often the profit secured above the price paid is the sole motive for the purchase; and, where there is an exchange of lands to some extent, one dealing fairly may sell his own at a high price, and secure another’s at a low one. To the entire benefit of his bargain he is entitled.

If there had been no fraud, he would have had it. He should not lose it because the other party has been dishonest. The measure of damages, therefore, should be that adopted by the court below, the difference in value between the property conveyed and that which would have been conveyed had the property been as represented and the actual contract honestly fulfilled."

And the foregoing appears to be the rule where an exchange of land for stock in a corporation was made, and no specific price was made upon either, just as the exchange in this case appears to have been made without any specific money valuation being placed on either tract: *Nysewander v. Lowman*, 124 Ind. 584, 24 N. E. 355; 11 Am. & Eng. Ency. of Law, p. 574.

We do not mean, of course, to hold herein that plaintiffs are precluded from assailing the title purported to be conveyed to them in their deed from the defendants. If the title tendered by defendants to plaintiffs fails in any particular whereby plaintiffs have a cause of action, the same will in no wise be interfered with by this judgment, but we do hold that the prayer of plaintiffs asking for a reformation of the deed which they received precluded them from objecting when their grantors tendered them just such a deed as the court, exercising its fullest powers, could possibly have secured for them. The elimination of this question reduces the case to simply one for damages for fraud and deceit, with the measure of damages as here stated, and on a new trial thereof the pleadings should be reformed to submit just this controversy for the consideration of the court and jury.

The cause is remanded to the lower court, with instructions <sup>575</sup> to set aside the judgment heretofore rendered and grant defendants a new trial.

All the justices concur.

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*The Subject of False Representations by a Vendor is Discussed* in the note to *Cottrill v. Krum*, 18 Am. St. Rep. 555; and in *Buchanan v. Burnett*, 102 Tex. 492, 132 Am. St. Rep. 901. The liability for misrepresentations indirectly made to the complaining party is the subject of a note to *Henry v. Dennis*, 85 Am. St. Rep. 368. One who, without knowledge of the truth or falsity of a material representation made with intent that another shall act thereon, which he does, is guilty of fraud, in legal contemplation, if the representation turns out to be false, as much as if he knew it was untrue when he made it: *Foulks etc. Motor Co. v. Thies*, 26 Nev. 158, 99 Am. St. Rep. 684. As to when a false statement of fact in a business transaction may be attributable to fraud, see, also, *Standard Mfg. Co. v. Slot*, 121 Wis. 14, 105 Am. St. Rep. 1016.

*The Liability of a Principal to Third Persons for the Acts of His Agent* is discussed in the notes to *Franklin Fire Ins. Co. v. Bradford*, 88 Am. St. Rep. 779; *Henry v. Dennis*, 85 Am. St. Rep. 372. See, also, *Morse v. Whitcomb*, 54 Or. 412, 135 Am. St. Rep. 832.

*Either a Vendor or a Vendee may Rescind a Contract for the Sale of Land for False Representations.*—The misrepresentation by a vendor of

material facts as to the quality, quantity or title to land, relied upon by the vendee as true, entitles him, as a rule, to repudiate the sale, but a representation as to the value is a mere matter of opinion: *State Bank etc. v. Brown*, 142 Iowa, 190, 134 Am. St. Rep. 412, and cases cited in the cross-reference note thereto. A vendor may rescind a contract for the sale of land made by the vendee's agent. So may a vendee rescind the contract if induced to enter into it by the fraud of the vendor's agent: *Note to Henry v. Dennis*, 85 Am. St. Rep. 373.

*The Measure of a Vendee's Damages on a Breach of Contract to Convey Realty* is the subject of a note to *Arentsen v. Moreland*, 106 Am. St. Rep. 963.

*The Measure of a Vendee's Damages, for Fraud or Deceit* in the sale of property, is the difference between the actual value at the time of the sale and what the property would have been worth had it been as represented: *Kendrick v. Ryns*, 225 Mo. 150, 135 Am. St. Rep. 585.

*On an Exchange of Property, the Measure of Damages for Fraudulent Representations* inducing the contract is the difference between the value of the property received and that given in exchange: *George v. Hesse*, 100 Tex. 44, 123 Am. St. Rep. 772.

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### HARE v. PHAUP.

[23 Okl. 575, 101 Pac. 1050.]

**CONTRACT—Location of Postoffice—Public Policy.**—A contract providing for the payment for services and expenses incurred in procuring the establishment of a postoffice in a city in and upon a certain block therein, the payments thereunder to continue so long as said postoffice shall be there maintained, not to exceed ten years, is contrary to public policy and void. (pp. 852, 856.)

(Syllabus by the court.)

Dudley B. Madden and W. L. McFall, of counsel, for the plaintiff in error.

Roscoe C. Arrington, for the defendant in error.

**575** DUNN, J. This cause comes to this court on a transcript of the record containing the bill of particulars, demurrer and judgment rendered thereon in the probate court of Pottawatomie county. The bill of particulars filed in the cause declared upon the following contract:

"Be it remembered that for and in consideration of the services **576** of and expenses incurred by Alfred Hare in procuring the establishment of the United States postoffice of the city of Tecumseh, O. T., in and upon the west side of block 52 of said city, I hereby promise to pay to the said Alfred Hare the sum of \$5 per month, monthly in advance, from the date of the removal of said postoffice to said block, and so long as said postoffice shall be maintained thereon, not to exceed ten years."

Designating the parties by the titles they bore in the lower court, it is the contention of defendant that the contract is without consideration and void, because the subject matter thereof was not such as constitutes a legal subject of contract, and that dealing therein was against public policy, and no enforceable obligation could grow out of it. Counsel for plaintiff argues in support of the contract that one person or many who might own a building or secure the right to the possession thereof by renting the same from its owner may lawfully let the same to the government of the United States for post-office purposes at a nominal rent, and a contract of contribution between the original parties be valid, and argues from this conceded proposition that which in our judgment does not follow, to wit, that a contract such as the one before us providing for payment of services and expenses incurred in procuring the establishment and the maintenance of a post-office at a certain point or place in the city, which contract shall continue for a period of ten years, would likewise be valid. He also argues that a contract such as the one in the case at bar is not necessarily an unlawful one so long as the procurement of the location of the postoffice is accomplished by fair and legitimate business methods; in other words, that no undue influence be exercised nor the principles of sound public policy be violated. We do not believe a discussion of the first proposition mentioned will be of value, as it is not involved in this case, but as counsel offers three cases to support his latter proposition, and as they seem to lend color to it, we will consider it. These cases are as follows: *Fearnley v. De Mainville*, 5 Colo. App. 441, 39 Pac. 73; *Bryan v. Dyer*, 28 Ill. 188; *Beale v. Polhemus*, 67 Mich. 130, 34 N. W. 532.

<sup>577</sup> The case first cited—*Fearnley v. De Mainville*, 5 Colo. App. 441, 39 Pac. 73—is from the court of appeals of Colorado. In this case there was an agreement of property owners and business men of the immediate neighborhood of the postoffice to pay the owners of a building in which it was located a reasonable rent on the same, provided said owners would tender such a lease that the government would accept it and continue the postoffice where it was. The court held that the parties agreeing to pay the rent as provided were liable, and that the consideration for the contract was valid.

The case from the supreme court of Illinois (*Bryan v. Dyer*, 28 Ill. 188) was one wherein subsequent to the location of the custom-house and postoffice building at Chicago there arose obstructions in the way of titles and leases to the land on which the same was to be built, and certain business men, owners of real estate, situated in the vicinity, agreed with the plaintiff in that case that they would pay him the sums set opposite their names on the building being located and erected at the point where it was then agreed upon. The services

rendered by plaintiff were in relieving the proposed location of the leases and clouds on the titles as above mentioned. The court in the consideration says: "There is not one particle of proof to show that any part of the consideration for this promise was that plaintiff should use his influence with the government to cause this building to be located at any place. The building was located before the promise was made." And the court allowed plaintiff to recover.

The holding of the supreme court of Michigan in the case of *Beale v. Polhemus*, 67 Mich. 130, 34 N. W. 532, more nearly supports the contention of counsel for plaintiff than either of the other cases. In that case Polhemus signed a contract to pay Beale six hundred dollars in consideration of his constructing a building and on its being occupied by the post-office. It was contended in that case, as in this, that the contract was void as opposed to public policy, but the court allowed Beale's executors to recover on the contract, because it was not shown that he used any improper or undue means to gain his point or to accomplish his end, and the court declined <sup>578</sup> to presume that he used his personal power, which was conceded to have been very great, in any corrupt or unseemly manner or in violation of any public policy. In so holding, it is our judgment that the learned court failed to take into consideration the reasons fundamentally underlying the great weight of judicial expression where this question has been presented to the courts for consideration. Cases almost without number could be cited and quoted from which hold that contracts of this character are not void because of the conclusion that corruption and wrongdoing and undue influence would be the certain result thereof, but on account of the recognition by them of corrupting tendencies of such contracts. "Lead us not into temptation" is the divine injunction obligatory upon all, and the declaration of the courts of this country when contracts of this character are presented to them, holding them void because of this tendency, is but a recognition of the doctrine contained in this scriptural precept and its salutary application to contracts which might unduly tempt or incline men to improperly influence their fellowmen, holding positions of confidence and trust. We believe that the principle invoked by counsel for defendant is a salutary one, applicable to the contract here in question. That such a contract is invalid and nonenforceable is the conclusion of a great majority of the courts which have had occasion to deal with it. A few of the cases in which the question has been considered and passed upon, where, in our judgment, the rule is correctly declared, are as follows: *Woodman v. Innes*, 47 Kan. 26, 27 Am. St. Rep. 274, 27 Pac. 125. This case is cited approvingly in *Harriman on Contracts*, sec. 180; *Elkhart County Lodge v. Crary*, 98 Ind. 238, 49 Am. Rep. 746,



cited approvingly to sustain one of the rules laid down by Mr. Greenhood in his work on Public Policy, p. 313; *Filson's Trustees v. Himes*, 5 Pa. 452, 47 Am. Dec. 422; *Meguire v. Corwine*, 101 U. S. 108, 25 L. ed. 899; *Providence Tool Co. v. Norris*, 2 Wall. 45, 17 L. ed. 868; *Oscanyan v. Winchester Arms Co.*, 103 U. S. 261, 277, 26 L. ed. 539.

In the case of *Woodman v. Innes*, 47 Kan. 26, 27 Am. St. Rep. 274, 27 Pac. 125, from the supreme court of the state of Kansas, the court held in the syllabus that: <sup>579</sup> "Any contract made for the purpose of securing the location of a public office, such as a postoffice, in any certain part of a city or elsewhere, or which prevents, or tends to prevent, the change or removal of such office, when the necessities of business or the interest of the public demand such change or removal, is opposed to public policy and void, as tending to the injury of the public service, and as subordinating the public welfare to individual convenience or gain."

This case was similar to the one from the Colorado court of appeals, and to the supposed case put by counsel for plaintiff, in that certain parties whose places of business were near the location of the postoffice agreed with the owner of a building in which it was located to pay him the rent therefor, provided the office was permitted to remain therein. On the refusal to pay the rent, the landlord brought an action to recover under the contract. The supreme court, even under this state of affairs, held: "Under the allegations of the petition the location of the postoffice in this case was to be restricted to one place. The government locates only one postoffice in a city, and such office is a public one, and the general public has an interest in the location of the office. Any contract which is made for the purpose of securing the location of such an office, or which prevents, or tends to prevent, the change or removal of such an office, when the necessities of business or the interest of the public demand a change or removal, tends to the injury of the public service, and therefore is against public policy. Such contracts as referred to in the petition tend to improperly influence those engaged in the public service, and also tend to subordinate the public welfare to individual convenience or gain. Parties should not be permitted to make contracts which induce personal or private interest to overbear public duty or public welfare; *Elkhart County Lodge v. Crary*, 98 Ind. 238, 49 Am. Rep. 746. Counsel for plaintiffs say that the written contract of the parties is enforceable, because it is not shown that it is unfair, or that any undue influence was to be used to retain the postoffice on Main street. Such contracts lead to secret, improper and corrupt influences, to the injury of the public. In this view we cannot think it good policy for the courts to enforce such contracts. 'All agreements for pecuniary considerations to

control the business operations of the government, or the regular administration of justice, or the appointments to public <sup>580</sup> offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country': *Providence Tool Co. v. Norris*, 2 Wall. 45, 17 L. ed. 868."

While we express no opinion on the rule as applied to the facts in that or a similar case, owing to the clash in the judgment of the courts thereon and because the facts on which it is predicated are not involved here, yet the rule thus declared is, in our judgment, a sound and salutary one when applied to the facts in the case at bar. The contract here, it will be noted, goes further than the contract in the case from which we have just quoted and in some of the other cases cited. There is no claim that the plaintiff owned any building, and was induced to lease it at a nominal rent on his being sustained therein by contributions of his neighbors. The contract declared on here seeks to recover for services and expenses incurred in procuring the establishment and the maintenance of the postoffice at a point certain and for a long period of time. The law, recognizing the general tendency of such contracts, closes its doors to temptation by refusing to enforce them or recognize their validity.

The judgment of the lower court is, accordingly, affirmed.

All the justices concur.

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*Contracts for Services Void as Against Public Policy* is the subject of a note to *Parsons v. Trask*, 66 Am. Dec. 506. As to the invalidity of a contract to secure the location of a postoffice in any certain part of a city or elsewhere, or which prevents, or tends to prevent, the change or removal of such office, when the necessities of business or the interest of the public demand such change or removal, see *Woodman v. Innes*, 47 Kan. 26, 27 Am. St. Rep. 274.

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## SPANGLER v. YARBOROUGH.

[23 Okl. 806, 101 Pac. 1107.]

**DEED FOR SUPPORT—Remedy of Grantor by Cancellation.**—Abandonment of their contract by defendants to support the plaintiff for life as the consideration for a deed to land from plaintiff to one of defendants entitled the grantor to a cancellation of the deed in equity, on the theory that the conduct of defendants raises the presumption of a fraudulent intention at the inception of the contract, and that, too, irrespective of any question of a remedy at law. (pp. 858, 860.)

(Syllabus by the court.)



T. A. Edwards, for the plaintiffs in error.

Rutherford Brett and James W. Smith, for the defendant in error.

<sup>807</sup> TURNER, J. On April 15, 1908, William H. Yarborough, defendant in error, plaintiff below, sued Myrtle M. Spangler, L. B. Spangler, A. C. Spangler, and W. W. Spangler, plaintiffs in error, defendants below, in the district court of Washita county. The petition states substantially that plaintiff is aged, infirm, with mind impaired, and in poor health; that defendants are his sister and her children; that on October 24, 1905, he was the owner of a certain tract of land in said county, which was his homestead and which he described; that by means of false and fraudulent promises and statements made to him by defendants, <sup>808</sup> which he relied on, believing the same to be true, he was induced by them to enter into a contract to convey to defendant Myrtle M. Spangler, his niece, his said homestead, which he did, in consideration of which defendants, in substance, therein agreed to provide him with a comfortable home for life, together with all necessary food, clothing, and medicines, and the use of a horse and buggy, and, in consideration of his personal property which he turned over to them, to pay his debts; that as soon as said contract was signed and said deed delivered defendants assumed an entirely different attitude toward him, and wholly failed to comply with their contract, and are trying to sell said land with a view to leaving the country for parts unknown and leave him on charity; that he had no adequate remedy at law, and prayed that said deed and contract be canceled. After answer by defendants, in effect denying fraud, admitting the execution of the contract and deed, and pleading performance of the contract on their part, there was trial to the court, which resulted in a judgment for plaintiff canceling the deed as prayed, to reverse which defendants bring error to this court.

There were no findings of fact made by the trial court. The evidence discloses that William H. Yarborough, plaintiff below, at the time of the execution of the contract and deed sought to be set aside, was a single man, living alone on his homestead, worth about three thousand dollars, seventy-seven years old, and very infirm. That defendant below, L. B. Spangler, was his sister, who lived near him on an adjoining farm owned by defendants, worth about four times as much. That the other defendants were her grown children. That, being unable to care for himself, and afraid to live alone, and anxious to be provided for during the remainder of his life, he went to defendants and entered into negotiations with them, which resulted in the making of the contract and deed

sought to be set aside, but not before tearful urgings on the part of his sister. That as soon as the same was executed, which was part of one and the same transaction, and before its delivery, he required defendants to solemnly swear to carry out said contract. <sup>809</sup> That the deed was then delivered, and plaintiff moved his little one-room house and placed it near that of defendants and lived there, taking his meals with defendants. This was all the home provided for him under the contract. As to the raiment furnished him, the testimony discloses that he furnished the same himself as a result of his own labor, with the exception of a pair or two of drawers furnished him by defendants. He was toothless, and complained much of the food, and asked to be permitted to grind the meat which he ate, which was refused. On arriving thus to live, he turned over to defendants all his personal property, consisting principally of a span of mules, worth some three hundred dollars, which were sold by defendants, and his debts, to the amount of one hundred and seventy-five dollars, paid, and the balance retained by them. No medicine of any kind was furnished him, although he was old, ill and complaining, but he was permitted to use such as lay around the house. No horse or buggy was furnished him, as agreed, and no pretense made at doing so. Odd change was given him on two or three occasions by one of defendants, much as he would have thrown a bone to a family dog. The testimony discloses that defendants wholly failed to comply with their contract from its inception. Thus matters continued up to a short time prior to this suit, at which time defendants were making arrangements to sell their land and the land set forth in the deed, and intended to do so and leave the country, when plaintiff, fearing that he might be deserted, brought this suit for the cancellation of said deed. The intent of this whole transaction is well characterized by the following testimony of the sister:

“Q. Are you all trying to sell out? A. We made some, but not much, effort.

“Q. Was it your intention to carry him with you? A. (No answer.)”

Notwithstanding the contention of defendants, in effect, that the judgment is unsupported by the evidence, we are of the opinion that the evidence justified the inference indulged by the trial court of an abandonment of the contract by defendants, one of whom was the grantee of the deed, and a fraudulent intent in entering <sup>810</sup> into it, and that the court did not err in setting the deed aside on the ground that it was fraudulently obtained. It has been frequently so held in cases of this character under similar circumstances. In *McClelland v. McClelland*, 176 Ill. 83, 51 N. E. 559, the court, after reviewing the evidence, said: “The case, therefore, is one where

an aged father and mother deed to their son their homestead farm in consideration of his furnishing them a home and support during the remainder of their lives, respectively. The evidence shows that he did not keep his agreement with them in this regard, but treated them with such unkindness as to force them to leave their home. Under the circumstances, it is well settled by the decisions of this court that the bill will lie to set aside the deed executed for such a consideration."

And, after citing *Frazier v. Miller*, 16 Ill. 48, where Miller and wife conveyed their real estate and personal property to Frazier, who had given a bond to support them for life, and had failed to perform his obligation, in which case it was held that Miller might proceed in equity to have the same rescinded, the court, referring to that case, said: "The ground upon which the jurisdiction of equity was there sustained was that the circumstances justified the inference of an abandonment of the contract by Frazier, and the presumption of fraudulent intent in entering into the contract." And held that, inasmuch as the conduct of plaintiff in error gave rise to the presumption of an abandonment of his contract and a fraudulent intent in entering into it, plaintiff was entitled to the relief sought, and affirmed the judgment of the lower court.

In *Oard v. Oard*, 59 Ill. 46, the facts were that a father, upward of seventy years of age, induced by the promises of a son to support him and his wife in comfort during the remainder of their lives, conveyed his farm to his son's wife and his personal property to his son; that the son took possession of the farm, and by his continued ill-treatment in about a year compelled his parents to leave and live with another child. It was there held that a bill would lie to rescind the contract, and the case of *Frazier v. Miller*, 16 Ill. 48, cited with approval; the court saying: <sup>811</sup> "If the rescission of the contract cannot be referred to any other head of equity jurisdiction, it would be proper to presume that it was made in the first instance with a fraudulent intent."

In *Jones v. Neely*, 72 Ill. 449, where the facts were similar, it was held that the evidence justified the inference of an abandonment of the contract and of a fraudulent intent in entering into it.

Reviewing the leading cases on the subject, the court in *Stebbins v. Petty*, 209 Ill. 294, 101 Am. St. Rep. 243, 70 N. E. 673, says: "It has been frequently held in this state that where a grantor conveys land, and the consideration is an agreement by the grantee to support, maintain and care for the grantor during the remainder of his or her natural life, and the grantee neglects or refuses to comply with the contract, the grantor may in equity have a decree rescinding the contract and setting aside the deed and reinvesting the

grantor with the title to the real estate: *Frazier v. Miller*, 16 Ill. 48; *Oard v. Oard*, 59 Ill. 46; *Jones v. Neely*, 72 Ill. 449; *Kusch v. Kusch*, 143 Ill. 353, 32 N. E. 267; *Cooper v. Gum*, 152 Ill. 471, 39 N. E. 267; *McClelland v. McClelland*, 176 Ill. 83, 51 N. E. 559; *Fabrice v. Von der Brelie*, 190 Ill. 460, 60 N. E. 835. A careful examination of these cases leads to the conclusion that the intervention of equity in such cases has been sanctioned in this state on the theory that the neglect or refusal of the grantee to comply with his contract raises a presumption that he did not intend to comply with it in the first instance, and that the contract was fraudulent in its inception; wherefore a court of equity will not permit him to enjoy the conveyance so obtained."

And so we say that as the facts in this case justified the inference of an abandonment of the contract by defendants, and the presumption that they did not intend to comply with it in the first instance, and therefore the contract and deed which were part of the same transaction were void at its inception, we are of the opinion that the trial court did not err in decreeing a cancellation of the deed, and we shall so hold. And that, too, although it is contended that, as the petition fails to state that defendants are insolvent, it does not appear that plaintiff was without a plain, adequate <sup>812</sup> and complete remedy at law, and that evidence was not properly receivable in support of its averments over their objections. In cases of fraud, such averment is unnecessary. In *Garretson v. Witherspoon*, 15 Okl. 473, 83 Pac. 415, this court said: "In such a case the exercise of equitable jurisdiction is not dependent upon the inadequacy of the legal remedy, but rescission and cancellation may be sought, irrespective of any question of a remedy at law: 16 Cyc. 291; *Hancock Mutual Life Ins. Co. v. Dick*, 114 Mich. 337, 72 N. W. 179, 43 L. R. A. 566; *Ranney v. Warren*, 13 Hun, 11; *Holden v. Hoyt*, 134 Mass. 181."

Finding no error in the record, the judgment of the trial court is affirmed.

All the justices concur.

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*Conveyances in Consideration of the Support of the Grantor by the Grantee* are discussed in *Stebbins v. Petty*, 209 Ill. 291, 101 Am. St. Rep. 243; *Hensan v. Cooksey*, 237 Ill. 620, 127 Am. St. Rep. 345; note to *Davis v. Davis*, 130 Am. St. Rep. 1039.

**SCHOOL BOARD DISTRICT No. 18 v. THOMPSON.**

[24 Okl. 1, 103 Pac. 578.]

**PARENT AND CHILD—Authority and Duties of Parent.**—At common law the principal duties of parents to their legitimate children consisted in their maintenance, their protection, and their education. While the municipal laws took care to enforce these duties, yet it was presumed that the natural love and affection implanted by Providence in the breast of every parent had done so more effectually than any law. For this reason, the parent, and especially the father, was vested with supreme control over the child, including its education. Except where modified by statute, that authority still exists. (p. 862.)

**SCHOOLS—Courses of Study—Rights of Parent.**—The school authorities of this state have the power to classify and grade the scholars in their respective districts, and cause them to be taught in such departments as they may deem expedient. They may also prescribe the courses of study and text-books for the use of the schools, and such reasonable rules and regulations as they may think needful. They may also require prompt attendance, respectful deportment, and diligence in study. The parent, however, has a right to make a reasonable selection from the prescribed course of study for his child to pursue, and this selection must be respected by the school authorities, as the right of the parent in that regard is superior to that of the school officers and the teachers. (p. 868.)

(Syllabi by the court.)

R. T. Jones, for the appellants.

J. B. Thompson and Blanton & Andrews, for the appellees.

<sup>2</sup> **KANE, C. J.** This was an action in mandamus, commenced in the district court of Garvin county by the defendants in error, to compel the school authorities of the city of Pauls Valley, in said county, to reinstate their children in the public schools, from which they were expelled, for the reason that under direction of their parents they refused to take singing lessons, which, it seems, were a part of the prescribed course of study in said schools. The school board and teachers of the schools were informed by the appellees that they did not wish their children to take singing lessons, that they would not supply them with the necessary singing books to do so, and requested them to excuse their children from this branch of the regular course. The school authorities refused to grant the request of appellees, and the appellees refused <sup>3</sup> to furnish the singing books, and the children, refusing to participate in the singing exercises, were expelled. It is agreed by both sides that, when boiled down, the only question really involved in this case is whether a patron of the public schools may make a reasonable selection from a course of study prescribed by the proper school authorities for his child to pursue, in opposition to a rule prescribed by such authorities requiring the child to take all the studies in such course. The trial court decided this question in favor of the appellees, and

the appellants, not being satisfied with the judgment, bring the case to this court by petition in error.

There is some conflict as to the power to suspend or expel pupils for failure to participate in certain required studies or exercises if the parents of the pupil request that the child be excused; but it seems to us that the weight of authority and the better reasoning sustain the judgment of the trial court. At common law the principal duties of parents to their legitimate children consisted in their maintenance, their protection, and their education. These duties were imposed upon principles of natural law and affection laid on them not only by Nature herself, but by their own proper act of bringing them into the world. It is true the municipal law took care to enforce these duties, though Providence has done it more effectually than any law by implanting in the breast of every parent that natural insuperable degree of affection which not even the deformity of person or mind, not even the wickedness, ingratitude and rebellion of children, can totally suppress or extinguish: 1 Lewis' Blackstone, sec. 447. The statutes of Oklahoma defining the relation between parent and child are in the main declaratory of the common law. Section 3763 of Wilson's Revised and Annotated Statutes of 1903 provides that the parent entitled to the custody of a child must give him support and education suitable to his circumstances. Section 3769 of Wilson's Revised and Annotated Statutes of 1903 provides that: "The authority of a parent ceases, first, upon the appointment <sup>4</sup> by a court of a guardian of the person of the child; second, upon the marriage of the child; third, upon its attaining majority."

Section 3768 of Wilson's Revised and Annotated Statutes of 1903 provides that: "The abuse of parental authority is the subject of judicial cognizance in a civil action in the district court brought by the child, or by its relatives within the third degree, or by the officers of the poor where the child resides; and when the abuse is established, the child may be freed from the dominion of the parent, and the duty of support and education enforced."

Counsel for plaintiff in error states in his brief that the only law in this state that would seem to recognize the old common law is to be found in the chapter on parent and child, the chapter from which the foregoing sections are taken; but, he contends, the old common-law idea that the parent has the exclusive control over the education of the child has long since been abandoned. We must find warrant for this statement in the statutory law of the state in order to agree with counsel in this contention. At common law the parent, and especially the father, was vested with supreme control over the child, including its education, and, except where modified by statute, that authority still exists in the parent: Board of Education



of *Cartersville v. Purse*, 101 Ga. 422, 65 Am. St. Rep. 312, 28 S. E. 896, 41 L. R. A. 593. It is true that with the organization of the common school system throughout the state statutes have been passed modifying more or less the authority of the parent over the child in school matters. Before statehood the general control and management of the schools of this jurisdiction was under the general supervision and management of the superintendent of public instruction, and the district schools were under the immediate control of the district school boards. The district school boards, in so far as the branches of study to be followed in such schools, after they had complied with the law requiring the studying of certain branches, might substitute any other studies that might be determined upon by them. The board was authorized under the statute to suspend from school pupils who were guilty of immoral conduct and continued violation of the rules of the school.

<sup>5</sup> It is admitted that these laws, in so far as they are not repugnant to the constitution of the state nor locally inapplicable, are still in force; but counsel for plaintiff in error contends that, no matter what the rule may have been under the old territorial laws, there can now be no doubt that under sections 308, 311, 312, 313, and 314, Bunn's Annotated Constitution, the management of the public schools is absolutely turned over to the legislature of the state, and that the compulsory education clause of the constitution absolutely destroys the old common-law doctrine that the parent had the entire control over the education of his child, and that the uniform text-book law of the state absolutely places the course of study that is to be used in all the public schools in this state in the hands of a text-book commission. The sections of the constitution referred to by counsel provide: (1) That the legislature shall establish and maintain a system of free public schools wherein all the children of the state may be educated; (2) that it shall provide for the compulsory attendance at some public or other school, unless other means of education are provided, of all the children in the state who are sound in mind and body, between the ages of eight and sixteen years, for at least three months in each year; (3) that the supervision of instruction in the public schools shall be vested in a board of education, whose powers and duties shall be prescribed by law; and (4) that the legislature shall provide a uniform system of text-books for the common schools of the state. To our mind the right of the board of education to prescribe the course of study and designate the text-books to be used does not carry with it the absolute power to require the pupils to study all of the branches prescribed in the course in opposition to the parents' reasonable wishes in relation to some of them.

In *Morrow v. Wood*, 35 Wis. 59, 17 Am. Rep. 471, Mr. Justice Cole, in discussing a similar proposition, says: "It is unreasonable to suppose any scholar who attends school can or will study all the branches taught in them. From the nature of the case some choice must be made, and some discretion be exercised as to the studies which the different pupils<sup>6</sup> shall pursue. The parent is quite as likely to make a wise and judicious selection as the teacher."

It is no argument in favor of limiting the common-law authority and control of parents over their children to say that the exercise of such power may result disastrously to the proper discipline, efficiency, and well-being of the schools. It is to be presumed that a normal reasonable man will exercise such authority in a reasonable way. In *Morrow v. Wood*, 35 Wis. 59, 17 Am. Rep. 471, Mr. Justice Cole, upon this proposition, says: "We do not intend to lay down any rule which will interfere with any reasonable regulation adopted for the management and government of the public schools or which will operate against their efficiency and usefulness. Certain studies are required to be taught in the public schools by statute. The rights of one pupil must be so exercised, undoubtedly, as not to prejudice the equal rights of others; but the parent has the right to make a reasonable selection from the prescribed studies for his child to pursue, and this cannot possibly conflict with the equal rights of other pupils. . . . And how it will result disastrously to the proper discipline, efficiency, and well-being of the common schools to concede this paramount right to the parent to make a reasonable choice from the studies in the prescribed course which his child shall pursue, is a proposition we cannot understand. The counsel for the plaintiff so insist in their argument, but, as we think, without warrant for the position."

In *State v. School District No. 1*, 31 Neb. 552, 48 N. W. 393, the supreme court of Nebraska had the same question before it. Mr. Justice Maxwell, who wrote the opinion of the court, used the following language: "Now, who is to determine what studies she shall pursue in school? A teacher who has a mere temporary interest in her welfare, or her father, who may reasonably be supposed to be desirous of pursuing such course as will best promote the happiness of his child? The father certainly possesses superior opportunities of knowing the physical and mental capabilities of his child. It may be apparent that all the prescribed course of studies is more than the strength of the child can undergo; or he may be desirous, as is frequently the case, that his child while attending school should also take lessons in music, painting, etc., from<sup>7</sup> private teachers. This he has a right to do. The right of the parent, therefore, to determine what studies his child shall pursue is paramount to that of the trustees or teacher.



Schools are provided by the public in which prescribed branches are taught, which are free to all within the district between certain ages; but no pupil attending the school can be compelled to study any prescribed branch against the protest of the parent that the child shall not study such branch, and any rule or regulation that requires the pupil to continue such studies is arbitrary and unreasonable. There is no good reason why the failure of one or more pupils to study one or more prescribed branches should result disastrously to the proper discipline, efficiency, and well-being of the school. Such pupils are not idle, but merely devoting their attention to other branches; and so long as the failure of the students, thus excepted, to study all the branches of the prescribed course does not prejudice the equal rights of other students, there is no cause for complaint."

The same question was also decided by the supreme court of Illinois in the case of Trustees of Schools v. People, 87 Ill. 303, 29 Am. Rep. 55. In that case Mr. Chief Justice Scholfeld, who delivered the opinion of the court, says: "But no attempt has hitherto been made in this state to deny, by law, all control by the parent over the education of his child. Upon the contrary, the policy of our law has ever been to recognize the right of the parent to determine to what extent his child shall be educated, during minority, presuming that his natural affections and superior opportunities of knowing the physical and mental capabilities and future prospects of his child will insure the adoption of that course which will most effectually promote the child's welfare. The policy of the school law is only to withdraw from the parent the right to select the branches to be studied by the child, to the extent that the exercise of that right would interfere with the system of instruction prescribed for the school, and its efficiency in imparting education to all entitled to share in its benefits. No particular branch of study is compulsory upon those who attend schools; but schools are simply provided by the public in which prescribed branches are taught, which are free to all within the district between certain ages. In most primary schools it would be both absurd and impracticable to require every pupil to pursue the same study at the same time. § Discrimination and preference between different branches of study, until some degree of advancement is attained, is inevitable, and, afterward, a due regard for the interest of the child will always require it, in greater or less degree. It is not claimed that every pupil attending high school must pursue every study taught therein, and manifestly, in the absence of legislation expressly requiring this, a regulation to that effect would be regarded as arbitrary and unreasonable, and could not therefore receive the sanction of the courts.

Conceding that all the branches of study decided to be taught in the school shall not necessarily be pursued by every pupil we are unable to perceive how it can, in any wise, prejudice the school, if one branch rather than another be omitted from the course of study of a particular pupil."

Further, upon the same question, the learned chief justice says: "It is possible that a father may have very satisfactory reasons for having his son perfected in certain branches of education to the entire exclusion of others; and so long as, in exercising his parental authority in making the selection of the branches he shall pursue, none others are affected, it can be of no practical concern to those having the public schools in charge."

The foregoing cases, it seems to us, state the true rule, and there are no provisions in our constitutions or laws that make it inexpedient to apply it here. Our laws pertaining to the school system of the state are so framed that the parent may exercise the fullest authority over the child without in any wise impairing the efficiency of the system. The only decided departure from the common-law rule is the section of our constitution providing for the compulsory attendance at some public or other school, unless other means of education are provided, of all the children of the state who are sound in mind and body, between the ages of eight and sixteen years, for at least three months in each year. Blackstone says that the greatest duty of parents to their children is that of giving them an education suitable to their station in life; a duty pointed out by reason, and of far the greatest importance of any. But this duty at common law was not compulsory; the common law presuming that the natural love and affection of the parents for their children would impel them to faithfully perform this <sup>9</sup> duty, and deeming it punishment enough to leave the parent, who neglects the instruction of his family, to labor under those griefs and inconveniences which his family, so uninstructed, will be sure to bring upon him: Lewis' Blackstone, bk. 1, sec. 451. Our constitution provides for compulsory education; but it leaves the parents free, to a great extent, to select the course of study. They may send their children to public schools and require them to take such of the studies prescribed by the rules as will not interfere with the efficiency or discipline of the schools, or they may withdraw them entirely from the public schools and send them to private schools, or provide for them other means of education.

Under our form of government, and at common law, the home is considered the keystone of the governmental structure. In this empire parents rule supreme during the minority of their children. After speaking of the power of parents over their children under the civil law, Judge Blackstone, in his Commentaries, speaking of the corresponding power under

the common law, says: "The power of a parent by our English laws is much more moderate, but still sufficient to keep the child in order and obedience. He may lawfully correct his child, being under age, in a reasonable manner, for this is for the benefit of his education. The consent or concurrence of the parent to the marriage of his child under age was also directed by our ancient law to be obtained; but now it is absolutely necessary, for without it the contract is void. And this also is another means, which the law has put into the parent's hands, in order the better to discharge his duty": Lewis' Blackstone, bk. 1, secs. 452, 453.

Again, in section 453, the learned commentator says: "The legal power of a father—for a mother, as such, is entitled to no power, but only to reverence and respect—the power of a father, I say, over the persons of his children, ceases at the age of twenty-one, for they are then enfranchised by arriving at years of discretion, or that point which the law has established, as some must necessarily be established, when the empire of the father, or other guardian, gives place to the empire of reason. Yet, till that age arrives, this empire of the father continues even after his death, for he may by his will appoint a guardian to his children. He may also delegate part of his parental authority, <sup>10</sup> during his life, to the tutor or schoolmaster of his child, who is then in loco parentis, and has such a portion of the power of the parent committed to his charge, viz., that of restraint and correction, as may be necessary to answer the purposes for which he is employed."

It is clear that neither the statute nor common law gives to the teacher or school officers the exclusive authority they claim in this case over the children of the patrons of the public schools, unless they get it upon the theory that the mere act of sending the children to school amounts to a delegation of the parental authority which the law of the land places in the hands of the parent; but this contention is fully answered by Mr. Justice Cole in *Morrow v. Wood*, 35 Wis. 59, 17 Am. Rep. 471. "Whence," asked the learned justice, "... did the teacher derive this exclusive and paramount authority over the child, and the right to direct his studies contrary to the wish of the father? It seems to us it is idle to say the parent, by sending his child to school, impliedly clothes the teacher with that power, in a case where the parent expressly reserves the right to himself, and refuses to submit to the judgment of the teacher the question as to what studies his boy should pursue."

We have made careful examination of the authorities directly in point on the question presented by the record here, and have found that the courts of last resort of four states have passed squarely upon it. Three of the states—Illinois, Nebraska, and Wisconsin—sustain our views. A case from

Indiana (*State v. Webber*, 108 Ind. 31, 58 Am. Rep. 30, 8 N. E. 708), seems to take the contrary view. Mr. Chief Justice Howk, who delivered the opinion of the court in *State v. Webber*, based his opinion upon the fact that the parent did not assign any cause or reason why his son should not participate in the musical studies and exercises of the high school, and that, therefore, it may be fairly assumed that he had none. We believe the presumption ought to be the other way. There are certain virtues that may safely be attributed to the generality of mankind, among which are love of country and love of offspring. The perpetuation of the <sup>11</sup> public school system of the state is probably as dear to the defendants in error as it is to the plaintiffs in error, and their interest in its efficiency, discipline and course of study as deep. They undoubtedly approve of the entire curriculum, except the singing lessons. We think it would be a reversal of the natural order of things to presume that a parent would arbitrarily and without cause or reason insist on dictating the course of study of his child in opposition to the course established by the school authorities. A better rule, we think, would be to presume, in the absence of proof to the contrary, that the request of the parent was reasonable and just, to the best interest of the child, and not detrimental to the discipline and efficiency of the school. The school authorities of the state have the power to classify and grade the scholars in their respective districts, and cause them to be taught in such departments as they may deem expedient. They may also prescribe the courses of study and text-books for the use of the schools, and such reasonable rules and regulations as they may think needful. They may also require prompt attendance, respectful deportment, and diligence in study. The parent, however, has a right to make a reasonable selection from the prescribed course of study for his child to pursue, and this selection must be respected by the school authorities, as the right of the parent in that regard is superior to that of the school officers and the teachers.

Counsel for plaintiff in error has cited several other cases to support his contention; but the ones we have heretofore noticed are all that, to our mind, are directly in point. *Donahoe v. Richards*, 38 Me. 376, was a case where a pupil was expelled for noncompliance with a rule requiring a scholar to take part in Bible exercises, although the pupil was willing to read from the "Douay" version. The parent brought an action on the case for such expulsion. It was held: That the parent could not recover, as there was no act done by which the ability of the child to render service was diminished; that the school was for the benefit <sup>12</sup> and instruction of the pupil; that, if pupil's rights have been violated, she alone was entitled to compensation.

Another case often cited in support of the contention of appellant is *Spiller v. Woburn*, 12 Allen, 127. In that case it was held that damages could not be recovered where a pupil was expelled from a public school for refusing to comply with a regulation requiring the pupils to bow their heads in morning prayer exercises, unless the parent of the pupil should request that such pupil be excused therefrom. The parent declined to make any request and directed the child not to obey the rule. It was held that the regulation was a reasonable one in the interest of quiet and decorum, and did not infringe on the religious liberty of the pupil.

It would serve no good purpose to note further this line of decisions. They are so different from the case at bar that they are valueless as authority upon the exact question involved. The difference between that class of cases and the case at bar is illustrated by *McCormick v. Burt*, 95 Ill. 263, 35 Am. Rep. 163, one of the states followed by us in this opinion. In that case it was held that the expulsion of a pupil for nonobservance of a rule requiring pupils to lay aside their books during the opening exercise while the Bible is being read did not authorize an action on the case for damages, where there was no allegation that the suspension was either wantonly or maliciously done. In this school no one was required to be present at such exercises unless he chose to do so; but the pupil insisted that the rule interfered with the religious convictions of himself and his father. None of this class of cases touch the identical question involved in the case at bar, although the relation of parent and child in school matters and the powers and duties of the school authorities are discussed generally.

We believe the court below reached the right conclusion, and its judgment is therefore affirmed.

All the justices concur.

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*A Parent may Control the Education of His Child* and may direct that he shall not study geography or grammar: *Morrow v. Wood*, 35 Wis. 59, 17 Am. Rep. 471; *Trustees v. People*, 87 Ill. 303, 29 Am. Rep. 55. If a candidate for admission to a free public high school passes a satisfactory examination in all the required branches except grammar, and is refused admission on account of that deficiency, and his father does not wish him to study grammar, mandamus will lie to compel his admission to study the other branches: *Trustees v. People*, 87 Ill. 303, 29 Am. Rep. 55. But that mandamus will not lie to compel the school authorities to readmit a pupil who has been suspended for disobeying a rule requiring him to employ a stated period of time in the study and practice of music, and to provide himself with a certain book therefor, see *State v. Webber*, 108 Ind. 31, 58 Am. Rep. 30. See, in this connection, the note to *Billard v. Board of Education*, 105 Am. St. Rep. 151, on religious and sectarian teaching in the public schools. As to causes for which children may be excluded from the public schools, see note to *Board of Education v. Purse*, 65 Am. St. Rep. 330.

**KANSAS CITY, MEXICO AND ORIENT RAILWAY  
COMPANY v. SHUTT.**

[24 Okl. 96, 104 Pac. 51.]

**ASSIGNMENT—Cause of Action for Burning Property.**—A cause of action in favor of the owner of personalty, on account of the wrongful destruction of such property by fire, against the wrongdoer, is not assignable. (p. 874.)

**ASSIGNMENT—Cause of Action for Converting Property.**—A cause of action in favor of the owner of personalty, against a party wrongfully taking and converting the same to his use, is assignable. (p. 874.)

**INSURANCE—Subrogation—Loss Caused by Third Person.**—Where an insurance company pays to the assured a loss occasioned by the wrong of a third party, and the value of the property destroyed by the fire exceeds the amount paid by the insurance company, the assured may bring an action in his own name against the wrongdoer, and recover the full amount of the loss. (pp. 875, 876.)

**ACTION—Divisibility of Action for Tort.**—An action for a tort, or based upon a wrongful act, is single and indivisible, and gives rise to but one liability. (p. 875.)

**APPEAL—Misjoinder of Parties or Causes of Action.**—The question of misjoinder of parties, or of causes of action, or of defect of parties, must be properly taken advantage of in apt time in the trial court, or the same will be treated as waived in the supreme court. (p. 876.)

(Syllabi by the court.)

John A. Eaton and Dudley W. Eaton, for the plaintiff in error.

W. M. Keith and Harris & Harris, for the defendant in error.

97 WILLIAMS, J. On the twenty-sixth day of December, 1903, the defendant in error, Franklin Shutt, and the St. Paul Fire and Marine Insurance Company, as plaintiffs, began in the district court of Woods county, Oklahoma Territory, an action against the plaintiff in error, the Kansas City, Mexico and Orient Railway Company, as defendant, declaring on an action for damages on account of the alleged destruction of a barn, grain and other property of said Franklin Shutt, by a fire negligently set out from a locomotive engine by the employees of said defendant. It is further alleged that on the twentieth day of July, A. D. 1903, at the time said loss occurred, an insurance policy issued by said insurance company in favor of said Shutt was in force covering said property; that said insurance company adjusted said fire loss, and paid to said Shutt as a result of said adjustment the sum of \$275.11 in settlement thereof; that said Shutt, in consideration of said sum of money paid in settlement of said fire loss, assigned and set over to said St. Paul Fire and Marine Insurance Company all right to recovery to the extent of such payment for



the loss sustained thereby. On the eleventh day of February, 1904, the defendant demurred to the petition on the grounds: (1) Defect of parties plaintiff; (2) misjoinder of causes of action; (3) facts stated did not constitute a cause of action. On April 25, 1904, said demurrer as to the insurance company was sustained, exceptions being saved and overruled as to said Franklin Shutt, and exceptions saved. On the thirteenth day of May, 1904, the defendant answered by a general denial and pleading contributory negligence.

On October 27, 1904, the plaintiff Franklin Shutt filed an amended petition in his name, not joining the insurance company, the same as the original petition; with the exception that he declared for damages in the sum of \$612.50, and also for an additional sum of \$100 as attorney's fees. On November 21, 1904, <sup>ss</sup> defendant filed a motion to dismiss, on the ground of a departure from the original action, which does not appear from the record to have been acted upon. On June 1, 1905, the defendant filed its answer to the amended petition, consisting of a general denial and pleading contributory negligence. On the same day the plaintiff filed his reply. Trial was had, and verdict rendered in favor of the plaintiff for the sum of \$231.74. On motion for a new trial the verdict was set aside.

By order of court the action was reinstated as to the St. Paul Fire and Marine Insurance Company, and a second amended petition was allowed to be filed, and on November 28, 1905, such petition was filed in behalf of said Franklin Shutt and the St. Paul Fire and Marine Insurance Company against said defendant, declaring for damages in the sum of \$612.50 and \$100 attorney's fees. On January 1, 1906, defendant filed its motion to require the plaintiffs to separately state and number the different causes of action stated in the second amended complaint.

On the third day of May, 1906, the third amended petition was filed, being styled "Franklin Shutt and the St. Paul Fire and Marine Insurance Company, a Corporation, Plaintiff, v. Kansas City, Mexico and Orient Railway Company, Defendant," a portion of which recites: "Now comes the above-named plaintiff Franklin Shutt, and by leave of court heretofore granted, files this his amended petition in the above-entitled action, and for cause of action against the above-named defendant alleges," etc., and closes with the prayer: "Wherefore said plaintiff demands judgment in his favor and against the said defendant for the sum of \$612.50, together with \$100 attorney fees, and the costs of this suit," etc. On May 15, 1906, the defendant filed its answer, consisting of a general denial and plea of contributory negligence, and that said cause of action had for value been transferred to said insurance company prior to the institution of the ac-

tion, and that the plaintiff was not the real party in interest. On December 4, 1906, reply was filed, and the cause was tried on the issues joined before a jury on the sixth day of December, 1906, and verdict rendered <sup>99</sup> in favor of the plaintiff for \$571.61. A motion for a new trial was filed in due time, and overruled.

Exhibit "C," attached to the original petition in this case, which purports to be a copy of the original, is in words and figures as follows:

"The St. Paul Fire & Marine Insurance Company having paid to me this day the sum of two hundred seventy-five & 11/100 dollars in settlement of any claim against said company for loss by fire occasioned by spark from a passing locomotive on the Kansas City, Mexico & Orient R. R. I hereby assign and set over to the said St. Paul Fire & Marine Insurance Company all my right of recovery, to the extent of such payment, for loss resulting therefrom.

"(Signed) FRANKLIN SHUTT."

On cross-examination of the plaintiff Franklin Shutt, the original petition, together with the exhibits thereto attached, was offered in evidence, to which the plaintiff objected as being incompetent, irrelevant and immaterial, and not proper cross-examination, and not being the petition upon which the trial of the case was being had, and not binding upon the plaintiff in that trial, which objection was sustained, exceptions being saved. The witness then was asked if at any time he had executed an assignment of his rights, as against the defendant, to the St. Paul Fire and Marine Insurance Company, to which the plaintiff objected, for the reason that it was incompetent, etc., and further, that it was not the best evidence, which objection was overruled, and the witness answered that he had, so far as their money covered the damages. The witness stated that he did not know where the original assignment that he had executed was, and there was no predicate laid for the introduction of secondary evidence of its contents.

<sup>100</sup> In this case the alleged assignment to the insurance company purported to cover only that portion of the loss paid the assured (assignor) by the assurer.

Section 4224 (Code Civ. Proc., sec. 26), Wilson's Revised and Annotated Statutes of Oklahoma of 1903, was borrowed from Kansas: Sec. 4103 (Code Civ. Proc., sec. 26), Kan. Gen. Stats. 1889 (Kan. Gen. Stats. 1868, c. 80, sec. 26). At the time said section was adopted by the legislature of Oklahoma Territory, section 4516, General Statutes of Kansas of 1889 (Code Civ. Proc., sec. 420), provided: "In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to the person, or to real or personal estate, or for any deceit or fraud, shall also



survive; and that the action may be brought, notwithstanding the death of the person entitled or liable to the same": Kan. Gen. Stats. 1868, c. 80, sec. 420. See, also, section 4609 (Code Civ. Proc., sec. 411), Wilson's Revised and Annotated Statutes of 1903. Section 4226 (Code Civ. Proc, sec. 28), Wilson's Revised and Annotated Statutes of Oklahoma of 1903, was also taken from Kansas: Sec. 4105 (Code Civ. Proc., sec. 28), Kan. Gen. Stats. 1889 (Kan. Gen. Stats. 1868, c. 80, sec. 28).

<sup>101</sup> In the case of Kansas Midland Ry. Co. v. Brehm, 54 Kan. 755, 39 Pac. 690, which involved the assignment under said statute of right of action against a party for wrongfully destroying property by fire, the court said: "The general doctrine, both at law and in equity, is that the right of action for a pure tort is not the subject of assignment. This rule has been changed to some extent by statute, and the provisions with reference to what choses in action will survive or abate by the death of either or both of the parties have been held to modify this rule, so that everything which survives and can be transmitted to the executor or administrator of the assignor, in case of death, is assignable: Smith v. New York etc. R. R. Co., 28 Barb. 605, and cases cited. Sections 420 and 421 of our code (Wilson's Revised and Annotated Statutes of 1903, secs. 4618, 4619) prescribe what actions may survive to the personal representatives of the party in case of his death, and if these provisions stood alone, it might, perhaps, be said that the legislature intended to modify the common-law rule so that all rights of action which survive might pass by assignment. Such provisions have been held to have the effect in other states. We have another provision, however, adopted at the same time, which clearly indicated a legislative intent to restrict the assignment of choses in action to those arising out of contract. In section 26 of the code (section 4224) it is provided that 'every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 28; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract.' Evidently this provision recognizes the limitation which existed at common law when the code was adopted, and, inferentially at least, provides that a chose in action arising out of a pure tort is not assignable. To meet the objection that a right of action arising out of torts of this character is not assignable, defendant in error relies upon Stewart v. Balderston, 10 Kan. 131. While some of the language of the opinion in that case might seem to warrant the view taken by the defendant in error, it is manifest that the case cannot be regarded as an authority that a right of action arising out of a tort is assignable. The subject matter of that action was a claim for money wrongfully taken; but, as the party injured in such a case can waive the tort and sue as

upon an implied contract (*Challiss v. Wylie*, 35 Kan. 506, 11 Pac. 438), and as there was an implied agreement to pay the money, it was treated as a <sup>102</sup> chose in action arising out of a contract, and was therefore assignable. Shortly afterward the same subject was under consideration, when it was said: 'At common law no chose in action was negotiable, or even assignable. In equity every chose in action, except a tort, was assignable; but it was assignable subject to all equities that might be set up against it. Under our statutes every chose in action is assignable except a tort, the same as it was in equity: Code Civ. Proc., sec. 26'; *McCrum v. Corby*, 11 Kan. 464, 470.'

It may be insisted that section 4163 (chapter 65, article 6, section 146), Wilson's Revised and Annotated Statutes of 1903, which provides that: "A thing in action arising out of the violation of a right of property or out of an obligation may be transferred by the owner. Upon the death of the owner, it passes to his personal representatives, except where, in the case provided by law, it passes to his devisees or successors in office"—renders an action, growing out of a tort pure and simple, assignable. But when we consider said section in connection with the provisions of section 4224, *supra*, wherein it is provided that said section shall not be deemed to authorize the assignment of a thing in action not arising out of a contract, such contention seems to be ill-founded, especially in the light of the case of the *Kansas Midland Ry. Co. v. Brehm*, 54 Kan. 755, 39 Pac. 690. These two sections are construed together, and, section 4224 being taken from Kansas, the decisions of the supreme court of that state construing said section, even after its adoption here, should at least be persuasive. We conclude that an action growing out of a tort pure and simple, like the one involved in this case—the destruction of property by fire alleged to have been wrongfully set out—is not assignable. We take it that section 4163, *supra*, in view of sections 4224 and 4609, *supra*, covers actions growing out of contracts, or arising out of violations of rights of property, where such violation partakes, not only of the nature of a tort, but also of an implied contract, being in the nature of *assumpsit*, as, for instance, the unlawful taking and conversion of money or of other personalty to one's use, as in the case of *Stewart v. Balderston*, 10 Kan. 131, which was an action based on a claim for money wrongfully taken and <sup>103</sup> converted. The right of action growing out of this character of torts not being assignable, under this assignment the insurance company could not have maintained an action in its own name on said assignment. Such an action on such assignment would have to be brought in the name of the assignor for the use and benefit of the assignee.

In the case of *Kansas City etc. R. Co. v. Blaker*, 68 Kan. 244, 75 Pac. 71, 64 L. R. A. 81, 1 Ann. Cas. 883, the court said: "It is contended here that the evidence did not establish a right of action in B. F. Blaker & Co., and that the court erred in not sustaining the railroad company's demurrer to the evidence. The fact that the insurance company was not a party plaintiff is the principal ground of this contention. The claim is that, as the insurance company had paid the greater part of the loss, it was a proper party, and, in fact, the only real party in interest in the result of the action. This question has already received the consideration of the court, and sanction has been given to the rule that where the value of the property destroyed exceeds the insurance money paid, the action must be brought in the name of the owner, and not in the name of the insurance company: *Atchison etc. R. R. Co. v. Home Ins. Co.*, 59 Kan. 432, 53 Pac. 459. The rule proceeds on the theory that the insured sustains toward the insurer the relation of trustee, and is well supported by the authorities: *Norwich Union Fire Ins. Co. v. Standard Oil Co.*, 59 Fed. 984, 8 C. C. A. 433; *Aetna Ins. Co. v. Hannibal & St. Joseph R. R. Co.*, 3 Dill. 1, Fed. Cas. No. 96; *London Assur. Co. v. Sainsbury*, 3 Doug. 245; *Rockingham Mut. Fire Ins. Co. v. Bosher*, 39 Me. 253, 63 Am. Dec. 618; *Hart v. Western R. R. Corp.*, 13 Met. 99, 46 Am. Dec. 719; *Connecticut Mutual Life Ins. Co. v. New York etc. R. R. Co.*, 25 Conn. 265, 65 Am. Dec. 571; *St. Louis etc. Ry. Co. v. Commercial Ins. Co.*, 139 U. S. 223, 11 Sup. Ct. Rep. 554, 35 L. ed. 154; *Marine Ins. Co. v. St. Louis etc. Ry. Co.*, 41 Fed. 643. The rule stated is applicable here, as the value of the property destroyed exceeded the amount paid by the insurance company. In addition to the rule of law which holds the insured in such cases chargeable as trustee, there was a specific agreement between the insured and the insurance company that the former should act and account in the capacity of a trustee for the insurance company, and the <sup>104</sup> recovery would necessarily conclude both parties, and effectively bar any other or further recovery against the railroad company for the loss."

In this case the alleged assignment to the insurance company covered only that portion of the total loss as was paid to the assignor by the insurance company. It is well settled that the wrongful act by the defendant company in the burning of the barn, etc., was single and indivisible, and gives rise to but one liability: *Aetna Ins. Co. v. Hannibal & St. Joseph R. Co.*, 3 Dill. 1, Fed. Cas. No. 96; *Hesser v. Johnson*, 13 Okl. 53, 74 Pac. 320. See, also, *Chicago etc. R. Co. v. Pullman S. C. Co.*, 139 U. S. 79, 11 Sup. Ct. Rep. 490, 35 L. ed. 97; *Pennsylvania R. Co. v. Manheim Ins. Co.*, 56 Fed. 301; *Southern Bell Telephone Co. v. Watts*, 66 Fed. 460, 13 C. C. A.

579; *Sun Mut. Fire Ins. Co. v. Mississippi Valley Co.*, 5 Mc-Crary, 477, 17 Fed. 919; *In re Harris*, 57 Fed. 243, 6 C. C. A. 320; *Hall v. Nashville & C. R. R. Co.*, 13 Wall. 367, 20 L. ed. 594. Hence, it appears that in any event, whether as assignor of the alleged claim or whether as subrogated to the rights of the assured, the plaintiff Franklin Shutt was a proper party plaintiff. As the assured, he was the trustee for the assurer for whatever amount was paid by it to him under said policy. With the matter of adjustment or settlement between them the defendant had no concern. If the assurer did not elect to intervene and have the amount awarded to it in that action, but preferred to await the result of the action, relying upon an accounting with the assured as to its subrogated rights, that could not prejudice the plaintiff in error. Further, if the assured executed the assignment as alleged, he was a proper party to prosecute the suit for himself, and also for the use and benefit of the insurance company, as the action was single and indivisible, not being separable.

The defendant in its answer insisted that the entire action had been assigned. There was no evidence offered to that effect. The only attempt made tended to show an assignment pro tanto, but in no event is the plaintiff in error in an attitude to complain. When the original petition was filed, the plaintiff Franklin <sup>105</sup>Shutt and the St. Paul Fire and Marine Insurance Company were joined as plaintiffs. Defendant then insisted that there was a defect of parties plaintiff, which contention was sustained. In the last amended petition the insurance company is joined in the caption as a coplaintiff with Franklin Shutt and the relief prayed for is solely in behalf of Franklin Shutt. Under any contingency the plaintiff Franklin Shutt is a proper plaintiff to recover in this action, and, the insurance company being joined therein, under the record in this case the plaintiff in error is amply protected. The insurance company will not be heard in any other tribunal, in any other action, to complain against the plaintiff in error. It is of no consequence to it as to what settlement may be made between the insurance company and the plaintiff Franklin Shutt. The insurance company was joined in the caption of the petition with the plaintiff Franklin Shutt, and there is no question raised, either by motion, demurrer, or answer, as to the last-amended petition in regard to misjoinder of parties or causes of action, or of defect of parties. Such question, not so taken advantage of in apt time, is waived: *Choctaw etc. R. Co. v. Burgess*, 21 Okl. 653, 97 Pac. 271.

There appearing no error in the record prejudicial to the rights of plaintiff in error, the judgment of the lower court is affirmed.

Kane, C. J., and Hayes and Turner, JJ., concur; Dunn, J., who, having been of counsel in the lower court, did not sit.

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*A Cause of Action for a Personal Tort is not Assignable* before judgment: *Boogren v. St. Paul City Ry. Co.*, 96 Minn. 51, 114 Am. St. Rep. 691. Mere personal torts that die with the party are not assignable: *Slauson v. Schwacher*, 4 Wash. 783, 31 Am. St. Rep. 948. For other cases concerning the assignability of a right of action for a tort, see *Ex parte Hiers*, 67 S. C. 108, 100 Am. St. Rep. 713, and cases cited in the cross-reference note thereto.

*The Right of an Insurer to Subrogation* is discussed in the notes to *American Bonding Co. v. National etc. Bank*, 99 Am. St. Rep. 504; *Mobile Ins. Co. v. Columbia etc. R. R. Co.*, 44 Am. St. Rep. 731; and in the subsequent cases of *Greenwich Ins. Co. v. Louisville etc. R. R. Co.*, 112 Ky. 598, 99 Am. St. Rep. 313; *Baker v. Monumental Sav. etc. Assn.*, 58 W. Va. 408, 112 Am. St. Rep. 996. An insurer, after paying a loss incurred by the assured, is subrogated to all the rights of the assured against the person or corporation whose indivisible tortious act has caused the loss; and the proper mode of enforcing such right of subrogation is by an action in the name of the assured for the benefit of the insurer: *Mobile Ins. Co. v. Columbia etc. R. R. Co.*, 41 S. C. 408, 44 Am. St. Rep. 725; *Hart v. Western R. R. Co.*, 13 Met. 99, 46 Am. Dec. 719. In this connection, see *Rockingham Mut. F. Ins. Co. v. Bosher*, 39 Me. 253, 63 Am. Dec. 618; *Connecticut etc. Ins. Co. v. New York etc. R. R. Co.*, 25 Conn. 265, 65 Am. Dec. 571.

*A Single Tort Gives Only One Cause of Action*, which cannot be split in order that separate suits may be brought for the various parts of what constitutes but one demand: *Wheeler Sav. Bank v. Tracey*, 141 Mo. 252, 64 Am. St. Rep. 505.

*A Question not Passed upon Below will not be Considered on Appeal*: *Farmers' etc. Ins. Co. v. Dabney*, 62 Neb. 213, 97 Am. St. Rep. 624; *Williamson v. Eastern Bldg. etc. Assn.*, 54 S. C. 582, 71 Am. St. Rep. 822; *Ashmead v. Reynolds*, 134 Ind. 139, 39 Am. St. Rep. 238.

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## SHANHOLTZER v. THOMPSON.

[24 Okl. 198, 103 Pac. 595.]

### **AFFIDAVIT—Validity Where Notary is Affiant's Attorney.—**

An affidavit filed in a case, executed before a notary public who is attorney of record appearing for the party offering the same, is voidable, and on being assailed for this reason, in the absence of a request for amendment, where such a course is permissible, should be held void. (p. 878.)

**AFFIDAVIT—Necessity of Stating Facts Positively.—**An affidavit to be used as evidence should state facts positively, and not merely upon belief. (p. 879.)

**DEFAULT JUDGMENT—Absence of Proof of Service.—**A judgment entered by default, where there is no proof of service of summons, when assailed by the defendant for this reason, should be set aside and leave given defendant to plead. (p. 879.)

(Syllabi by the court.)

W. J. Campbell, for the plaintiff in error.

Tillotson & Elliott, for the defendants in error.

<sup>190</sup> DUNN, J. January 24, 1908, defendants in error, as plaintiffs, filed their petition in the district court of Nowata county, against plaintiff in error, P. H. Shanholtzer. The record shows that on the same day summons was issued, but that the same was never returned showing service. On March 6, 1908, there was filed in the office of the clerk of the district court an affidavit by the clerk showing that on the twenty-fourth day of January, 1908, on a praecipe duly filed, summons was issued under the seal of the court to the sheriff of the county; also, an affidavit by the sheriff of the county that he directed one of his deputies to make service of this summons; also, an affidavit on the part of said deputy that he executed the summons by serving a copy of the same on the defendant, that the original of said summons had been misplaced, that the whereabouts of the same was unknown to him, and that he had never made return of the summons, but that the same had been duly and properly served according to law. All of these different affidavits were verified as correct upon the belief of the parties making them, and were sworn to before Thomas E. Elliott, who was a notary public, and who was appearing as one of the attorneys of record for the plaintiffs. Upon this showing of service upon the defendant, and in the absence of any answer, demurrer, motion or other plea or appearance, the court entered judgment in favor of plaintiffs and against defendant. On the same day that these affidavits were filed and judgment rendered there was filed on the part of counsel for defendant two motions; one to strike from the files in the cause the affidavits mentioned, for the reason that they were subscribed and sworn to before one <sup>200</sup> of the attorneys in the cause, and, second, a motion to vacate the judgment and allow defendant an opportunity to plead on the ground of irregularity in the obtaining of the said judgment. These motions were by the court overruled, exceptions saved, and from which action defendant has brought the case to this court by petition in error and case-made, praying a reversal thereof.

The statutes of Kansas in reference to the right of an attorney of a party in an action to take affidavits therein at his instance, as notary public, are the same as ours, and the question has been passed upon by the supreme court of that state in a number of cases, several of which are as follows: *Tootle v. Smith*, 34 Kan. 27, 7 Pac. 577; *Swearingen v. Howser*, 37 Kan. 126, 14 Pac. 436; *Schoen v. Sunderland*, 39 Kan. 758, 18 Pac. 913. Under these authorities the motion made by counsel for defendant should have been sustained.



Moreover, it will be observed that the affidavits were made merely upon the belief of the different parties. The supreme court of the state of Kansas in the case of *Thompson v. Higginbotham*, 18 Kan. 42, said: "An affidavit to be used as evidence should state facts positively, and not merely upon belief." Justice Brewer, who wrote the opinion for the court, said that such an affidavit proves nothing, except affiant's belief. The foregoing comment is equally true of the affidavits in the case at bar, and hence there was no evidence whatever before the court of any proof of service of summons. This being true, no judgment should have been entered, but, having been, it should have been annulled and set aside on defendant's motion.

The judgment of the lower court is accordingly reversed, and the case remanded, with instructions to set aside the judgment heretofore entered and grant defendant the statutory time for pleading.

Hayes, Turner and Williams, JJ., concur; Kane, C. J., absent and not sitting.

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*An Affidavit on Information and Belief is Sufficient* where the facts sworn to are necessarily matters of information and belief: *Leigh v. Green*, 64 Neb. 533, 101 Am. St. Rep. 592.

*Judgment by Default Without Legal Evidence of Service of Summons*: *Lawrence v. Stone*, 160 Ala. 382, 135 Am. St. Rep. 105, and cases cited in the cross-reference note thereto.

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## HALES v. ZANDER.

[24 Okl. 246, 103 Pac. 669.]

**CHATTEL MORTGAGE—Proper County in Which to Record.** Under Wilson's Revised and Annotated Statutes of 1903, section 3578, providing for the filing of mortgages in the county where the property "is at such time situated," a mortgage of mules which were taken by the mortgagor by consent of the mortgagee into Indian Territory is properly recordable in the county in which the mules were at the time the mortgage was executed, and not in Indian Territory, where they were subsequently taken, and, such mortgage not being there recorded, is void as to subsequent attaching creditors of the mortgagor. (p. 882.)

(Syllabus by the court.)

Everest & Smith and C. M. Thorp, for the plaintiff in error.

A. J. Morris, for the defendants in error.

<sup>246</sup> TURNER, J. On January 27, 1907, W. T. Hales, plaintiff in error, plaintiff below, sued A. Zander, F. W.

Schultz and J. S. Thompson, defendants in error, defendants below, in the district court of Caddo county in replevin for four head of mules, alleging special ownership therein by virtue of a chattel mortgage executed and delivered to him by W. H. Walls on June 8, 1905, to secure a debt of seventeen hundred and fifty dollars. Defendants justified under a writ of <sup>247</sup> attachment, subsequently sued out and levied on the property at the instance of creditors of said Walls. There was trial to a jury, which resulted in judgment for defendants, to reverse which plaintiff brings the case here.

At the time the mortgage was executed, plaintiff lived in Oklahoma City. Walls lived in Coalgate, in the sixteenth recording district in Indian Territory. On said date Walls came to Oklahoma City, bought the mules in question of plaintiff, then and there executed and delivered to him the mortgage in question, which not only covered said mules then located in Oklahoma City, but also other personal property belonging to Walls located at Coalgate. Said mortgage was never filed for record in Oklahoma, but next day was filed for record in the office of the clerk of the United States court in the Indian Territory, southern district, at Ada, who was also ex-officio recorder of said sixteenth recording district. The property was subsequently taken by Walls into Caddo county, where it was attached, as stated, and the only question for us to determine is whether the mortgage is void as against said attaching creditors. The trial court held that it was, and therein we see no error.

Wilson's Revised and Annotated Statutes of 1903, section 3578, provides: "A mortgage of personal property is void as against creditors of the mortgagor, subsequent purchasers, and encumbrancers of the property in good faith, for value, unless the original or an authenticated copy thereof, be filed by depositing the same in the office of the register of deeds of the county where the property mortgaged, or any part thereof, is at such time situated."

"At such time" refers to the time of execution of the mortgage, and required it to be filed in Oklahoma county, where the property was situated at the time it was executed, and not in the sixteenth recording district in Indian Territory, where it was afterward taken, and where it was located at the time the mortgage was there filed, as stated. Jones on Chattel Mortgages, fifth edition, section 251, says: ". . . . It is the county where the property is at the time the mortgage is executed which determines the place of <sup>248</sup> record under a statute providing that a mortgage shall be recorded in the county where the property is located. It is the plain intent of such a statute that the filing should be in the township where the property is at the time of the execution and delivery of the mortgage, and not in some other township



or city to which the property may be removed after such execution and delivery''; citing *Yund v. First Nat. Bank of Shawnee*, 14 Wyo. 81, 82 Pac. 6; *Greenville Nat. Bank v. Evans-Snyder-Buel Co.*, 9 Okl. 353, 60 Pac. 249; *First Nat. Bank v. Weed*, 89 Mich. 357, 50 N. W. 864; *Stirk v. Hamilton*, 83 Me. 524, 22 Atl. 391.

In *Greenville Nat. Bank v. Evans-Snyder-Buel Co.*, 9 Okl. 353, 60 Pac. 249, the court said of this statute that it "only provides for the filing of the mortgages on property which is located within the territory at the time of the execution of the mortgage."

In *Yund v. First Nat. Bank of Shawnee*, 14 Wyo. 81, 82 Pac. 6, the court, in construing this statute, speaking of those mortgages, said: "The first mortgage, having been filed where the property was situated at the time it was executed and while the property remained there, became a valid lien as against the creditors of the mortgagor in Oklahoma. The second mortgage was not filed until some time after the property covered by it had been removed from Oklahoma, and it is now contended by counsel for plaintiff that for that reason it never became a lien on the property. This contention must be sustained. The mortgage was void as against creditors of the mortgagor in Oklahoma, unless filed, and, not being filed before the property was removed to the Indian Territory, it went there free of any lien as to creditors, and the subsequent filing in Oklahoma could create no lien upon it in a foreign jurisdiction. The third mortgage never became a lien as against creditors, because not filed where the property was situated at the time it was executed."

And in *First Nat. Bank v. Weed*, 89 Mich. 357, 50 N. W. 864, in construing the language of a statute providing for the filing of chattel mortgages in the office of the clerk of the town or township "where the property is," it is said: "It is plain that it is the intent of the statute that the filing<sup>249</sup> should be in the township or city where the property is at the time of the execution and delivery of the mortgage, and not in some other township or city to which the property may be removed after such execution and delivery."

In *Mumford v. Harris*, 8 Colo. App. 51, 44 Pac. 772, in construing Mills' Annotated Statutes, section 387, which provides for the recording of mortgages in the county where the property "shall" be situated, the court held that the mortgage of cattle which are to be taken by the mortgagor to some other county was properly recorded in the county in which the cattle were at the time the mortgage was executed, and not the county to which they were subsequently taken.

There is no room to speculate on the force and effect of this mortgage being filed for record in the sixteenth recording

district of the Indian Territory, to which place the property was removed after its execution by consent of the mortgagee. We think it sufficient to say that the same was nil, for the reason that the mortgage statute of Arkansas then in force in the Indian Territory did not permit the filing of a chattel mortgage in that jurisdiction executed in another territory on property located there, but referred to mortgages on property located within said territory at the time of their execution. Said statute provided (Mansfield's Digest, sec. 4742): "All mortgages, whether for real or personal estate, shall be proved, or acknowledged in the same manner that deeds for the conveyance of real estate are now required by law to be proved or acknowledged; and when so proved and acknowledged shall be recorded—if for lands, in the county or counties, in which the lands lie, and if for personal property, in the county in which the mortgagor resides." Which was by the act of Congress approved February 1, 1897 (29 Stat. 510, c. 136), amended so as to add thereto: "Provided, that if the mortgagor is a nonresident of the Indian Territory the mortgage shall be recorded in the judicial district in which the property is situated at the time the mortgage is executed."

It follows that, as the mortgage was executed outside of said territory on property not located therein, and as there was no <sup>250</sup> statutory provision authorizing a removal of said property into said territory and the filing of said mortgage therein, said filing added nothing thereto. This was so expressly held in *Greenville Nat. Bank v. Evans-Snyder-Buel Co.*, 9 Okl. 353, 60 Pac. 249. In that case the cattle were located in the Chickasaw Nation, and the mortgages executed and delivered and duly filed for record there. The cattle were afterward moved to a pasture in the Kiowa reservation, in Oklahoma Territory, and there attached. In passing the court in effect held that the mortgages, being in conformity to the laws of the *lex loci contractus*, were valid and subsisting securities capable of being enforced elsewhere, and that the mortgagees lost no right by failing to have them filed in Canadian county.

We are therefore of opinion that as plaintiff gained nothing by filing his mortgage in the sixteenth recording district, and that to preserve his lien it was properly fileable in Oklahoma county before the mules were shipped out, that the same was void as to these attaching creditors, and for that reason the judgment of the trial court is affirmed.

All the justices concur.

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*The Effect of Failure to Execute and Record Chattel Mortgages as prescribed by statute is the subject of a note to People v. Burns, 137 Am. St. Rep. 471.*

*A Chattel Mortgage Executed and Recorded in One State is not constructive notice to purchasers or attaching creditors of property covered*

by it, but situated in another state at the time of the execution of the mortgage: *Aultman etc. Mach. Co. v. Kennedy*, 114 Iowa, 444, 89 Am. St. Rep. 373. And the removal to another state of mortgaged chattels by the mortgagor subjects them to attachment by his creditors in the state to which they are removed, though the mortgage was duly recorded in the state where it was given, and the goods were removed without the knowledge or consent of the mortgagee: *Corbett v. Littlefield*, 84 Mich. 30, 22 Am. St. Rep. 681. A chattel mortgage executed and recorded in another state, embracing property then there but afterward removed to Tennessee, is not entitled to registration in the latter state so as to give the mortgagee, on the ground of constructive notice, priority over the lien of resident attaching creditors of the mortgagor: *Synder v. Yates*, 112 Tenn. 309, 105 Am. St. Rep. 941.

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### PULS v. HORNBECK.

[24 Okl. 288, 103 Pac. 665.]

#### **SALES—Caveat Emptor—Cattle Infected With Fever Ticks.—**

A vendor, who sells cattle at a sound price, knowing that they have Texas fever ticks on them, or any other infection affecting their value for the purpose for which they are bought, the infection not being easily detected by those having had no experience with it, and who does not disclose such knowledge to the vendee, is guilty of the fraudulent concealment of a latent defect, for which he must answer, and the rule of caveat emptor does not apply. But the vendor is not answerable unless he has knowledge, prior to the time the sale is consummated, that the cattle had such ticks on them. (p. 887.)

(Syllabus by the court.)

Bradley & Bradley, for the plaintiff in error.

R. W. Wylie and L. M. Gray, for the defendants in error.

**289 WILLIAMS, J.** On the fifteenth day of September, 1906, the plaintiff in error, L. Puls, as plaintiff, commenced this action in the district court of Kingfisher county, Oklahoma Territory, against the defendants in error S. T. Hornbeck and Emilia Hornbeck, his wife, as defendants, alleging, in substance: That on the third day of September, 1906, he entered into a contract with the defendants for the purchase of thirty-five head of mixed cattle, at the price of four hundred dollars; that the cattle were delivered to him under such contract; that he paid the purchase price; that the cattle were sold to him as sound and merchantable and free and clear of all disease; that the plaintiff so understood and contracted for said cattle as sound and merchantable; that at the time the cattle were sold to plaintiff the same were infected with what is known as "Texas fever ticks," and were not merchantable stock; that the fact that said cattle were infected with Texas fever ticks was concealed from

the plaintiff by the defendants; that the defendants knew that the cattle were so infected and not merchantable, but that they concealed such facts from the plaintiff and sold the cattle to him as sound and merchantable; that plaintiff placed said cattle in his pasture and mixed them with other cattle, and shipped them, together with the other cattle, to the market; and that, by reason of said cattle being infected with Texas fever ticks, he suffered various elements of damages, for which he seeks to recover from the defendants the sum of fifteen hundred dollars.

The plaintiff asked the court to instruct the jury as follows, which was refused: "(4p.) The jury are instructed that if the plaintiff paid defendants a fair value for said thirty-five head of cattle, as if said cattle were free and clear of such Texas fever ticks, and the defendants received such consideration from the plaintiff, such consideration would import that such cattle were in sound condition and free of Texas fever ticks and of the value of sound cattle and free of fever ticks, at the place where those cattle were at the time plaintiff <sup>290</sup> purchased them from the defendants. (5p.) The jury are instructed, also, in estimating damages, if there were any damage sustained by plaintiff, to take into consideration the expense of plaintiff, the annoyance and time occupied by plaintiff because of such cattle being infected with fever ticks, and because of such quarantine regulations. (6p.) You are instructed that in the sale of personal property the law is that there is an implied warranty that the article or thing sold is fit for the purpose for which the article or thing is intended. If you find from the evidence that the plaintiff in this case, Puls, purchased the cattle from the defendants for the purpose of using the same for sale upon the markets, and such fact was known to the defendants at the time of the sale, then if you further find that the cattle at the time were infected with what is known as Texas fever ticks, or fever ticks, then your verdict should be for the plaintiff, provided you further find that the plaintiff sustained any damage by reason of the transaction. (7p.) If the jury believe from the evidence that the defendants sold the cattle to the plaintiff for the purpose of plaintiff shipping them to market, and that the defendants knew at the time that such cattle were infected with Texas fever ticks, and the defendants did not disclose that fact to the plaintiff, and the plaintiff did not know that fact, then the jury may allow exemplary damages over and above the actual damages sustained by the plaintiff as to the jury may seem just and reasonable under all the circumstances of the case."

In this case the facts are undisputed that the defendant in error, S. T. Hornbeck, understood that the cattle, which

were located above <sup>291</sup> the quarantine line, were being purchased by the plaintiff in error for the purpose of being shipped to the Wichita or St. Joe market. Cattle infected with Texas fever ticks would not be classed as marketable cattle in said markets.

The court instructed the jury: “(5) When one sells personal property he impliedly warrants that it is merchantable and reasonably suited to the use intended, and that the seller knows of no latent defects. ‘Latent defects’ mean such defects as are hidden. The implied warranty, however, does not cover such defects which can be discovered by ordinary prudence and caution. As to those, the law presumes the buyer to exercise his own judgment. If you find that the cattle referred to in the evidence in this case, or a portion of them, were infected with Texas fever ticks, and that such infection rendered the cattle unmerchantable, or unfit for the purpose for which they were purchased, and that such infection was a latent defect, and was not such a defect as could be discovered by ordinary prudence and caution, then the seller will be held to have impliedly warranted them to be free from such defect. Upon the other hand, if you find from the evidence that the cattle at the time they were purchased by the plaintiff were infected with Texas fever ticks, but that such defect, if you find same to be a defect, was such that could have been discovered by the plaintiff by ordinary prudence and caution, and that he failed to exercise the same, then he cannot hold the defendant to any implied warranty as to the cattle being free from such defect.”

The court further instructed the jury: “(6) The detriment caused by the breach of a warranty of the fitness of personal property for a particular use is deemed to be the excess, if any, of the value which the property would have had, at the time to which the warranty referred, if it had been complied with, over its actual value at that time, together with a fair compensation for the loss incurred by an effort in good faith to use the property for the purpose for which it was purchased. That is, the measure of damages in this case, if you find that the plaintiff is entitled to recover any damages, will be the excess, if any, of what the cattle would have been worth had they been sound and free from any infection over their actual value at the time of the purchase, together with a fair compensation for the loss incurred by the plaintiff in an effort in good faith to use the <sup>292</sup> cattle for the purpose for which he purchased the same; but before the plaintiff can recover damages for loss incurred in an effort to use the cattle for the purpose for which he purchased them, he must show by a preponderance of the evidence that the defendant knew, or had reasonable

grounds to know, the purpose for which the plaintiff intended to use them."

And further: "(8) If the jury believe from the evidence that the cattle which the defendant, S. T. Hornbeck, sold the plaintiff, Puls, had Texas fever ticks upon them at that time, and that the defendant knew that fact, or knew that they had ticks upon them, but was uncertain as to whether such ticks were fever ticks or ticks that were harmless, and if defendant also knew that plaintiff was buying such cattle for shipment to market, and defendant did not disclose the fact of such cattle being infected by such ticks, then the defendant would be liable to plaintiff for all the damages sustained by plaintiff occasioned by the depreciation in value of the cattle in the market by reason of being infected with fever ticks; and the defendant would, under such circumstances, be liable to the plaintiff for all damages sustained by the plaintiff resulting from the commingling of the cattle he bought from Hornbeck with plaintiff's other cattle."

In the case of *Grigsby v. Stapleton*, 94 Mo. 423, 7 S. W. 421, the court said: "There is no claim in this case that defendant (vendee) knew these cattle were diseased. It seems to be conceded on all hands that Texas fever is a disease not easily detected, except by those having had experience with it. The cattle were sold to the defendant at a sound price. If, therefore, plaintiff knew they had the Texas fever, or other disease materially affecting their value upon the market, and did not disclose the same to the defendant, he was guilty of a fraudulent concealment of latent defect. It is not necessary to this defense that there should be any warranty or representations as to the health or condition of the cattle. Indeed, so far as this case is concerned, if the cattle had been pronounced by some cattlemen to have the Texas fever, and, after knowledge of that report came to the plaintiff, some of them, to his knowledge, died from sickness, then he should have disclosed these facts to the defendant. They were circumstances materially affecting the value of the cattle for the purposes for which they <sup>293</sup> were bought, or for any other purpose, and of which defendant, on all the evidence, had no equal means of knowledge. To withhold these circumstances was a deceit, in the absence of proof that defendant possessed such information." See, also, *Ricks v. Dillahunt*, 8 Port. (Ala.) 133; *Burnett v. Stanton*, 2 Ala. 181; *Armstrong v. Bufford*, 51 Ala. 410; *Cardwell v. McClland*, 3 Sneed, 150; *Jeffery v. Bigelow*, 13 Wend. 518, 28 Am. Dec. 476; *McAdams v. Cates*, 24 Mo. 223; *Barron v. Alexander*, 27 Mo. 530.



In the case at bar, the plaintiff was buying cattle in a district above the quarantine line, where the Texas fever ticks would not reasonably be supposed to exist and a reasonable and prudent man would not be supposed to examine for them (*Croff v. Cresse*, 7 Okl. 408, 54 Pac. 558), and when he (the plaintiff in error) went to buy cattle in such a district for the purpose of shipping them to the northern market, if the defendant in error, S. T. Hornbeck, knowing that cattle infected with the Texas fever ticks would not be marketable in such market, stood silently by and sold such cattle to the plaintiff in error with knowledge of such infection, he would be liable for proper damages. By instruction 8, *supra*, the court appears to have so instructed the jury. The testimony is undisputed that S. T. Hornbeck knew the purpose for which the cattle were bought, and the jury necessarily found in this case that said Hornbeck had no knowledge that the cattle were so infected, and, therefore, having no such knowledge, he was not liable under any theory: *Croff v. Cresse*, 7 Okl. 408, 54 Pac. 558; *Missouri Pac. Ry. Co. v. Finley*, 38 Kan. 550, 16 Pac. 951; *Patee v. Adams*, 37 Kan. 133, 14 Pac. 505; *Lynch v. Grayson*, 5 N. M. 487, 25 Pac. 992, 163 U. S. 468, 16 Sup. Ct. Rep. 1064, 41 L. ed. 230.

There are various assignments of error relative to the admission of testimony; but this evidence, except in instances where it is purely hearsay, or the questions are leading, was offered as to the measure of damages; and there being no liability found by the jury, if there was error as to the admission of testimony, there having been no damages found whatever, it would be error without injury.

<sup>294</sup> We think the instructions of the nisi prius court properly submitted the issues to the jury as to the liability, and were sufficiently favorable to plaintiff in error; and, the jury having found against the plaintiff in error on that point, if any evidence was excluded as to the measure of damages under the finding of the jury as to the facts, it would be error without injury.

The vice of instruction 4p, requested by the plaintiff in error, is that it eliminates the question as to knowledge on the part of the defendants in error as to the infected condition of the cattle, and for that reason should have been refused. Instruction 5p, requested by the plaintiff in error, was susceptible of the construction that the plaintiff was entitled to recover damages for mental annoyance, and on that score it was properly refused, there being neither any allegation nor proof tending to support such damages. Instruction 6, given by the court, appears to have properly submitted the question of damages, and for that reason, if for no other, there was no error in refusing instruction 5p. Instruction

6p, requested by the plaintiff in error, is fairly covered by instruction 8, given by the court. The jury having found that there was no liability whatever on the part of the defendants, the refusal of instruction 7p. was without error, because, if the plaintiff was not entitled to nominal and actual damages, the failure to submit the question of exemplary damages, even though plaintiff in error was entitled to such submission, would be error without injury.

The evidence failed to sustain any liability against the wife of the defendant.

Upon the whole record, we find no reversible error, and the judgment of the lower court is accordingly affirmed.

All the justices concur.

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*That the Seller is Aware of a Latent Defect in an Animal Sold Does not Amount to Fraud*, unless he makes some statement or uses some act or device calculated to deceive the buyer, or to induce him not to make inquiry, see *Court v. Snyder*, 2 Ind. App. 440, 50 Am. St. Rep. 247. When there is no express warranty, and the vendor sells a thing as sound which has a latent defect unknown to him, he is not answerable to the buyer: *Westmoreland v. Dixon*, 4 Hayw. (Tenn.) 223, 9 Am. Dec. 763. But there may be fraud in suppressing and concealing material facts, as well as in direct misrepresentation, if the other party is knowingly suffered to deal under a delusion: *Barnard v. Duncan*, 38 Mo. 170, 90 Am. Dec. 416, and numerous cases cited in the cross-reference note thereto. As to when there is no implied warranty in a contract of sale, see *Farren v. Dameron*, 99 Md. 323, 105 Am. St. Rep. 297; note to *Gold Ridge Min. Co. v. Tallmadge*, 102 Am. St. Rep. 619, 622.

*Harmless Error* in the admission of evidence is no ground for reversal of the judgment: *Rockford City Ry. Co. v. Blake*, 173 Ill. 354, 64 Am. St. Rep. 122; nor is harmless error in the rejection of evidence: *Burns v. Smith*, 29 Ind. App. 181, 94 Am. St. Rep. 268.

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### THRELKELD v. STEWARD.

[24 Okl. 403, 103 Pac. 630.]

**EVIDENCE—Parol Affecting Writing.**—In the absence of fraud, accident or mistake, the terms of a written contract are not permitted to be varied by parol testimony; but evidence showing the relation of the parties and their profession or business, when not in conflict with the express terms or language of the contract, is admissible. (p. 889.)

**CONTRACTS—Restraint of Practice of Medicine.**—A contract restraining the practice of medicine and surgery in a particular locality within a reasonable area is valid. (pp. 890, 891.)

**CONTRACTS—Restraint of Practice of Medicine.**—The practice of medicine and surgery within the prescribed limit, contrary to the provisions of such a contract, may be restrained by injunction. (pp. 890, 892.)



**CONTRACTS—Restraint of Practice of Medicine.**—Courts will not, as a rule, inquire into the adequacy of the consideration of such contract. (p. 891.)

(Syllabi by the court.)

Harley & Lewis, for the plaintiffs in error.

<sup>403</sup> **WILLIAMS, J.** The assignment of error will be considered under two heads: (1) As to whether or not there was error in <sup>404</sup> refusing to strike the amendment from the complaint; and (2) as to the granting of the temporary injunction.

1. It is a well-settled rule that, in the absence of fraud, accident or mistake, the terms of a contract are not permitted to be varied by parol testimony. The bond and agreement herein are part of one entire contract, and are to be construed together.

The bond recites: "For and in consideration of the purchase by the said Steward & Deal of a certain drug business owned by the said W. C. Threlkeld in the town of Allen, and known as the Allen Drug Company, binds himself under this bond to protect the said Steward & Deal against all indebtedness of said Allen Drug Company, except amounts due the following firms. . . . The said W. C. Threlkeld, in consideration of the sale of the above-mentioned drug stock to the said Steward & Deal further binds himself under this bond that he will not engage in the drug business either directly or indirectly nor in any manner be connected with such business in the town of Allen, Indian Territory, or within a radius of ten miles of said town, for a period of two years from the date of this instrument. The said W. C. Threlkeld further binds himself under this bond, that he will not engage in the practice of medicine in the town of Allen, Indian Territory, or within a radius of ten miles of said town for a period of two years from the date of this instrument."

The contract of sale provides: "The said W. C. Threlkeld further agrees to execute a bond in the sum of one thousand dollars, that he will not engage in nor be connected with a drug business in the town of Allen, Indian Territory, or practice medicine in Allen, Indian Territory, or the vicinity thereof for a period of two years from the date of this instrument."

The amendment objected to by the plaintiff in error was, in effect, that the defendant in error, C. A. Steward, of the firm of Steward & Deal, was and had been a practicing physician in the town of Allen and the surrounding country for seven years; that the plaintiff in error, W. C. Threlkeld, was also practicing physician at the date of the execution of said contract and bond at said town, and within a radius of ten miles thereof, and that one of the inducements to plaintiff

to make the purchase and to pay <sup>405</sup> the price mentioned was the agreement by said Threlkeld not to practice medicine within the said area, and for the term mentioned in said contract and bond. This does not appear to vary or to be contradictory of any of the terms of either the contract of sale or of the bond. It shows the relation and situation of the parties, and the action of the lower court thereon was without error.

2. An agreement by a physician for a valuable consideration not to practice medicine and surgery at a designated place within a reasonable distance is valid, and a breach of such agreement will be restrained by injunction, either to prevent a multiplicity of suits, or where the party is insolvent: *Wittaker v. Howe*, 3 Beav. 399, 49 Eng. Reprint, Full Reprint (Rolls Court Book), 2, p. 153; *Candler v. Candler*, Jac. 231; *Bunn v. Guy*, 4 East, 109; *Homer v. Graves*, 7 Bing. 735; *Mitchel v. Reynolds*, 1 P. Wms. 183, 24 Eng. Reprint, Full Reprint (Chancery Book, 4), p. 347; *Catt v. Tourle*, 4 L. R. Ch. App. Cas. 654; *Davis v. Mason*, 5 Term Rep. 118; *Archer v. Marsh*, 6 Ad. & E. 959; *Hayward v. Young*, 2 Chit. 407; *Mallon v. May*, 11 Mees. & W. 652; *Atkyns v. Kinner*, 4 Ex. 776; *Hastings v. Whitley*, 2 Ex. 611; *Chappel v. Brockway*, 21 Wend. 157; *McClurg's Appeal*, 58 Pa. 51; *Butler v. Burleson*, 16 Vt. 176; *Beard v. Dennis*, 6 Ind. 200, 63 Am. Dec. 380; *Palmer v. Graham*, 1 Pars. Eq. Cas. (Pa.) 476; *Smalley v. Greene*, 52 Iowa, 243, 35 Am. Rep. 267, 3 N. W. 78; *Hedge v. Lowe*, 47 Iowa, 137; *Jenkins v. Temples*, 39 Ga. 655, 99 Am. Dec. 482; *Holbrook v. Waters*, 9 How. Pr. 335; *Dwight v. Hamilton*, 113 Mass. 175; *Linn v. Sigsbee*, 67 Ill. 75; *Gilman v. Dwight*, 13 Gray, 356, 74 Am. Dec. 634; *Hoyt v. Holly*, 39 Conn. 326, 12 Am. Rep. 390; *French v. Parker*, 16 R. I. 219, 27 Am. St. Rep. 733, 14 Atl. 870; *Tillinghast v. Boothby*, 20 R. I. 59, 37 Atl. 344; *Gordon v. Mansfield*, 84 Mo. App. 367; *Wolverton v. Bruce*, 6 Ind. Ter. 135, 89 S. W. 1018; *Nobles v. Bates*, 7 Cow. 307; *Pyke v. Thomas*, 7 Bibb, 486, 7 Am. Dec. 741; *Haldeman v. Simonton*, 55 Iowa, 144, 7 N. W. 493; *Mandenville v. Harman*, 42 N. J. Eq. 185, 7 Atl. 37.

<sup>406</sup> In the case of *Leghton v. Wales*, 3 Mees. & W. 551, the court said: "Since the case of *Hitchcock v. Coker*, 6 Ad. & E. 438, the court cannot inquire into the extent or adequacy of the consideration." In the case of *Pierce v. Fuller*, 8 Mass. 223, 5 Am. Dec. 102, the pecuniary consideration of one dollar was held sufficient to uphold the contract, wherein it was agreed, under liquidated penalty of two hundred and ninety dollars, not to run a stage on a certain road. In 1 *Smith's Leading Cases*, ninth edition, page 708, it is held that the doctrine as to the adequacy of consideration has been entirely upset by the case of *Hitchcock v. Coker*, and that

the true question is whether the contract is injurious to the public or not, and, if so, it is void; if not, the parties may contract for what consideration they please.

There is no discord in the authorities that, where the restraint is no more extensive as to area than the protection of the party with whom the contract is made reasonably requires, the public not being likely to be injured by such an agreement, every other person being at liberty to practice within such limits, such contract is reasonable and valid, unless otherwise vitiated. Whilst courts will scrutinize to determine whether or not the restraint be unreasonable, yet, as a rule, they will leave it to the parties themselves to make their terms in regard to the consideration thereof.

The question of duration is not raised in this record. See chapter 15, article 4, section 91 (section 820), Wilson's Revised and Annotated Statutes of 1903, which does not apply to this case; the contract under consideration having been executed in the Indian Territory prior to statehood, where the common law relating to contracts governed.

The following rules are supported by both reason and authority: (1) That contracts restraining the exercise of a trade, etc., in particular localities, when there is reasonable ground for the restriction, are valid; (2) an agreement for a valuable consideration not to practice medicine within a reasonable distance of a designated place is not unreasonable, and the exercise of the profession within such prescribed limit may be restrained by injunction; <sup>407</sup> and (3) the court will not inquire into the adequacy of the consideration: McClurg's Appeal, 58 Pa. 51.

In the case of *Dwight v. Hamilton*, 113 Mass. 175, the bond ran from C. H. Hamilton to William Dwight, and was in words and figures as follows: "The condition of this obligation is such, that whereas the said C. H. Hamilton has agreed with the said William Dwight to sell him his place in said Douglas, the land and building where he now lives, and his practice and goodwill as a physician, for the sum of fifty-five hundred dollars; now, if the said C. H. Hamilton shall convey to the said William Dwight, by a good and sufficient warranty deed, all of his aforesaid real estate in said Douglas, and fulfill his other agreements hereto, on or before the first day of April next, on the payment of him, by the said William Dwight, of the aforesaid sum of fifty-five hundred dollars, then this obligation shall be void, otherwise to remain in full force and effect."

The case was tried upon the following agreed statement of facts: "That the defendant executed the bond set forth in the bill, and was paid the sum therein named, but that the consideration money came from, and the real estate was conveyed to, the wife of the plaintiff by consent of all parties

to the transaction. It is further admitted that in consequence of the signing of the bond the plaintiff removed his family to Douglas, and there commenced the practice of medicine, and that the defendant thereupon ceased to reside and practice medicine in said town, but after an absence of about twelve weeks returned to Douglas, and recommenced the practice of medicine in that town and its vicinity, and was engaged in such practice until the injunction was issued on the filing of this bill."

The decree in that case granting an injunction was sustained by the appellate court.

There being no question raised as to misjoinder or excess of parties plaintiff, no opinion is here expressed thereon.

Finding no reversible error in the record, the judgment of the lower court is affirmed.

All the justices concur.

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*Parol Evidence is not Admissible, as a General Rule, to Vary the Terms of a Writing:* Note to Harris v. Murphy, 56 Am. St. Rep. 659; Graham v. Savage, 110 Minn. 510, 136 Am. St. Rep. 527; but it is admissible to show the circumstances under which a contract was made: Note to Harris v. Murphy, 56 Am. St. Rep. 661.

*The Validity of Contracts in Restraint of Trade Depends upon the Reasonableness* of the restrictions under the conditions of each case: McCurry v. Gibson, 108 Ala. 451, 54 Am. St. Rep. 177, and cross-reference note thereto; Swigert & Howard v. Tilden, 121 Iowa, 650, 100 Am. St. Rep. 374. An agreement not to practice law in a particular town is valid: Smalley v. Greene, 52 Iowa, 241, 35 Am. Rep. 267; and an injunction may issue to compel a physician to comply with his agreement not to practice his profession in a designated place: McCurry v. Gibson, 108 Ala. 451, 54 Am. St. Rep. 177, and cross-reference note thereto.

*In the Recent Case of Brown v. Edsall*, 23 S. D. 610, 122 N. W. 658, an action for damages was brought for the breach of a written contract whereby the defendant had sold to the plaintiff a drug-store in a certain town and medical practice, together with their goodwill, and agreed not to practice pharmacy, medicine or surgery in the town for the period of five years, unless in plaintiff's interest. The defendant also agreed to forfeit five hundred dollars for a breach of the agreement. The defendant contended that the agreement sued on was entered into after, and was entirely separate and distinct from, the sale of the stock of goods, and that there was no separate and distinct consideration for the agreement to refrain from business. There was evidence that the defendant had treated two or three patients during the five years, had made a few calls on each one, and had also written about eight prescriptions, most of them in the town. Certain letters were also introduced tending to show a desire and motive by defendant to injure the plaintiff's business. The defendant offered to show that, in what few cases he did render medical services, it was to parties who would not have called plaintiff, and who had so advised defendant, and that certain calls which he made were not in fact in a professional capacity. This evidence was excluded.

The plaintiff obtained judgment, but the case was reversed on appeal, the appellate court holding that the agreement sued on, being an exception to the general law forbidding contracts in restraint of

trade, should not be extended beyond its express terms; that it was necessary for the plaintiff to show a substantial breach on the part of the defendant by actually engaging in the business of pharmacy, or practicing medicine or surgery, before he could recover the forfeiture provided; and that the evidence introduced did not show a substantial breach of the agreement. The court also decided, in view of the necessity of a new trial being ordered, that the written agreement was prima facie evidence of a valid consideration; that the evidence offered by defendant, above referred to, was wrongfully excluded; and that the court below committed reversible error in not instructing the jury, as requested by the defendant, that, if the defendant obtained the plaintiff's permission to treat certain patients, the plaintiff could not recover under the contract for such treatment.

## WESTERN UNION TELEGRAPH COMPANY v. BLACKWELL MILLING AND ELEVATOR COMPANY.

[24 Okl. 535, 103 Pac. 717.]

**TELEGRAMS—Notice of Contents—Negligent Transmission.** In order to charge a telegraph company with liability for damages growing out of its neglect to correctly transmit a dispatch ordering the purchase or sale of a certain commodity, it is not necessary that the message should, on its face, disclose the nature of the business, so that the operator may understand its meaning as to the article, quantity, quality and price. If enough appears in the message to show that it relates to a commercial business transaction between the correspondents, it will be sufficient to charge the company with damages resulting from its negligent transmission. (pp. 898, 899.)

**TELEGRAMS—Mistake in Transmission—Damages for Loss of Sale.**—A postal card containing the following offer was received by plaintiff: "Gainesville, Tex., June 29, 1903. We bid you track A. T. & S. F. Ry., Blackwell, acceptance to reach us here by 9:30 a. m. next business day, shipment within 20 days, 2 Red Wheat, 63¾. Wire acceptance to Gainesville. State price when telegraphing acceptance. We reserve the right to reject amounts in excess of 10,000 bushels. Richardson & Co." Plaintiff, in ample time for delivery in due course within its terms, answered by cipher message, which, translated, read as follows: "We accept your bid 63¾ cents, 20,000 bushels wheat, shipment within 20 days. Give shipping instructions." The address of the sendee of the message was plainly written; but the same was by the telegraph company negligently missent, and by reason thereof arrived too late. On this account no sale was made, and plaintiff sustained loss. There was testimony establishing that, if the message had been delivered, the amount of wheat offered would have been purchased. Held, the telegraph company was liable for the loss sustained. (pp. 895, 897.)

(Syllabi by the court.)

Action by the Blackwell Milling and Elevator Company against the Western Union Telegraph Company. From a judgment for the plaintiff the defendant brings error. Affirmed.

Shartel, Keaton & Wells, for the plaintiff in error.

Tetrick & Curran, for the defendant in error.

**536** DUNN, J. This case has once been before the supreme court of the territory of Oklahoma: Blackwell Milling & Elevator Co. v. Western Union Tel. Co., 17 Okl. 376, 89 Pac. 235, 10 Ann. Cas. 855. The statement of facts relating thereto, as prepared by Justice Pancoast, is as follows:

"This is an appeal from the district court of Kay county. The Blackwell Milling and Elevator Company, plaintiff in error, through its petition filed October 9, 1903, sought to recover from the Western Union Telegraph Company, defendant in error, damages upon two causes of action; each cause of action being for the failure of the defendant in error to properly transmit the telegrams therein described. On December 21, 1903, plaintiff below filed an amended petition, consisting of two causes of action based upon the two telegrams described in the original petition. On January 8, 1904, the telegraph company demurred to said amended petition, which demurrer was overruled, and thereafter on February 27, 1904, filed a general denial for its answer. The case came on for trial on March 20, 1905, at which time the defendant company moved for judgment on the pleadings. This motion was sustained by the court and exception allowed. Motion for new trial was filed within the statutory time by the plaintiff in error, overruled and exception saved. This proceeding is commenced to review the action of the trial court. It appears from the pleading: That the plaintiff in error is an **537** Oklahoma corporation, engaged in the business of buying and selling grain, manufacturing flour, and other milling products, located in the city of Blackwell, Oklahoma. That the defendant is a New York corporation owning, leasing, controlling and operating lines of telegraph throughout the United States and maintaining an office in said city of Blackwell. That on the evening of June 26, 1903, the elevator company received at its office in Blackwell an offer from Richardson & Co., dealers in grain at the city of Gainesville, Texas, of 63¾ cents per bushel for 5,000 bushels of wheat. That said offer was good only until accepted at the office of Richardson & Co., in said city of Gainesville, Texas, up to the hour of 9:30 o'clock A. M. of June 27, 1903, all of which was known to said telegraph company. That on said twenty-seventh day of June, 1903, at 8:15 o'clock A. M., said plaintiff in error delivered to the telegraph company, at its office in Blackwell, for transmission to the said Richardson & Co., a telegram, of which the following is a copy: 'Blackwell, Okla., June 27, 1903. Richardson & Co., Gainesville, Texas. Stagger Costly Absolutely Alchemy. [Signed] Blackwell Milling & Elevator Co.' That said telegram was prepaid, and, when translated, meant: 'We accept your bid 63¾ cents, 5,000 bushels of wheat.' That said telegram was received for transmission by said defendant in error, who failed to de-



live the same at the proper place until 10 o'clock of said date, thereby entailing a loss to plaintiff in error in the sum of \$75. The second cause of action is upon a telegram, a copy of which is as follows: 'Blackwell, Okla., June 29, 1903. Richardson & Co., Gainesville, Texas. Stagger Cool Absorbed Alchemy Bounteous Speaking by wire. [Signed] Blackwell Milling & Elevator Co.' That said telegram was the acceptance of an offer for a certain amount of wheat, and was delivered to said telegraph company prepaid. The telegraph company, however, sent the telegram to Collinsville, Texas, instead of to Gainesville, from whence it was the next day sent to Gainesville, from which delay damages to the plaintiff below arose in the sum of \$400, for which it asked judgment, together with \$400 exemplary damages."

The supreme court reversed the case and remanded it for a new trial, and it came on for hearing before the district court of Kay county on the tenth day of December, 1907. On this occasion the first cause of action mentioned in the statement of <sup>538</sup> facts was dismissed by plaintiff, and recovery demanded upon the second only. At the conclusion of plaintiff's evidence, counsel for defendant filed a demurrer, which being overruled, they elected to submit the case. The court gave the jury general and special instructions, which, after argument, retired and returned a verdict in favor of plaintiff in the sum of \$400, upon which judgment was rendered. A motion for new trial was duly filed, overruled, exception saved, and the case has been brought to this court for review upon petition in error and case-made. The parties will be denominated hereafter by the titles which they bore in the trial court.

Some additional facts, material to be considered, are: That June 29, 1903, plaintiff received from Richardson & Co., of Gainesville, Texas, a postal card, the material portion of which read as follows: "Gainesville, Tex., June 29, 1903. We bid you track A., T. & S. F. Ry., Blackwell, acceptance to reach us here by 9:30 a. m. next business day, shipment within 20 days, 2 Red Wheat, 63 $\frac{3}{4}$ . Wire acceptance to Gainesville. State price when telegraphing acceptance. We reserve the right to reject amounts in excess of 10,000. Richardson & Co."

In response to the foregoing offer, it filed for transmission with the operator of defendant at Blackwell, Oklahoma, the message over which this controversy arises. The allegations of plaintiff's petition in reference thereto are as follows: "That on the evening of June 29, 1903, the plaintiff received from Richardson & Co., grain dealers in the city of Gainesville, state of Texas, an offer of 63 $\frac{3}{4}$  cents per bushel for 20,000 bushels of wheat. That said offer was good until accepted by plaintiff at the office of Richardson & Co., in the

city of Gainesville, Texas, up to the hour of 9:30 o'clock A. M. of June 30, 1903. That on the evening of June 29, 1903, the plaintiff delivered to defendant, at its office in the city of Blackwell, and defendant received from plaintiff for transmission to the said Richardson & Co., a prepaid telegram, of which the following is a copy: 'Blackwell, Okla., June 29, 1903. Richardson & Co., Gainesville, Texas. Stagger Cool Absorbed Alchemy Bounteous Speaking by wire. <sup>539</sup> [Signed] Blackwell Milling & Elevator Company.' A copy of said telegram with all indorsements thereon is hereto attached, made a part of, and marked Exhibit 'B.' That said telegram was in cipher, and meant, when translated: 'We accept your bid 63¾ cents 20,000 bushels wheat, shipment within 20 days. Give shipping instructions.' That defendant, by and through the carelessness and negligence of itself, its officers, servants, agents, and employees, failed and neglected to properly and promptly transmit said telegram and deliver the same, and that it did not make delivery of said telegram until 11:10 o'clock A. M. of June 30, 1903, long after the hour of 9:30 o'clock A. M., the time within which plaintiff had to make acceptance of said offer of Richardson & Co. at its office in said city of Gainesville, and for said reason the firm of Richardson & Co. refused to accept plaintiff's acceptance."

Plaintiff's agent testified that fifteen minutes was the usual time taken to send a message from Blackwell to Gainesville.

Of the issues presented here, counsel for defendant in their briefs pursue a most commendable course in specifically admitting the propositions they do not controvert. They admit that, as a result of the trial, verdict and judgment, the following points are established: "First, that the message was transmitted as alleged. Second, that the message was not delivered to Richardson & Co., at Gainesville, until about 11 o'clock on June 30th in the forenoon. Third, that the failure to so deliver the message was the result of the defendant's negligence. Fourth, that the message was sent in response to a communication from Richardson & Co., by postal card, the substance of which is as follows: 'Gainesville, Tex., June 29, 1903. We bid you track A., T. & S. F. Ry., Blackwell, acceptance to reach us here by 9:30 a. m. next business day. shipment within 20 days, 2 Red Wheat, 63¾.' Among other conditions printed on the card is the following: 'We reserve the right to reject amounts in excess of 10,000 bushels.' "

They rely in this court, for a reversal, upon two instructions, which were tendered and requested by them, but which were refused by the trial court. The first of these instructions reads as follows: "The message set out in the second cause of plaintiff's petition <sup>540</sup> constitutes merely an offer to sell wheat as to 10,000 bushels of the 20,000 mentioned therein,



and plaintiff is not entitled to recover damages as to more than 10,000 bushels."

The manager of the customer's office at Gainesville, Texas, testified that, had the telegram referred to been received by Richardson & Co. before 9:30 in the morning on the day it was received, the company was ready, willing, and would have taken the grain referred to therein. This testimony was objected to at the time it was offered, as calling for an opinion of the witness on a hypothetical question, and, while it is doubtless to some extent open to this objection, still as it is undisputed, and there is nothing in the record to discredit it or weaken its force to any extent, and as it probably was the only method available to plaintiff whereby its loss could be shown, it was, in our judgment, susceptible of proof, and evidence thereof was not too uncertain, remote, or hypothetical to be admissible.

The case of Postal Telegraph Cable Co. v. Nichols, 159 Fed. 643, 89 C. C. A. 585, 16 L. R. A., N. S., 870, in some of its facts, presents a situation similar to the facts we are discussing. Nichols & Co. were general contractors in Tacoma, Washington. They had submitted a proposal in writing to do some work for the government in Alaska at a place called "Haines," the bids on which were to be opened by the government official at noon on the thirteenth day of June, 1903. On the twelfth day of June, 1903, and in ample time to have had the same delivered to the official, the contractors wired him to add five per cent to their bid. The company neglected to make the delivery in time. Circuit Judge Ross, who prepared the opinion for the court, in the discussion thereof states that there was evidence going to show that, if the telegram had been delivered before noon on June 13th, the additional five per cent would have been added to the bid of defendants in error. To this showing the same objection was raised as to the testimony above discussed and involved in the instruction asked in the case at bar. On that question it was said: <sup>541</sup> "We are also of opinion that the damages sued for, and which the defendants in error recovered in the court below, were not speculative or remote, as they covered only the five per cent desired by the defendants in error to be added to their bid, and which the officers of the government having in charge the work in question testified would have been added, had the telegram been delivered prior to the opening of the bids at noon of the 13th of June, 1903."

To the same effect, in a degree, is the finding of the court on similar facts in the cases of Western Union Tel. Co. v. Nye & Schneider Co., 70 Neb. 251, 97 N. W. 305, 63 L. R. A. 803, and Postal Telegraph Cable Co. v. Robertson, 36 Misc. Rep. 785, 74 N. Y. Supp. 876. This fact, then, being found to be

susceptible to proof and established, it is settled that: "The measure of damages which may be recovered from a telegraph company for negligence transmitting or delivering a message, whereby a sale has been prevented, is the difference between the price of the subject matter of sale at the time it would have been sold, had it not been for such negligence, and the price the plaintiff is thereafter enabled to obtain therefor, after exercising reasonable diligence to make such latter sale, together with expenses necessarily incurred in consequence of the delay or failure. In other words, if the plaintiff could have gotten a certain price for the thing to be sold at the time the message was delivered to the company, but was, after the negligence of the company in transmitting or delivering the message, only able to sell at a less price, and that by reasonable diligence, the measure of damages would be the difference between the two prices, together with the necessary expenses incurred in making the latter sale. The object of the law in such cases is to compensate the injured party as near as possible for the loss incurred": Jones on Telegraph and Telephone Companies, sec. 546.

The other instruction tendered by defendant, on which the claim of error is predicated, is as follows: "The court instructs you in this case that both messages sued on by plaintiff were in cipher, and unintelligible to a person reading same without knowledge of such cipher, and that no recovery can be had by plaintiff thereon in the action unless you believe from the evidence that the agent of defendant, <sup>542</sup> who receives such messages for transmission, knew at the time of such receipt that such messages constituted acceptance of offers for the purchase of wheat."

We do not regard the failure to give this instruction as error, as it was not necessary that the company or its operator should know at the time of the receipt of the message that it constituted an acceptance or offer for purchase of wheat. It was sufficient, if the message, as written, when read in the light of well-known usage in commercial correspondence, reasonably informed the operator that it was one of business importance involving a money or financial liability in event of delay or negligent transmission. The undisputed testimony appearing in the record is that the message was sent in what is known as "Robinson's Code," and that with this code the operator informed the agent of the plaintiff he was familiar, and the testimony of the same agent is to the effect that the operator said he knew when he received a Robinson's cipher message that a good deal of money was at stake on a prompt transmission, and that he gave it a preference. This evidence was undenied, and in our judgment presents the character of knowledge required, and was sufficient to render the company liable for substantial damages for and on ac-

count of a negligent delay in delivery, and it was not necessary, in order that defendant be liable, to show that it or its operator knew at the time of the receipt of the message that the same constituted an acceptance or offer for the purchase of wheat. There might have been no evidence in the record showing that the defendant knew that the message in question related in any particular to this specific commodity, yet the company would have been liable from the facts showing the operator's knowledge of the value and importance of the message.

The general rule as sustained by a large number of authorities, and, in our judgment, the correct one, is that when the message, though couched in unusual or technical trade language, if read in the light of well-known usage, or other circumstances, sufficiently apprises the telegraph company, through its operator, <sup>543</sup> that it relates to a commercial business transaction between the correspondents, and that a pecuniary loss may, and probably will, result from an incorrect or delayed transmission, there is no such obscurity as will confine its liability to nominal damages: 27 Am. & Eng. Ency. of Law, p. 1063; *Smith v. Western Union Tel. Co.*, 80 Neb. 395, 114 N. W. 288; *Erie Tel. etc. Co. v. Grimes*, 82 Tex. 89, 17 S. W. 831; *Western Union Tel. Co. v. Williford*, 2 Tex. Civ. App. 574, 22 S. W. 244; *Postal Telegraph Cable Co. v. Lathrop*, 131 Ill. 575, 19 Am. St. Rep. 55, 23 N. E. 583, 7 L. R. A. 474; *Postal Telegraph Cable Co. v. Robertson*, 36 Misc. Rep. 785, 74 N. Y. Supp. 876.

The facts in the case which we have last cited (*Postal Telegraph Cable Co. v. Robertson*) were peculiarly similar to those in the case at bar, and are stated by the court as follows: "The defendant is a broker on the Produce Exchange (New York City), and sent the telegram from the floor of the exchange by delivering it to the plaintiff's operator there. The telegram was an important one, and was, with the exception of the address, in cipher. The operator knew that defendant was such broker, and that the telegram was according to the cipher code used by brokers to purchase and sell grain. The said telegram was plainly directed to Churchill & Co., Toledo, Ohio, yet, through some unexplained mistake, the plaintiff sent it to Churchill & Co., Chicago, Illinois. This firm, perceiving that the telegram was not for them, returned it to the plaintiff in New York, and not until then did the plaintiff's servants and agents perceive the error, and send the telegram to Churchill & Co., Toledo, Ohio. The defendant claims to have been damaged \$250 by the delay, and swears positively that by reason thereof the grain was not purchased until some time later, which caused the loss indicated."

Judgment was rendered in that case by the trial court, and on appeal was sustained.

Independent of all these considerations, however, we do not see that plaintiff was prejudiced by the failure to give these instructions. The undisputed evidence in support of the verdict <sup>544</sup> and judgment clearly warrants them. To our minds the verdict could not have been otherwise upon the evidence. Every element necessary to entitle plaintiff to recover was abundantly sustained by uncontradicted evidence, so, had these instructions been given and a verdict followed for defendant, it seems to us that could not have been sustained. The rule obtaining in such cases was announced in the case of *Shawnee National Bank v. Wootten & Potts*, 24 Okl. 425, 103 Pac. 714, in an opinion delivered at this term of court.

Therefore, finding no error in the record, the judgment of the trial court is, accordingly, affirmed.

Hayes, Turner and Williams, JJ., concur; Kane, C. J., absent and not sitting.

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*If a Telegraph Message, on Its Face, Relates to a Commercial or Legal Transaction of Value*, it is sufficient to charge the telegraph company with liability for all damages naturally and proximately arising from delay in delivery: Note to *Kagy v. Western Union Tel. Co.*, 117 Am. St. Rep. 290, 291, giving numerous instances of such liability, as well as the law governing the liability of telegraph companies for messages in cipher. For later cases on notice of the importance of messages, see *Western Union Tel. Co. v. Merritt*, 55 Fla. 462, 127 Am. St. Rep. 169; *Lyles v. Western Union Tel. Co.*, 84 S. C. 1, 137 Am. St. Rep. 829; *Baker v. Western Union Tel. Co.*, 84 S. C. 477, 137 Am. St. Rep. 848. As to liability for transmitting cipher message incorrectly, see, also, *Western Union Tel. Co. v. Merritt*, 55 Fla. 462, 127 Am. St. Rep. 169; and as to duty and liability with respect to a misdirected message, see *Woods v. Western Union Tel. Co.*, 148 N. C. 1, 128 Am. St. Rep. 581. Delay in the transmission and delivery of a telegram is evidence of negligence on the part of the telegraph company: *Baker v. Western Union Tel. Co.*, 84 S. C. 477, 137 Am. St. Rep. 848.

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## HARLEY & WILLIS v. STANLEY.

[25 Okl. 89, 105 Pac. 188.]

**CONDITIONAL SALE—Destruction of Property.**—Where personal property is sold and delivered to the vendee under an agreement that title is to remain in the vendor until payment, the loss or destruction of the property while in the possession of the vendee before payment, without his fault, does not relieve him from the obligation to pay the price. (p. 901.)

(Syllabus by the court.)

J. B. Wilkinson, for the plaintiffs in error.

Gilbert & Bond, for the defendant in error.

<sup>80</sup> DUNN, J. December 7, 1907, Harley & Willis, plaintiffs in error, as plaintiffs, filed their action in the county court of Stephens county, Oklahoma, against Mrs. P. Stanley, to recover the price agreed to be paid by the defendant for certain furniture and other items sold and delivered by plaintiffs to the defendant. The answer was a general denial. The uncontradicted evidence shows that the bill of goods was sold by plaintiffs to defendant under an <sup>80</sup> agreement that the title was to remain in plaintiffs until they were paid for. The defendant received the goods and placed them in her house, which, without her fault, were destroyed by fire, and the defense seems to be predicated upon the proposition that this destruction of the property purchased under such a contract relieved defendant of any obligation to pay for the same; that the loss fell on the vendors, and not on herself. The case was tried to a jury, which on this evidence and the instructions of the court returned a verdict in favor of defendant, upon which the court rendered judgment, to reverse which the case has been brought to this court by petition in error and case-made.

There are a number of questions raised by the brief of counsel for plaintiffs in error, but they all revolve around the single legal proposition suggested above, and with its determination they will be rendered of no consequence. There is some conflict of authority on the question presented, but to our minds the great weight of authority supports the general rule laid down in 6 American and English Encyclopedia of Law, page 455, which is stated as follows: "Where personal property is sold and delivered to the vendee under an agreement that title is to remain in the vendor until payment, the loss or destruction of the property while in the possession of the vendee before payment, without fault, does not relieve him from the obligation to pay the price."

This text finds support in a large number of authorities: *La Valley v. Ravenna*, 78 Vt. 152, 112 Am. St. Rep. 898, 62 Atl. 47, 2 L. R. A., N. S., 97, 6 Ann. Cas. 684, with note; *Osborn v. South Shore Lumber Co.*, 91 Wis. 526, 65 N. W. 184; *Burnley v. Tufts*, 66 Miss. 48, 14 Am. St. Rep. 540, 5 South. 627; *Planters' Bank of Tennessee v. Vandyck*, 4 Heisk. 617; *American Soda Fountain Co. v. Vaughn*, 69 N. J. L. 582, 55 Atl. 54; *Goldie & McCulloch Co. v. Harper*, 31 Ont. 284; *Tufts v. Griffin*, 107 N. C. 47, 22 Am. St. Rep. 863, 12 S. E. 68, 10 L. R. A. 526; *Tufts v. Wynne*, 45 Mo. App. 42; *Marion Mfg. Co. v. Buchanan*, 118 Tenn. 238, 99 S. W. 984, 8 L. R. A., N. S., 590, 12 Ann. Cas. 707; *Phillips v. Hollenburg*

Music Co., 82 Ark. 9, 99 S. W. 1105; *Cole v. Hines*, 81 Md. 476, 32 Atl. 196, 32 <sup>91</sup> L. R. A. 455, and note; *First Congregational Church v. Grand Rapids School Furniture Co.*, 15 Colo. App. 46, 60 Pac. 948.

The cases holding to the contrary are set forth in the note in the case of *La Valley v. Ravenna*, 6 Ann. Cas. 684, and are as follows: *Arthur v. Blackman* (C. C.), 63 Fed. 536; *Bishop v. Minderhout*, 128 Ala. 162, 86 Am. St. Rep. 134, 29 South. 11, 52 L. R. A. 395; *Randle v. Stone*, 77 Ga. 501; *Swallow v. Emery*, 111 Mass. 355; *Cobb v. Tufts*, 2 Wills. Civ. Cas. Ct. App., sec. 152; *Glisson v. Heggie*, 105 Ga. 30, 31 S. E. 118; *Mountain City Mill Co. v. Butler*, 109 Ga. 469, 34 S. E. 565.

In the case of *Burnley v. Tufts*, 66 Miss. 48, 14 Am. St. Rep. 540, 5 South. 627, the defendant in error sold to the plaintiff in error a soda-water fountain under practically the same terms as the goods in the case at bar were sold. Prior to complete payment it was destroyed by fire, and the vendee refused to make payment on the same grounds as are raised by the vendee in the case at bar. Discussing the case the supreme court of Mississippi said: "Burnley unconditionally and absolutely promised to pay a certain sum for the property, the possession of which he received from Tufts. The fact that the property has been destroyed while in his custody and before the time for the payment of the note last due, on payment of which only his right to the legal title of the property would have accrued, does not relieve him of payment of the price agreed on. He got exactly what he contracted for, viz., the possession of the property and the right to acquire an absolute title by payment of the agreed price. The transaction was something more than an executory conditional sale. The seller had done all that he was to do except to receive the purchase price. The purchaser had received all that he was to receive as the consideration of his promise to pay. The inquiry is, not whether if he had foreseen the contingency which has occurred he would have provided against it, nor whether he might have made a more prudent contract, but it is whether by the contract he has made his promise is absolute or conditional. The contract made was a lawful one, and, as we have said, imposed upon the buyer an absolute obligation to pay. To relieve him from this obligation, the court must make a new agreement for the parties, instead of enforcing the one made, which it cannot do."

<sup>92</sup> To the same effect is the holding of the supreme court of Wisconsin in the case of *Osborn v. South Shore Lumber Co.*, 91 Wis. 526, 65 N. W. 184, a case where the facts were similar to those in the case at bar. Justice Marshall, writing the opinion of the court on this question, said: "The conditional vendee, having possession subject only to the vendor's



reservation of title as security for the unpaid purchase money, is in a sense the owner. If he pays the purchase money, he becomes the absolute owner, without any new transaction or bill of sale. If the goods be wrongfully taken away from him by a third party, he may recover their full value of the wrongdoer; and, if the property is lost or stolen while in his possession, whether by or without fault on his part, he must nevertheless pay the full price agreed upon."

Further quotations might be made from all of the authorities cited above, but we cannot see that it would be of value. The obligation is no different than any other, and may be sued for and recovery had at any time within the statute of limitation. It thus being seen that the judgment of the trial court is contrary to law, the same must be reversed and a new trial granted.

The case is accordingly remanded to the county court of Stephens county, with instructions to set aside the judgment heretofore rendered herein and grant plaintiffs in error a new trial.

All the justices concur.

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**CONDITIONAL SALE—RIGHT OF VENDOR TO RECOVER PRICE OF PROPERTY DESTROYED WHILE IN POSSESSION OF VENDEE.**

The question of the effect of the accidental destruction of property while in possession, and without the fault, of the vendee, the title to which property is reserved by and remains in the vendor, has given rise to conflicting decisions. A majority of the courts hold that since the vendee enjoys all the incidents of ownership, the fact that the bare title is reserved by the vendor until the price is fully paid will not relieve the former of his obligation to pay the price of the goods destroyed while in his possession, even though the destruction was without his fault: *Philips v. Hollenberg Music Co.*, 82 Ark. 9, 99 S. W. 1105; *Roach v. Whitefield*, 94 Ark. 448, 127 S. W. 722; *Phenix Ins. Co. v. Hilliard (Fla.)*, 52 South. 799; *Jesup v. Fairbanks*, 38 Ind. App. 673, 78 N. E. 1050; *Burnley v. Tufts*, 66 Miss. 48, 14 Am. St. Rep. 540, 5 South. 627; *Jacob Strauss Saddlery Co. v. Kingman*, 42 Mo. App. 208; *Tufts v. Wynne*, 45 Mo. App. 42; *American Soda Fountain Co. v. Vaughn*, 69 N. J. L. 582, 55 Atl. 54; *National Cash Register Co. v. South Bay Club House Assn.*, 64 Misc. Rep. 125, 118 N. Y. Supp. 1044; *Tufts v. Griffin*, 107 N. C. 47, 22 Am. St. Rep. 863, 12 S. E. 68, 10 L. R. A. 526; *Whitlock v. Auburn Lumber Co.*, 145 N. C. 120, 58 S. E. 909, 12 L. R. A., N. S., 1214; *Lancaster v. Southern Ins. Co.*, 153 N. C. 285, 69 S. E. 214; *Harley v. Stanley*, 25 Okl. 89, ante, p. 900, 105 Pac. 188; *Marion Mfg. Co. v. Buchanan*, 118 Tenn. 238, 99 S. W. 984, 8 L. R. A., N. S., 590, 12 Ann. Cas. 707; *La Valley v. Ravenna*, 78 Vt. 152, 112 Am. St. Rep. 898, 62 Atl. 47, 2 L. R. A., N. S., 97, 6 Ann. Cas. 684; *Osborn v. South Shore Lumber Co.*, 91 Wis. 526, 65 N. W. 184.

Many decisions quote with approval the case of *Burnley v. Tufts*, 66 Miss. 49, 14 Am. St. Rep. 540, 5 South. 627, wherein the court says: "Burnley unconditionally and absolutely promised to pay a

certain sum for the property, the possession of which he received from Tufts. The fact that the property has been destroyed while in his custody, and before the time for the payment of the notes last due, on payment of which only his right to the legal title of the property would have accrued, does not relieve him of payment of the price agreed on. He got exactly what he contracted for, viz, the possession of the property, and the right to acquire an absolute title by payment of the agreed price. The transaction was something more than an executory conditional sale. The seller had done all that he was to do, except to receive the purchase price; the purchaser had received all that he was to receive as the consideration of his promises to pay. The inquiry is not whether, if he had foreseen the contingency which has occurred, he would have provided against it, nor whether he might have made a more prudent contract, but it is whether by the contract he has made his promise is absolute or conditional. The contract made was a lawful one, and, as we have said, imposed upon the buyer an absolute obligation to pay. To relieve him from his obligation the court must make a new agreement for the parties, instead of enforcing the one made, which it cannot do."

In the case of *American Soda Fountain Co. v. Vaughn*, 69 N. J. L. 582, 55 Atl. 54, where notes were given by the vendee for unpaid installments of the purchase price of apparatus, the title of which was retained by the vendor, the court says: "The question to be determined is, What was the consideration of the note? If the passing of the title to the apparatus was the consideration, the defense must prevail. If the delivery of the apparatus, with the right to acquire title, was the consideration, the plaintiff must prevail. We think the consideration for the note was the delivery of the apparatus with the right to acquire title. . . . The consideration for these payments, and for the monthly installments as they fell due, must necessarily be the same as the consideration for the notes not yet matured. It can hardly be contended that the consideration for the payments already made, and for the notes which matured prior to the fire, which we assume were paid, has failed. It must have failed if the consideration was the passing of the title. The language of the note and order also indicate that the obligation of the defendant was absolute immediately upon the delivery of the goods, and was not conditioned in any way upon the passing of the title. The title was retained by the plaintiff merely as security for the unpaid purchase money. Nothing remained to be done by the plaintiff to perfect the title of the defendant; that title would have become perfect immediately upon payment."

In *Osborn v. South Shore Lumber Co.*, 91 Wis. 526, 65 N. W. 184, the court says: "Where property is sold and delivered, and the vendor has fully performed all the conditions of the contract of sale on his part and the intention of the parties at the time of the making of the contract, as in this case, clearly is that the vendor is to have no interest in the property after delivery, except as security for the unpaid purchase money; that, subject to the right to resort to said property as such security, the entire dominion and control over the same are turned over to and assumed by the vendee, as such, although, for the purpose of retaining effectually the security, the contract of sale provides that the title and right of possession shall remain in the vendor, as security, until the purchase price is fully paid, and though



the amount of the property is yet to be ascertained by a measurement in order to determine the amount of the purchase money—if any such property is lost after such delivery, before measurement, such loss must fall upon the vendee, whether the loss accrues through his negligence or otherwise, and the amount of such lost property may be ascertained by competent evidence. The relation of the parties to each other in respect to the question here presented, in such a case, is the same as between a mortgagor and mortgagee of personal property.”

Some courts hold the contrary, namely, that the loss must be borne by the vendor, basing their decisions upon the principle that the loss follows the title; hence the goods in possession of the vendee are at the risk of the vendor. And in the event of their destruction, without the fault of the vendee, the vendor must bear the loss, and the vendee is not obliged to pay the agreed price: *Bishop v. Minderhout*, 128 Ala. 162, 86 Am. St. Rep. 134, 29 South. 11, 52 L. R. A. 395; *American Soda Fountain Co. v. Blue*, 146 Ala. 682, 40 South. 218; *Randle v. Stone*, 77 Ga. 501; *Glisson v. Heggie*, 105 Ga. 30, 31 S. E. 118; *Swallow v. Emery*, 3 Mass. 355; *Cobb v. Tufts*, 2 Wills. Civ. Cas. Ct. App. sec. 152; *Arthur & Co. v. Blackman*, 63 Fed. 536.

In *Cobb v. Tufts*, 2 Wills. Civ. Cas. Ct. App., sec. 152, the court says: “Where a sale is made and possession delivered to the vendee, upon the express condition that the title to the thing is to remain in the vendor until the purchase price be paid, such payment is strictly a condition precedent, and, until performance thereof, the sale is incomplete, and the right of property is not vested in the vendee. . . . In a suit by T. upon the notes, C. pleaded the destruction of the property, . . . and it was held, on general exception to the plea, that it was a good plea of failure of consideration, and the judgment was reversed because the court sustained plaintiff’s general exception to it.”

We incline to the view taken by the minority decisions, not because we sometimes doubt the wisdom of majorities, but because we know that minorities are not always wrong. We have only to consider the rule of conditional sales generally, in order to arrive at a logical conclusion whether the majority is in the right and the minority in the wrong, or vice versa, on the subject under consideration. We find in *Benjamin on Sales*, Bennett’s seventh edition, paragraph 328, the following rule: “Where the buyer is by contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer.” It is therefore apparent that what a vendee buys is property, not solely the title to or the possession thereof; and if, without his fault, the property is destroyed, there is, in our opinion, an entire failure of consideration.

**TAYLOR v. INSURANCE COMPANY OF NORTH AMERICA.**

[25 Okl. 92, 105 Pac. 354.]

**INSURANCE—Construction in Favor of Insured.**—If a policy of insurance is susceptible of two constructions, that one is to be adopted which is more favorable to the assured. (p. 908.)

**INSURANCE—Construction of Policy in Another State.**—If a policy of fire insurance has been framed under the laws of another state, and has been interpreted by the highest court of that state, such construction should be of the most persuasive influence, if not binding, with us, especially when supported by the weight of authority. (By the editor.) (p. 914.)

**INSURANCE—Cancellation of Policy.—The Return of the Unearned Premium** is essential to a cancellation by the company, where the policy, among other things, provides, "when this policy is canceled by this company by giving notice, it shall retain only the pro rata premium." (pp. 908, 914.)

**INSURANCE—Cancellation of Policy—Unearned Premium.**—When a local agent for an insurance company, under instructions thereto, gives the assured notice of the cancellation of the policy, without tendering or offering to tender the unearned premium, and neither being authorized to make such tender nor seeking a waiver thereof, or being authorized thereto, the fact that the assured does not protest against such cancellation does neither amount to a waiver of tender nor consent to such cancellation. The local agent being in possession of the policy as bailee for the assured, his marking the same "canceled" and returning same to the company, without the consent or knowledge of the assured, does neither constitute a waiver or estoppel nor a consent or acquiescence. (pp. 906, 914.)

**TRIAL — Conflicting Evidence — Question for Jury.**—Where there is a reasonable conflict in the evidence, the issue must be submitted to the jury for determination. (p. 914.)

(Syllabi by the court, except when stated to be by the editor.)

Action by Taylor against the Insurance Company of North America. Judgment for defendant, and plaintiff brought error.

Dennis H. Wilson, Preston S. Davis and T. L. Brown, for the plaintiff in error.

Fulton, Stringer & Grant and Burwell, Crockett & Johnson, for the defendant in error.

**94 WILLIAMS, J.** The agent of the company, in whose possession insured left the policy upon which this action was based, was named Comer. On September 26, 1904, Comer met Taylor on the streets of Claremore and said to him: "The insurance company has canceled your policy on your hay." Taylor asked him on what ground, and the agent said: "They did not state." Taylor then said: "Where is my money?" or "How about my money I have paid them, if they have canceled it? How about my money?" And the agent said:

“They did not say anything about it.” Taylor rejoined: “I guess I can get my money, then, if they have canceled it.” The agent, Comer, testified that he canceled the policy on September 26, 1904, and on that day returned the same to the company.

It is the contention of counsel for plaintiff in error that the company, under the terms of this policy, could not cancel it except that it at some time tendered or returned to him the unearned premium in accordance with what he argues are its terms, and on account of the fact that this unearned premium was neither returned nor tendered prior to October 9, 1904, that this had the effect of keeping alive the policy and rendering the company liable for the loss. The paragraph of the policy relating to cancellation is what is commonly known as the “New York standard form,” and reads as follows:

“This policy shall be canceled at any time at the request of the insured, or by the company by giving five days’ notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate, except that, when this policy is canceled by this company by giving notice, it shall retain only the pro rata premium.”

The construction of this contract is necessary in order to determine whether or not the policy is canceled. If the construction contended for by the defendant in error is correct, the clause was intended to read as follows: “If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate, except that, when this policy is canceled by this company by giving notice (on surrender of this policy), it shall retain only the pro rata premium.”

Without the interpolation of the words “on surrender of this policy” in the last clause, there is an ambiguity, and there is equal reason for the following interpretation: “If this policy shall be canceled (at any time at the request of the insured), or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate, except that, when this policy is canceled by this company by giving notice, it shall retain only the pro rata premium.”

When the policy is canceled by giving “five days’ notice of such cancellation,” the company retaining “only the pro rata premium,” this cannot be accomplished without a tender. unless the words “on surrender of the policy” are read into

said clause; and if that was the intention, why repeat the words "by giving notice"? If that contention is correct, it should have been stated as follows: "This policy shall be canceled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually <sup>96</sup> paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate, except that, when this policy is canceled by this company, . . . it shall retain only the pro rata premium."

To say the least, the cancellation clause is ambiguous, and when we consider that the insurer was skilled, not only in the framing, but also the interpretation, of such contracts, and that the insured had no part in the framing thereof, as well as being unskilled in such interpretation, such construction should be adopted as is more favorable to the insured; and especially is this true when the construction contended for by the insurer is not only inequitable, but also unjust.

The contract of insurance here involved, known as the "New York standard policy," was framed by virtue of chapter 488, page 720, of the Laws of New York of 1886, providing for a uniform contract of fire insurance to be used by fire underwriters within said state. The clause here under consideration was first before the supreme court of the state of New York in the case of *Nitsch v. American Central Ins. Co.*, 83 Hun, 614, 31 N. Y. Supp. 1131, wherein a tender was construed to be necessary to the cancellation of the policy. The judgment of the supreme court was affirmed by the New York court of appeals on March 16, 1897 (152 N. Y. 635, 46 N. E. 1145). Afterward, on March 1, 1898, in the case of *Tisdell v. New Hampshire Fire Ins. Co.*, 155 N. Y. 163, 49 N. E. 664, 40 L. R. A. 765 (see, also, 11 Misc. Rep. 20, 32 N. Y. Supp. 166), it was again held that a tender was a condition precedent to the cancellation of such a policy—the opinion being delivered by Mr. Justice Bartlett, concurred in by Justices Haight, Martin, and Vann, Chief Justice Parker and Mr. Justice O'Brien dissenting, and Mr. Justice Gray being absent. Again, in the case of *Buckley v. Citizens' Insurance Co.*, 188 N. Y. 399, 81 N. E. 165, 13 L. R. A., N. S., 889 (see, also, 112 App. Div. 451, 98 N. Y. Supp. 622), the court of appeals, following the *Nitsch* and *Tisdell* cases, said: "It is a question of vital importance to the insurer and the insured as to the precise meaning of the cancellation clause in the <sup>97</sup> standard policy. The situation is not a complicated one, and the court desires to so construe the clause that its meaning may be made clear. If the insurance company desires to cancel, it must, as we have held in the cases cited, not only give the notice required, but accompany it by the payment or

tender of the pro rata amount of the unearned premium. It cannot legally demand of the insured the surrender of the policy and its cancellation until this is done."

The court was unanimous as to the foregoing conclusion. At that time Chief Justice Cullen and Justices O'Brien, Haight, Hiscock, Bartlett, Chase and Vann comprised the court.

In the case of Philadelphia Linen Co. v. Manhattan Fire Ins. Co., 8 Pa. Dist. R. 261, that court, after referring to the Tisdell case, said: "The question which is now before us was then passed upon by the supreme court of New York upon a policy where the language was identically the same as that which has been quoted from the defendant's policy. The majority of the court in that case decided that, upon cancellation of the policy by the company, it must return or tender the unearned premium in order to effect a cancellation. The same conclusion seems to have been arrived at by the same court in an earlier case, Nitsch v. American Cent. Ins. Co., reported in 152 N. Y. 635, 46 N. E. 1149. While these decisions are not binding upon the courts of Pennsylvania, they are, of course, entitled to great respect. It is, no doubt, eminently proper to hold companies and corporations, such as insurance companies, to a strict construction of their rights as defined in formal contracts, which are prepared in their own interest and the terms of which the insured, as a rule, has little or no part in determining. This has been the policy of the courts, and has been found by experience to be necessary in order to guard the interests of those who are in many cases ignorant and in all cases more or less at the mercy of such corporations. The courts of this state have been moved by the same policy, and it may be, and we are inclined to think, that the attitude which has been taken by our own supreme court with reference to provisions not identical with, but similar to, those in question, requires us to follow the ruling which has been made in the state of New York."

<sup>98</sup> In the case of Gosch v. Fireman's Ins. Co., 33 Pa. Super. Ct. 496, the court said: "The plaintiffs, then, having paid the premium for the entire term, could the defendant, at its own pleasure, effect a complete extinguishment of the insurance contract, merely by giving notice of its determination to cancel, without at the same time returning or tendering the unearned portion of that premium? Where a contract with mutual undertakings has been entered into by two parties and fully performed by one of them, we may certainly say, speaking generally, that the other party could not successfully invoke the aid of any court in an effort to rescind until he had returned or tendered the return of any valuable thing he had received by reason of the contract. To permit him to retain the benefits and at the same time repudiate the burdens

of his own agreement would be highly unconscionable and shocking to our sense of natural justice. It would be out of harmony with some of the fundamental principles on which our entire system of jurisprudence is built. Of course, where the right to cancel has been expressly reserved in the contract itself, then the extent of the right and the conditions upon which it may be exercised must be determined by a reference to the contract, rather than to principles of general law. Turning, then, to the language of the agreement, in which the parties have undertaken to state their respective rights and duties, if we find it susceptible of two constructions, one in harmony with, the other in opposition to, those general principles already referred to, a sound discretion would seem to invite us to accept the former and reject the latter, just as, in ascertaining the true meaning of a doubtful clause in a will, the courts incline to that construction which would vest the estate, rather than leave it contingent, which would give the inheritance to the heir rather than to a stranger. Taking up, then, the provision of the policy on this subject, and looking at it as a whole, we may confidently say that it contemplates a complete and effective destruction of the contractual relation at the instance of either party, and that to accomplish this end the party moving must do two distinct and separate things; the object in view undeniably being that, when the cancellation shall have been completed, both parties will have been restored, as far as possible, to the conditions existing before the contractual relation began. If the destruction of this relation be begun by the assured, he must give notice to the other party and surrender his policy, which <sup>so</sup> proclaims the existence of the relation he would now destroy. If begun by the company, it must also give notice and repay or tender payment of the unearned premium in its hands. The right reserved to each party is but a single one, viz., the right to cancel; and the cancellation contemplated is not a partial, but a complete, one. The obligation imposed on the party moving to cancel is, looking broadly at the entire contract provision, also single, viz., the restoration of the other party, as far as may be, to the situation occupied before the contractual relation began. True, this involves the performance or tender of performance of another act besides the giving of notice; but it does not necessarily follow that such performance or tender may be totally dissevered in time from, and thus rendered wholly independent of, the giving of the notice. Such a construction of the policy provision, although strongly urged on us by the learned counsel for appellant, is, at best, a doubtful one. More than this he can hardly claim for it, in the light of the fact that it has been deliberately rejected by the courts of last resort of most of our sister states. The argument supporting it, as he agrees, has been stated, as



forcibly as it can be, in the dissenting opinion of Chief Justice Parker in *Tisdell v. New Hampshire Fire Ins. Co.*, 155 N. Y. 163, 49 N. E. 664, 40 L. R. A. 765. An examination of this opinion seems to show that its conclusions are reached rather from a critical analysis of some of the language of the policy provision and the order in which its sentences are collated than from a broad view of the entire provision and a consideration of the nature of the object to be accomplished thereby. The following language from the majority opinion clearly indicates that the question must now be considered as settled in that jurisdiction: 'The question presented on this appeal is no longer an open one in this court. It was decided in *Nitsch v. American Central Ins. Co.*, 152 N. Y. 635, 46 N. E. 1149, affirmed in this court without an opinion. In that case, as in this one, the question presented was whether the provision of the New York standard policy of fire insurance relating to the cancellation of a policy at the instance of the company requires that, in addition to giving the five days' notice, the company must return or tender the unearned premium in order to effect a cancellation. The answer was in the affirmative.' In an elaborate discussion of the whole subject, to be found in Cooley's *Briefs of Insurance*, wherein all of the cases from the various jurisdictions are cited and considered, the general rule to be drawn <sup>100</sup> from them is thus stated on page 2801: 'The general rule is that under such a provision, unless waived, the repayment of such proportion of the premium is essential to a valid cancellation, and notice without such repayment or a tender of the amount is ineffectual. . . . There must be an actual repayment or tender; a mere promise to pay, a request to call for the amount due, or notice that the money is subject to insured's order, being insufficient.' "

In 33 Pa. Super. Ct. 505, the court further said: "But we cannot regard the question as an open one, because we believe it to have been ruled in the case of *Baldwin v. Pennsylvania Fire Ins. Co.*, 206 Pa. 248, 55 Atl. 970. In that case, the suit being on a policy similar to the one now under consideration, the company in its affidavits of defense set up 'that the policy in suit had been surrendered and returned for cancellation, and actually had been canceled on December 8, 1897.' We have not the record actually before us, but take this statement from the paper book of the appellant, which we have carefully examined. The trial court held that the contract of insurance had never been completed, and the policy had never gone into force, and on this ground nonsuited the plaintiff. This court affirmed the judgment for the same reason. But the supreme court held that the contract had been fully completed, and therefore the policy was in force at the time of the fire, unless it had been canceled

meantime, as the company had alleged. As the case was sent back to be retried, the court could not well avoid disposing of this important defense, set up by the averment of the affidavit quoted, and we think they did it in no uncertain manner. Speaking for the court, Mr. Justice Dean, after pointing out the character of evidence necessary to show a cancellation at the instance of the insured, turns to the question now before us and says: 'The company gave no notice of its intention to cancel as required by the contract, nor did it return nor offer to return five-sixths of the premium, a preliminary to cancellation as the contract required. We can take no other view of the evidence than that the contract of indemnity was complete when Hatfield and the agent both agreed to it, and the agent, by consent of Hatfield, retained for the company the unearned premium. Was the contract afterward rescinded or canceled by the company, or by consent of Foster, the attorney (for the insured)? The company could cancel it just one way at any time. That was by five days' notice to the representative of the estate of <sup>101</sup> its intention to do so and return of five-sixths of the premium. It gave no notice and offered to return no premium.' We are earnestly urged by the learned counsel for the appellant to regard this clear and emphatic statement of the law, upon the very point now under consideration, as merely dictum; but we are wholly unable to do so, in the light of the fact that the cancellation of the policy was a defense distinctly raised by the pleadings, and the further fact that in the judgment entered, in which the entire court concurred, we find the following: 'On a retrial it is directed that the law be announced as we have indicated,' etc.'"

In the case of *Continental Ins. Co. v. Daniel*, 25 Ky. Law Rep. 1501, 78 S. W. 866, the court said: "The difference between the contentions of appellant and appellee is this: The appellant contends that the notice and tender must be given and made five days preceding the cancellation, which takes effect immediately. The appellee contends that the act of cancellation should take place, and notice and tender be given and made, and five days after this the cancellation takes effect, and the policy is then no longer in force. The lower court took appellee's view of the matter, and we are not prepared to say that the court erred. This provision of the policy is somewhat ambiguous. This court has repeatedly decided in such cases that the policy should be construed most strongly against the company, as it prepared it. This language of the policy seems to support the construction contended for by appellee, to wit: 'This policy shall be canceled at any time . . . by the company by giving five days' notice of such cancellation.' This seems to imply that the act of cancellation precedes the notice; but the cancellation is not to take effect



until five days after the giving of the notice of the cancellation and the tender of the premium."

In the case of *Chrisman & Sawyer Banking Co. v. Hartford Fire Ins. Co.*, 75 Mo. App. 310, that court said: "In the rescission of a contract by one party, it is a necessary condition precedent to such rescission to place the other party in statu quo—to restore to him whatever may belong to him by reason of bringing the contract to an end. This is the general rule, as applied to all cases of contract. And within this rule it has been repeatedly held that before an insurance company can make an effective cancellation, it must return or tender the unearned premium. . . . In this case no attempt was made to do so. <sup>102</sup> No effort was made to ascertain what the unearned premium was, and certainly it will not be pretended that the president of the woolen-mill released his claim for that. But it is said that this particular policy provided that the unearned premium was to be returned 'on the surrender of the policy.' And, as the policy was not surrendered, it was not necessary to return the premium. We think the return of the premium and the surrender of the policy, under the terms of the contract, were concurrent acts; that neither could be demanded without the other. But, as defendant was the party seeking cancellation, it was its duty first to have tendered the unearned premium on a surrender of the policy. It then would have done all that the contract required it to do in order to place the assured in statu quo."

In the case of *Hartford Fire Ins. Co. v. Cameron*, 18 Tex. Civ. App. 237, 45 S. W. 158, the court said: "We think that the cancellation clause, taken as a whole, means that, when the company elects to cancel the policy, it must, upon giving notice of such intention, at the same time return or tender to the insured or his agent the unearned portion of the premium. The latter part of the clause, by providing that the company, in such cases, 'shall retain only the pro rata premium,' clearly implies that the other portion shall be returned; and, while it does not in turn declare when the return shall be made, it would be unreasonable and unjust to allow it to cancel its obligation and retain the consideration upon which it was based. It would be equally as unjust and inequitable to require the insured 'to dance attendance at the place of business of an insurance company, and await their pleasure,' and probably be put to his action to recover the little sum due him, the cost of which might be greater than the sum due."

In the case of *Hartford Fire Ins. Co. v. McKenzie*, 70 Ill. App. 615, the court for the second district, in construing an identical contract, said: "Where the company seeks to cancel the contract under such stipulation as is above set out, the insured does not have to tender his policy, in order to entitle

him to receive back the unearned premium; but it is for the company desiring cancellation to seek the assured and tender the money to him, and till it does so the cancellation has not been effected." See, also, *Peterson v. Hartford Fire Ins. Co.*, 87 Ill. App. 103 567; *Hartford Fire Ins. Co. v. Tewes*, 132 Ill. App. 321; *Williamson v. Warfield-Pratt-Howell Co.*, 136 Ill. App. 168; *Mississippi Valley Ins. Co. v. Bermond*, 45 Ill. App. 22; *Hamburg-Bremen Fire Ins. Co. v. Browning*, 102 Va. 890, 48 S. E. 2; 2 Clement on Insurance, p. 405.

In the case of *Mississippi Fire Assn. v. Dobbins*, 81 Miss. 630, 33 South. 506, the same character of contract is construed, and the court, going further, holds that, even in case the contract becomes void, before the company can defend, it must tender and pay over to the insured the unearned portion of the premium.

The authorities holding to the contrary are as follows: *Schwarzchild & Sulzberger Co. v. Phoenix Ins. Co. of Hartford*, 124 Fed. 52, 59 C. C. A. 572, 115 Fed. 653; *El Paso Reduction Co. v. Hartford Ins. Co.*, 121 Fed. 937; *Davidson v. German Ins. Co.*, 74 N. J. L. 487, 65 Atl. 996, 13 L. R. A., N. S., 884, 12 Ann. Cas. 1065; *Phoenix M. Ins. Co. v. Brecheisen*, 50 Ohio St. 542, 35 N. E. 53; *Newark Fire Ins. Co. v. Sammons*, 11 Ill. App. 230.

Such policy being framed by virtue of the laws of New York, and the highest court of that state having interpreted same, such construction should be of most persuasive influence, if not binding, with us, especially when supported by the weight of authority: *Equitable Life Assur. Soc. v. Brown*, 213 U. S. 25, 29 Sup. Ct. Rep. 404, 53 L. ed. 682. Hence we hold that the policy was not canceled, no tender having been timely made.

2. It is further insisted that the assured consented as a matter of law that the contract of insurance should be canceled. We do not so conclude from the evidence: *Hartford Fire Ins. Co. v. Tewes*, 132 Ill. App. 321.

3. As to the question of forfeiture on account of the alleged encumbrance, that was a question for the jury; there being a conflict in the evidence thereon. The fact that a mortgage may have been made thereon and filed of record, and not canceled of record, was not conclusive. It was competent to show the mortgage <sup>104</sup> security had been changed or substituted, or that the debt had been extinguished by renewal and taking other security or payment. All these questions were for the determination of the jury.

The case is reversed and remanded, with instructions to grant a new trial.

Kane, C. J., and Turner, J., concur.

Dunn, J., dissented.

*That Construction Most Favorable to the Insured* should be given to a policy of insurance where it is susceptible of two constructions: *Mutual Life Ins. Co. v. New*, 125 La. 41, 136 Am. St. Rep. 326; *Monahan v. Fidelity Life Ins. Co.*, 242 Ill. 488, 134 Am. St. Rep. 337; *Forest City Ins. Co. v. Hardesty*, 182 Ill. 39, 74 Am. St. Rep. 161.

*As to the Weight to be Given to the Decisions of a Court of Last Resort in Another State* concerning a statute, or the controlling word in a statute, see *Rouse v. Donovan*, 104 Mich. 234, 53 Am. St. Rep. 457, and cases cited in the cross-reference note thereto.

*As to What is not Sufficient Notice of Cancellation of an Insurance Policy* to arbitrarily terminate the policy if the insurer does not refund or offer to refund the amount of unearned premium as required by cancellation conditions in the policy, see *Savage v. Phoenix Ins. Co.*, 12 Mont. 458, 33 Am. St. Rep. 591. As to sufficiency of notice of cancellation of policy, see *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 17 Am. St. Rep. 233; *Insurance Cos. v. Raden*, 87 Ala. 811, 13 Am. St. Rep. 36; *Mutual Assur. Society v. Scottish Union etc. Ins. Co.*, 84 Va. 116, 10 Am. St. Rep. 819.

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## COALGATE COMPANY v. BROSS.

[25 Okl. 244, 107 Pac. 425.]

**TRIAL—Necessity of Objection to Misconduct of Counsel.**—To present the question of misconduct of counsel in making improper statements to the jury in his argument for appellate review, there must be an objection seasonably made, and an exception properly taken if it is overruled. (p. 917.)

**DAMAGES—Evidence of Extent of Personal Injuries.**—Where several nonexpert witnesses testify on one side to the effect that an injury for which damages were allowed by a jury was of a permanent nature, and the plaintiff's injured hand was exhibited to the jury in corroboration of said testimony, and several expert witnesses testify on the other side that the injury was slight, and that there was a complete recovery, it was proper to submit the evidence on both sides to the jury, and let it decide the disputed question of fact. (pp. 918, 919.)

**FELLOW-SERVANTS—Joint Liability With Master for Negligence.**—Under section 36, article 9, of the constitution, which provides: "The common-law doctrine of the fellow-servant, so far as it affects the liability of the master for injuries to his servant, resulting from the acts or omission of any other servant or servants of the common master, is abrogated as to every employee of every railroad company and every street railway company or interurban railway company, and of every person, firm, or corporation engaged in mining in this state; and every such employee shall have the same right to recover for every injury suffered by him for the acts or omissions of any other employee or employees of the common master that a servant would have if such acts or omissions were those of the master himself in the performance of a nonassignable duty . . . ."—where the negligence of the fellow-servant causes the injury of a person engaged in the service of a corporation as a rope-rider in the slope of a coal mine, his act constitutes a breach of duty of the master, and at the same time a breach of duty on his own part toward his coemployee, and the person injured may maintain a joint action against the master and servant for the injury. (pp. 919, 920.)

(Syllabi by the court.)

E. E. McInnis, C. Porter Johnson and Arthur G. Moseley, for the plaintiffs in error.

D. H. Linebaugh, for the defendant in error.

<sup>245</sup> KANE, C. J. This was an action for personal injuries, commenced against the Coalgate Company, a corporation owning and operating a coal mine at Coalgate, Oklahoma, and its hoisting engineer, George Wheeler, by Jesse Bross, the defendant in error, who was plaintiff in the court below; the plaintiffs in error here <sup>246</sup> being defendants. The plaintiff claims to have received injuries while in the service of the defendants as a rope-rider, in a slope of a coal mine near Coalgate, on December 1, 1907. It appears from the evidence that he was pushing a trip of two cars down the slope; that to this trip was attached one end of a wire rope, while the other end was attached to the drum of a hoisting engine upon the surface of the ground near the mouth of the mine; that the latch-kicker, Madden, who was in the slope at the time near the plaintiff, gave a signal to the engineer, Wheeler, to lower the trip, but, instead of lowering it, he jerked it upward and against plaintiff, injuring him. The defendants filed separate demurrers to the petition, on the ground that the causes of action sought to be joined against the Coalgate Company and against defendant Wheeler were improperly joined, which demurrers were overruled by the court, and the defendants excepted. Thereafter defendants filed separate answers, containing a general denial, a plea of contributory negligence, and one of assumption of risk, on the part of the plaintiff. Plaintiff filed a reply in the nature of a general denial. When the cause was called for trial the defendants filed separate motions to require the plaintiff to elect as to whether he would proceed against the Coalgate Company or defendant Wheeler, alleging the causes of action against them were improperly joined, and that the petition was multifarious, which motions were overruled, and defendants excepted. Thereupon the cause proceeded to trial before the court and a jury upon the issues joined by the pleadings. Thereafter a verdict signed by nine of the jurors in favor of the plaintiff and against defendants, for the sum of three thousand dollars, was returned, and judgment was duly entered thereon. From this judgment the defendants appealed to this court by petition in error and case-made.

While counsel for defendants assign various grounds upon which the judgment of the court below should be reversed, they have confined themselves in their brief and oral argument to the following: (1) That there is error in the said judgment and proceedings in that the defendant in error, being the prevailing party, at the trial in the said action was guilty of irregularity in <sup>247</sup> the proceedings therein, by reason of

his counsel making the remarks in his address to the jury excepted to by plaintiffs in error and set forth in full in the record; (2) that there is error in the said judgment and proceedings in that the verdict of the jury is excessive, appearing to have been given under the influence of passion or prejudice; (3) that the court committed error by overruling the separate demurrers of said defendants. The other errors complained of are predicated upon instructions given and refused, and excluding from the jury certain evidence as to a conversation in the mine between plaintiff and Madden, or so much thereof as passed from Bross to Madden.

The misconduct of counsel complained of, as shown by the record, was that plaintiff's attorney, while engaged in the closing argument before the jury, and in reply to the argument of defendant's attorneys, based upon the evidence of the early date of filing of the first suit in this cause, made the following remarks:

"There are two sides to this question, gentlemen of the jury. These corporations make a habit of going to these men that are hurt and settling these cases without consulting their attorneys. Lawyers have suffered that way in the Indian Territory."

Whereupon attorneys for defendants asked, "Do you claim that has occurred in this case?" to which the attorney for the plaintiff replied: "No; because I beat them to it"—to all of which remarks of counsel the defendants then and there duly excepted at the time. Counsel for defendant in error insists that to present the question of misconduct of counsel in the argument, objections should be made to the alleged improper statements, and a ruling asked thereon by the trial court, and a mere exception to the remarks of counsel, not preceded by any ruling of the court, is not sufficient to raise the question as to the propriety of such language. There is considerable confusion upon the question, How may error in allowing a prejudicial line of argument be saved for review in an appellate tribunal? This court has not committed itself on the question, and is disposed to follow the rule approved by Mr. Thompson in his work on Trials (volume 1, section 962), that the "more correct view is that such an irregularity can only be saved <sup>248</sup> for appellate review by an objection seasonably made, and exception properly taken if it is overruled." However, we are of the opinion that the misconduct of counsel in the case at bar could not, under the circumstances, have been prejudicial to the rights of the defendant. The record shows that after the conclusion of argument of counsel, and just before the jury retired, the court made the following statement: "Gentlemen of the jury, in reference to the remarks that Mr. Linebaugh made in regard to the coal company settling these suits without the consent or knowledge of the attor-

neys of the injured parties, you will not consider that. When the defendant's attorneys excepted to the remarks, he said that he would withdraw them—I understood him to say that he would take it back; he said that he told me to instruct the jury not to consider those remarks—I did not hear that part of it, but you will not now consider those remarks.”

We are of the opinion, therefore, that the conduct of counsel was not such under the circumstances as to warrant this court in holding it to be reversible error.

Under the second subhead of his brief counsel for plaintiff in error argues that, as plaintiff's injuries consisted of a simple fracture of the radius of the forearm, from which no serious consequences followed, and which without fault on his part would have kept him from work about sixty days, the verdict of the jury was excessive. The plaintiff introduced no expert evidence to establish the nature or permanency of the injury. He and the members of his family testified that since the injury he had never been able to use the hand injured; that he has no power to open and close the fingers of that hand; that the injury is permanent, and he could not open his hand as far at the time of the trial as he could sixty days before; that he had not at the time of the trial, nor had he had since the time of the injury, any power or control over the fingers of that hand. On the other hand, five physicians, among them two who waited upon the plaintiff, testified in substance, that the radius of the forearm was broken; that there was a slight displacement; that they put the bone in perfect apposition, and that there had been a complete recovery; that the <sup>249</sup> splints were taken off at the end of thirty days, and that the recovery at that time was practically complete; that the ligaments were not torn, and that there was no paralysis; that if the patient had begun to use his hand at the time the splints were taken off, the hand would have been all right at the date of the trial. Counsel insists that this expert evidence, notwithstanding that it is contradicted by the nonexpert evidence of plaintiff and his kinfolds, conclusively shows that the injury was merely a simple fracture, and not a permanent injury, and that, giving the plaintiff thirty days after the splints were removed in which to recover normal strength, the greatest loss of time that would seem to be reasonably due to the injury would be sixty days. Plaintiff was receiving two dollars and fifty cents per day, and a verdict for three thousand dollars was so disproportionate to the actual damage incurred that it ought not in good conscience to be permitted to stand. If it could be taken for granted that the experts were right, and that in view of their testimony no weight should be given to the testimony of the plaintiff and his nonexpert witnesses, the contention of counsel would probably be well taken. But they cite no author-



ity where such preponderance has been given to expert testimony, and we can think of no reason now why it was not proper to submit the testimony on both sides to the jury, and let it decide its weight and the credibility of the witnesses. The testimony of the experts may seem very persuasive to the court, but the jury and the court below saw the witnesses face to face, the condition of the injured hand, and no doubt gave due consideration to all the evidence. Under the circumstances, we are of the opinion that the court is bound by the oft-reiterated rule that, if there is any evidence, direct or indirect, reasonably tending to support the verdict of the jury, this court will not disturb it. Every presumption is in its favor, and the court will not weigh or balance the evidence.

Under the next assignment of error counsel for plaintiffs in error insist that it was error for the court below to refuse to require the defendant in error to elect as to which cause of action alleged in his petition, viz., the cause set out against the defendant the Coalgate Company, or the cause set out against the <sup>250</sup> defendant Wheeler, he would stand on; maintaining that the cause of action against the master, the Coalgate Company, and the servant, Wheeler, are separable, and that they ought not to be proceeded against jointly. There is considerable conflict on the question of the right to join master and servant as defendants in an action for the servant's negligence. The question does not seem to have been passed upon squarely by the supreme court of the United States, but the courts of last resort of a good many of the states and the federal courts, district and circuit, and circuit court of appeals, have passed upon it many times. From an examination of the authorities it seems that the weight of authority in the state courts is in favor of such joinder, while in the federal courts the preponderance is perhaps the other way. Both state and federal authorities in favor of and against such joinder are collected and considered in *Charman v. Lake Erie & W. R. Co.*, 105 Fed. 449, and *Helms v. Northern Pac. Ry. Co.*, 120 Fed. 389, the first case taking the affirmative and the second the negative side of the question. As these cases have fully collected the authorities and discussed the proposition pro and con, we will not cite further cases, or attempt to reconcile them, but merely adopt the reasoning of Judge Baker in *Charman v. Lake Erie & W. R. Co.*, 105 Fed. 449, as it seems to us to be sound, and the statute construed is practically the same in effect as section 36, article 9, of our constitution, which provides: "The common-law doctrine of the fellow-servant, so far as it affects the liability of the master for injuries to his servant, resulting from the acts or omission of any other servant or servants of the common master, is abrogated as to every employee of every railroad company

and every street railway company or interurban railway company, and of every person, firm, or corporation engaged in mining in this state; and every such employee shall have the same right to recover for every injury suffered by him for the acts or omissions of any other employee or employees of the common master that a servant would have if such acts or omissions were those of the master himself in the performance of a nonassignable duty. . . . .”

It is argued by counsel for plaintiffs in error that the cause of action of one servant against another grows out of the legal <sup>251</sup> duty that each owes to the other to use due care for the other's safety in the conduct of the common undertaking, and that the cause of action against the master for the negligence of the servant, being based upon the foregoing provision of the constitution, precludes the idea of joint liability; that each is separately liable for the same thing upon a different cause of action; neither is jointly liable with the other for the same thing upon the same cause of action. Judge Baker, who wrote the opinion in the Charman case (105 Fed. 449), on this question, says: “It is not necessary to the maintenance of a joint action for tort that the injury should grow out of the breach of a joint duty, nor out of the same or similar duties deducible from the same or similar principles of law. The rule would seem to be that, where the same acts or omissions constitute and give rise to a breach of duty owing by such defendant to the plaintiff, and concur and co-operate in producing the injury, a joint action may be maintained.”

This language seems to be peculiarly pertinent to the case at bar. The constitutional provision above referred to seems to make the tort of the servant the tort of the master, and gives the injured employee the same right to recover against the master for injuries incurred by him for the acts or omissions of his fellow-servant as if the master himself was present and committed the tort in the performance of a nonassignable duty. We are of the opinion that under the foregoing section of the constitution a servant has the right to join his master and fellow-servant as defendant in an action for the servant's negligence, although the master may not be present and participating in the injury complained of except in virtue of the foregoing constitutional provision.

The remaining assignments of error present questions based upon alleged error in refusing and giving certain instructions, and in sustaining an objection to certain evidence sought to be elicited on cross-examination. We have examined the instructions given and refused and the record of the trial very closely, and are satisfied that the case was submitted to the jury upon proper instructions, and that the defendant is not prejudiced by any of <sup>252</sup> the instructions



given or refused, and that the rejection of the evidence complained of was in no way prejudicial.

The judgment of the court below is accordingly affirmed.

All the justices concur.

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*An Objection to Improper Remarks Made by Counsel* must be made at the time the statement is made, or within a reasonable time thereafter, and must be brought to the attention of such counsel, as well as to that of the court: *Bond v. Bean*, 72 N. H. 444, 101 Am. St. Rep. 686. See, further, on misconduct of counsel in argument, *Toledo etc. R. R. Co. v. Burr*, 82 Ohio St. 129, 137 Am. St. Rep. 771, and authorities cited in the cross-reference note thereto.

*Where the Negligence of a Master and That of a Fellow-servant* together produce injury to an employee, the master is liable therefor: *Lincoln v. Central Vermont Ry. Co.*, 82 Vt. 187, 137 Am. St. Rep. 998, and cases cited in the cross-reference note thereto.

*Master and Servant are Jointly Liable as Joint Tort-feasors*, for the tort of the servant committed within the scope of his employment and while in the master's service, whether the master is present or not: *Schumpert v. Southern Railway*, 65 S. C. 332, 95 Am. St. Rep. 802. A master and servant may be jointly sued in trespass for a willful wrong committed by the servant within the scope of his employment: *Central of Georgia Ry. Co. v. Brown*, 113 Ga. 414, 84 Am. St. Rep. 250. A railroad company and its engineer are jointly liable when the sole ground of liability is a negligent act of misfeasance on the part of such engineer: *Southern Ry. Co. v. Grizzle*, 124 Ga. 735, 110 Am. St. Rep. 191.

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## JONES v. BALSLEY & ROGERS.

[25 Okl. 344, 106 Pac. 830.]

**APPEAL—Parties—Service of Case-made.**—An action brought by J. against B. & R., contractors, for material furnished in the construction of buildings on lots of B., C. & M. for judgment in a certain sum, and also to enforce a mechanic's lien for that amount upon said building and lots, B. & R. having defaulted after service, and judgment being rendered against them for the amount sued for, and in favor of B., C. & M. as to the lien, on appeal to this court by J. without making B. & R. parties thereto, held, that B. & R. could not be affected or their rights prejudiced thereby, and that they were unnecessary parties. It being unnecessary to join certain parties in a proceeding in error to this court, it is not essential that the case-made be served upon them. (pp. 923, 926.)

**APPEAL—Statement of Case-made—Notice.**—Where it is unnecessary to join certain parties on appeal in a proceeding in error to the supreme court, it is not essential that they have notice of the time and place of the presentation of the case-made for settlement. (pp. 923, 926.)

**APPEAL—Manner of Service of Case-made.**—There being no mode of service of the case-made prescribed by statute, if the opposite party or his attorney of record actually receive such case-made within the given time, it is immaterial whether it be by mail, express, or otherwise, it being admitted that he actually received the same within such time. (p. 927.)

**NOTICE—Whether Service may be Made by Telegraph.**—The law requiring a written notice to be given to the opposite party or his attorney of record of the time and place of the presentation of a case-made for settlement, and a message containing a proper notice and signed by the party, or another as his attorney, seeking to have the case-made settled, sent by telegraph and properly delivered in writing, is a sufficient notice. (pp. 927, 928.)

(Syllabi by the court.)

J. S. Arnote, for the plaintiff in error.

Cottigham & Bledsoe, for the defendants in error.

**345 WILLIAMS, J.** This action was instituted in the United States court for the southern district of the Indian Territory, at Tishomingo, by James E. Jones v. E. S. Balsley and J. F. Rogers, doing business as Balsley & Rogers, contractors, and H. L. Muldrow, Jr., S. T. Bledsoe, and B. H. Colbert, owners, for the sum of \$862.85, and to enforce a lien for material furnished and used in the construction of four buildings erected on lots 7, 8, 9, and 10 in block 99, in the town of Tishomingo. It was pending at the time of the organization of the state government upon the report of the master or referee and exceptions of the plaintiff thereto. On December 17, 1907, the exceptions being overruled, the report was confirmed. On the same day, a motion for new trial being overruled, judgment was entered in favor of Muldrow, Bledsoe & Colbert on all the issues and in favor of the plaintiff against Balsley & Rogers on default. On the same day, sixty days' time was granted to prepare and serve a case-made. On or about February 13, 1908, counsel for plaintiff in error, over the telephone, **346** inquired of the attorneys for the defendants in error, Muldrow, Bledsoe & Colbert, if they would accept service of the case-made, and the reply was that they would. Thereupon the case-made on the fourteenth day of February, 1908, was mailed to S. T. Bledsoe, at Ardmore, Oklahoma, one of the attorneys for said defendants in error, which was received by him on the fifteenth day of February, 1908, being retained by him several days, when it was returned without any acceptance of service indorsed thereon, at the same time mailing to the attorneys for plaintiff certain objections and suggestions. Nothing further was done toward having the case-made settled until on or about October 20, 1908, when S. T. Bledsoe, attorney for said defendants in error, was notified by telegram at Guthrie, Oklahoma, that the case-made would be presented to the trial judge at Coalgate on the morning of October 24, 1908, which telegram was received by Mr. Bledsoe on October 21, 1908, to which he replied by wire: "Can't be there on account of engagement. Notice too short and understand your time has expired." The case was presented to Judge West, the trial judge, on October 24, 1908,

when affidavit of J. S. Arnote, showing service of case-made, and the telegram mentioned, were presented to the trial judge, whereupon he heard and determined the objections made by said defendants and signed and settled the case-made, and ordered the same to be filed as required by law, the certificate not having been prepared at the time. It was later prepared, attached to the case-made and mailed to Judge West, at Ada, in his district, where, on October 26, 1908, it was then filed with the clerk of the district court of Johnston county, and later, in due time, filed in this court. The certificate of the trial judge recited "that the above and foregoing case-made had been duly served within the time allowed by the court and the amendments thereto duly suggested, and the same duly submitted to me for settlement and signing, as provided by law, by the parties hereto," but the foregoing appear to be the undisputed facts.

<sup>347</sup> The defendants in error, Muldrow, Bledsoe & Colbert, moved to dismiss this appeal on the following grounds: (1) The case-made was never served upon Balsley & Rogers; (2) the said Balsley & Rogers are necessary parties to the proceeding in error; (3) same was never legally served upon the defendants in error, Muldrow, Bledsoe & Colbert; (4) no proper notice of the time and place of settlement of the case-made was served.

(1) If Balsley & Rogers were not necessary parties to the proceeding in error, it was not essential that the case-made be served upon them or that they have notice of the time and place of the presentation of the settlement of the same. In the case of *Atlantic Trust Co. v. Prescott*, 5 Kan. App. 172, 48 Pac. 926, the court said: "On June 24, 1892, C. J. Prescott and Arthur Allen, partners as Prescott & Allen, filed their petition in the circuit court of Shawnee county against Hattie I. Dennis, J. H. Dennis, the Atlantic Trust Company, W. E. Swentzel, B. L. Vineyard, and C. T. Harvin to foreclose a mechanic's lien on property [described] in the city of Topeka, and to correct the statement filed for said lien on said property. To this petition the Atlantic Trust Company filed its answer, denying the validity of plaintiffs' lien, and setting up a mortgage in its favor on said property given by the Dennises, defendants, April 6, 1889, for \$27,000, and asking that it be declared paramount and superior to plaintiffs' claim. To this answer the plaintiffs filed a general denial. The defendant W. E. Swentzel filed his answer to plaintiffs' petition, denying the validity of plaintiffs' lien, and setting up a first lien in his favor on said property for \$7,699.73 by virtue of a judgment of the circuit court of the United States for the district of Kansas. To which plaintiffs filed a general denial. The cause came on for hearing February 1, 1893, the plaintiffs and the defendants, W. E. Swentzel and

the Atlantic Trust Company appearing. The defendants Hattie I. Dennis, J. H. Dennis, B. L. Vineyard, and C. T. Harvin made default, although all were personally served. A jury was waived, and the cause tried by the court, the issues found for the plaintiffs, and the judgment rendered for said plaintiffs and against said Dennises, defendants, for \$141.50, and interest at six per cent from date, and costs. The property was ordered sold, if judgment be not paid within <sup>348</sup> thirty days, and proceeds applied, first, to the payment of the costs; second, to the payment of plaintiffs' judgment and interest, and to the defendant W. E. Swentzel \$7,699.73 and interest, with equal priorities; third, to the defendant the Atlantic Trust Company, \$27,000, with interest; fourth, that the balance be brought into court to abide its further order. To the rendition of which judgment and decree in favor of said plaintiffs, defendants Swentzel and the Atlantic Trust Company excepted. Motion for a new trial was duly made and overruled, and the case brought here, on a petition in error attached to a case-made, for review. The first question for our decision is the motion of the defendants in error to dismiss the petition in error, for the reason that the defendants in the court below, Hattie I. Dennis, James H. Dennis, B. L. Vineyard and C. T. Harvin, have not been brought into this court. This is not merely a question of the marshaling of liens. The issue raised is, Have the defendants in error any lien upon the property in question? If they have a lien for the amount claimed, it is undoubtedly superior to the lien of the plaintiffs in error. In *Paper Co. v. Hentig*, 31 Kan. 317, 1 Pac. 529, the court says: 'In no case should a judgment be interfered with by the supreme court where one of the parties to the judgment is not a party in the supreme court.' In *Central Kansas Loan & Inv. Co. v. Chicago Lumber Co.*, 53 Kan. 677, 37 Pac. 132, it was held that, where 'it appears that a modification or reversal will affect a defendant who has not been made a party, the proceedings in error will be dismissed.' In that case the plaintiff in error claimed that not only was its lien prior to the lien of the defendant in error, but that the amount allowed the defendant in error against the owner of the land, who was not brought into the reviewing court, was too large, and the case was dismissed for defect of parties. That case is very much like the case at bar, the main difference being that in that case the omitted defendant contested in the court below, which was not done by the Dennises. But we do not think this is material. The motion to dismiss the petition in error for defect of parties is sustained."

In the case of *Hallwood Cash Register Co. v. Dailey*, 70 Kan. 620, 79 Pac. 158, the court said: "Counsel for defendant in error ask for a dismissal of the petition in error because Schroeder was not made a party nor was the case-

made served on him. He 'did not appear at the trial and take part in the proceedings,' for which reason, under <sup>349</sup> section 5020, General Statutes of 1901, he was not a necessary party: *Haas v. Tough*, 67 Kan. 253, 72 Pac. 856."

In the *Haas* case, in 67 Kan. 253, 72 Pac. 856, the court likewise predicates its ruling on section 5020, General Statutes of 1901. By reference to said section (Kan. Gen. Stats., 1901, sec. 5020, p. 1029), we find that on the twenty-second day of March, 1901, the legislature of that state provided: "It shall not be necessary for the party desiring to have any judgment or order of the district court, or other court of record, other than the probate court, to serve the case-made for such court on any party to the action who did not appear at the trial and take part in the proceedings from which the appeal is taken, or who shall have filed a disclaimer in the district court, nor shall it be necessary to make any such person a party to the petition in error: Provided, that any person so omitted from the proceedings in error, who was a party to the action in the district court, may be made a party plaintiff or defendant in the action in the supreme court upon such terms as the court may direct upon its appearing that he might be affected by the reversal of the judgment or order from which the appeal was taken, with the right to be heard therein the same as other parties."

The case of *Atlantic Trust Co. v. Prescott*, 5 Kan. App. 172, 48 Pac. 926, was decided by the Kansas court of appeals on April 30, 1897. It is reasonable to presume that the act of March 22, 1901, was passed in view of that decision.

In the case of *Gillette v. Murphy*, 7 Okl. 91, 54 Pac. 413, on reading paragraph 1 of the syllabus, on first impression it may seem that the supreme court of the Territory of Oklahoma expressly decided that where a party permitted judgment to go against him by default, that on that ground he was not a necessary party on appeal in the supreme court. When the syllabus is read as an entirety, and also in the light of the body of the opinion, such seems not to have been the holding of the court, but to have depended upon the question as to whether or not such defaulted parties could be affected by the result of the appeal. The court said: "In the suit between the county and Jackson, Jackson recovered <sup>350</sup> a judgment for \$588.16. The board never appealed from that judgment, and it has long since become final, and the board, having failed to appeal from that judgment, can never change its liability thereon. The board of county commissioners was made a party in the present suit, but did not answer or appear at the trial. It defaulted in that suit, evidently because it had no interests that could be affected by any judgment which might be rendered in such action. This suit was an action over the judgment rendered against the board of

county commissioners, and in favor of Jackson. Gillette & Libby were claiming all of said judgment by virtue of an assignment, and by their attorney's lien, while the plaintiffs and the other defendants were claiming a part of the judgment under their respective assignments of the claims against the county, which claims were included in said judgment. The board of county commissioners owes the judgment, and is only interested in seeing that it is not compelled to pay the judgment twice; and this, we think, it cannot be required to do under the circumstances in this case. It can go into court at any time, and pay the judgment standing against it, and take the clerk's receipt for the same, which would forever settle its liability. Neither of the parties to this action could thereafter cause such board any trouble. The board is simply a trustee, holding the fund for the party or parties whom the court may determine to be entitled to it. The court could at any time require it to pay the money or warrants therefor into court. It is immaterial to the board who it owes. Its liability is in the form of a judgment, and collection could be enforced at any time. A party is not a necessary party when he has no interests that can be affected in the suit, or does not stand as the representative of some other party who has some interest in the matter in controversy. We think the board of county commissioners is not a necessary party to the appeal in this case, and so hold."

It is clear that the decision in that case was not predicated upon the ground that the board of county commissioners defaulted, but that it could in no event be affected by the result of the appeal. It is insisted, however, that Balsley & Rogers could not be affected by the result of the appeal. In the lower court, judgment was rendered in favor of the plaintiffs in error. If this cause be reversed in this court and remanded for a new trial, and, on retrial, judgment should be rendered against the defendants in error enforcing a lien on their property for the <sup>351</sup> amount of the judgment, how could that affect Balsley & Rogers? They have no interest, so far as this record discloses, in the lots or buildings on which the lien is sought to be enforced. In the Kansas court of appeals case (5 Kan. 172, 48 Pac. 926), the defaulting defendants were the owners of the land which was being subjected to the different liens. Can Balsley & Rogers be prejudiced by a lien on the property of the other defendants in any way? We think not: See, also, *Megin v. Filor*, 4 Fla. 203.

(2) The disposition of proposition 1 applies equally to proposition 2.

(3) It seems to be admitted that the case-made as prepared by the plaintiff in error was mailed and received by



the attorney of the defendants in error, Muldrow, Bledsoe & Colbert, within due time. The statute does not prescribe how the same shall be served, and in the absence of such statutory regulation, when it is received by the proper party within due time, the same will be treated as having been properly served.

(4) It is uncontroverted that the notice of the time and place of serving the case-made was served by telegram, and it is insisted in this court that such was not a proper service, there being no contention that the time was not sufficient. This question appears to have been passed on in the case of *Western Union Tel. Co. v. Bailey*, 115 Ga. 725, 42 S. E. 89, 61 L. R. A. 933. In that case, the late Chief Justice Simmons, in delivering the opinion of the court, said: "The Civil Code [1895], section 4644, requires that 'the plaintiff in certiorari shall cause written notice to be given to the opposite party in interest, his agent or attorney, of the sanction of the writ of certiorari, and also the time and place of hearing, at least ten days before the sitting of the court to which the same shall be returnable.' Is a telegram such 'written notice' as would be effectual? It will be observed that the section does not require the notice to be served by any particular or designated person. It merely declares that the plaintiff in certiorari shall cause written notice to be given. The object of the notice is to give the opposite party timely information that the judge has sanctioned the writ, and that it will be heard at a certain time and place. The object of requiring it to be in writing is to prevent, as far as <sup>352</sup> possible, all disputes as to the correctness and sufficiency of the notice and as to whether it was given. When the opposite party has received a notice in writing which contains the information prescribed, the object of the statute is accomplished, and there has been, in our opinion, a sufficient compliance with the law. Why, then, cannot the notice be delivered by any person authorized by the plaintiff in certiorari? Were he to write the notice himself and send it by another, it would clearly be sufficient. So, if his attorney were to write it and have it delivered by a messenger. If the attorney authorized his clerk to write and deliver the notice and the clerk did so, that would clearly be sufficient. Why, then, can the attorney not employ the telegraph company as his agent, and why, if it sends the message as written by the attorney and delivers to the opposite party a written transcript of it, would this not be a sufficient compliance with the law? We think that it is. It is true the notice actually written by the attorney is not delivered, but the same words are sent in symbols and signals, and are transcribed in writing at the office where received, and the written transcript delivered

to the opposite party. The paper delivered contains the same words and is in writing. It affords to the opposite party all the information that could have been given by a delivery of the original. This mode of service of the notice is not the usual one, but the telegraph and the telephone are used daily in all business transactions, and have been frequently recognized by the courts. Had Bailey telephoned to a friend living near the party to be served, and asked that friend to write the notice as dictated over the telephone and deliver the writing to the party to be served, a compliance with this request would have been as effectual as though Bailey had delivered the notice himself. The case does not seem different when, by his contract with the telegraph company, he authorized the company's agent in the receiving office to deliver a written transcript of the words which are transmitted over the wire. The statute requires that the notice shall be in writing, but not that it shall be written or signed by the party or his attorney. A writing by an employee of the company is just as good. The telegraph is used very commonly now to make contracts, and such contracts are uniformly upheld by the courts. It has been held that a contract so made is in writing within the meaning of the statute of frauds: *Croswell on Electricity*, sec. 690; *Joyce on Electric Law*, sec. 901. For these reasons we hold that if Bailey's telegram <sup>353</sup> had been sent properly and delivered in time, it would have been sufficient notice of the certiorari." See, also, *State v. Holmes*, 56 Iowa, 588, 41 Am. Rep. 121, 9 N. W. 894; *Cape May & S. L. R. Co. v. Johnson*, 35 N. J. Eq. 422; *Ex parte Langley*, L. R. 13 Ch. D. 110, 49 L. J. Bankr., N. S., 1, 41 L. T., N. S., 388, 28 Week. Rep. 174; *In re Bryant*, L. R. 4 Ch. D. 98, 35 L. T., N. S., 489, 25 Week. Rep. 230; *Heywood v. Wait*, 18 Week. Rep. 205; *Kaufman v. Wilson*, 29 Ind. 504; *Cabell v. Arnold*, 86 Tex. 102, 23 S. W. 645, 22 L. R. A. 87; *McElveen Commission Co. v. Jackson*, 94 Ga. 549, 20 S. E. 428.

The question as to the controlling effect of the certificate of the trial judge is not here considered, but nothing in this opinion is to be construed as any intimation that the same is not controlling as to everything certified to.

It follows that the motion to dismiss the appeal should be overruled.

All the justices concur.

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*Service of Notice by Telegraph.*—A telegram from a judge to the clerk of the court, ordering an adjournment, is a "written order," and warrants the adjournment: *State v. Holmes*, 56 Iowa, 588, 41 Am. Rep. 121. But a notice by telephone is verbal, and insufficient where the statute requires it to be given in writing: *Note to Barrett v. Magner*, 127 Am. St. Rep. 554.



## JULIAN v. YEOMAN.

[25 Okl. 448, 106 Pac. 956.]

**PARTITION—Personal Property.**—A Court of Equity has Jurisdiction to decree partition of personal property where the same is held by cotenants. (p. 930.)

**PARTITION.**—A Cotenant of Personal Property has a Right to have the same partitioned, and the exercise of this right is not subject to the control of another cotenant. (p. 930.)

**COTENANCY—Foreclosure of Mortgage on Undivided Interest.**—In a case where a mortgagee forecloses a chattel mortgage given on an undivided interest in certain personal property, the interest of a cotenant as such only will not give him a standing to attack the validity of the sale of the property mortgaged on foreclosure of the said chattel mortgage, where such sale is acquiesced in by the mortgagor. (p. 931.)

(Syllabi by the court.)

Action by Yeoman against Julian and others. Judgment for plaintiff, and defendants brought error.

Stevens & Myers and James F. Steck, for the plaintiffs in error.

O. H. Travers, for the defendant in error.

449 DUNN, J. This action comes to this court from a judgment of the district court of Comanche county. Two propositions are presented and relied on by plaintiffs in error for a reversal: First, it is contended that the court was without authority to decree a partition of the property involved, which was personalty and held in common by the defendant in error Yeoman, who was plaintiff in the court below, and the defendants Julian, Cook, and Cassin, who appear in this court as plaintiffs in error; and, second, that the plaintiff Yeoman was without sufficient title to sustain an action of partition. We shall discuss these propositions in the order stated.

Assuming, for the purpose of consideration only, that the plaintiff had title to an interest in the property, we think there can be no doubt about this absolute right to present to the court his petition for a partition thereof, or of the jurisdiction of the court to entertain it. The property involved was a set of abstract-books, and it is not claimed that they were severable and capable of being divided among the parties who were cotenants thereof. From the evidence in the case it is clear that the owners of the books were unable to agree upon a common possession and enjoyment thereof. As two or more persons cannot at the same time well use or have the actual complete possession of the same piece of personal property, and as each under the law is entitled to the exclusive enjoyment and possession of all, and none can exhibit any

claim paramount to that of his associates, courts of law are without jurisdiction to award replevin or detinue to enable one of the co-owners to take it from the possession of any other: Freeman on Cotenancy and Partition, sec. 245; Smith v. Rice, 56 Ala. 417; Frans v. Young, 24 Iowa, 375; Smith v. Dunn, 27 Ala. 315; Southworth v. Smith, 27 Conn. 365, 71 Am. Dec. 72; Young v. Adams, 14 B. Mon. 127, 58 Am. Dec. 654. The legal remedy against a cotenant of personal property seems to be limited to those cases only where it is converted or destroyed, and then the other is entitled to maintain trover for his interest: Smith & Co. v. Rice, 56 Ala. 417. Yet the title <sup>450</sup> to an undivided portion of a piece of personalty is just as complete in the party who holds it, so far as his portion is concerned, as if he owned the entire chattel. He may sell it, pledge it, mortgage it, devise it, or deal with it as with any other property which he may possess: Jones on Chattel Mortgages, 5th ed., sec. 47; Denison v. Sawyer, 95 Minn. 417, 104 N. W. 305; Frans v. Young, 24 Iowa, 375.

From the foregoing it is readily seen that it necessarily follows, so far as the legal remedy is concerned, a party may be entirely denied any and all benefit of the interest which he may have in personalty if his cotenant secures and holds the exclusive possession thereof. It follows, therefore, from the necessity of the case that his relief must be in equity, and this relief is granted by the courts under and through a suit in partition. Referring to such cases, Mr. Freeman, in his work on Cotenancy and Partition, at section 426, says: "A court of equity is competent to give relief in such cases, by decreeing a partition of the property, or a sale thereof where such partition is impracticable, and a division of the proceeds. The powers of a court of equity were conferred and exist to meet just such cases, where no adequate remedy exists at law." See, also, Smith v. Dunn, 27 Ala. 315; Godfrey v. White, 60 Mich. 443, 1 Am. St. Rep. 537, 27 N. W. 593. And this right is one that is absolute, and is not subject to question by plaintiff's cotenant (21 Am. & Eng. Ency. of Law, p. 1146; Tripp v. Riley, 15 Barb. 333), and is not affected by the fact that complainant's title may be denied by defendant: Godfrey v. White, 60 Mich. 443, 1 Am. St. Rep. 537, 27 N. W. 593; Freeman on Cotenancy and Partition, sec. 448. It is therefore seen that the court had jurisdiction to entertain the action of partition brought by plaintiff.

Nor do we regard the second proposition presented to be more difficult of solution than the one just considered. Plaintiff had a mortgage upon an undivided interest in this property. He brought foreclosure proceedings and sold the same thereunder. The mortgagor made no appearance and no objection, and is not now entering any protest as to the regularity of the foreclosure of the mortgage or the validity of the

sale of the property thereunder. <sup>451</sup> The defendants in this case were strangers to that transaction; their interests were not involved, and if plaintiff was both seller and purchaser, and the property sold was not present at the sale, if the mortgagor of the property was satisfied to so have it, these parties have no such interest as will entitle them to be heard. The sale might have been voidable as to the mortgagor or others with an interest, but the defendants, whose relationship was that of cotenants merely, had not, by virtue of that relationship alone, such an interest as would entitle them to question the sale: Jones on Chattel Mortgages, 5th ed., sec. 814; 2 Cobbey on Chattel Mortgages, sec. 1028; Cartier v. Pabst Brewing Co., 112 App. Div. 419, 98 N. Y. Supp. 516; Gaar, Scott & Co. v. Hurd, 92 Ill. 315; People v. Wiltshire, 9 Ill. App. 374; Dirks v. Humbird, 54 Md. 399; Broughton v. Atchison, 52 Ala. 62; Olcott v. Tioga Ry. Co., 27 N. Y. 546, 84 Am. Dec. 298. Nor would the lease taken subsequent to and subject to the mortgage change this rule.

The foregoing questions are the only ones raised, relied upon and argued in the brief of counsel for plaintiff in error. We have, however, carefully examined the entire case as presented by the briefs of the parties, and are satisfied that substantial justice was done on the trial, and that decree of partition rendered was without error.

The judgment of the trial court is accordingly affirmed.

All the justices concur.

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*A Cotenant of Personal Property is Entitled to Partition* (Pickering v. Moore, 67 N. H. 533, 68 Am. St. Rep. 695), though it is held adversely: Note to Nichols v. Nichols, 67 Am. Dec. 707; and a court of equity has exclusive jurisdiction, though the complainant's title is denied by the defendant: Godfrey v. White, 60 Mich. 443, 1 Am. St. Rep. 537.

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## FARMERS' BANK OF ROFF v. NICHOLS.

[25 Okl. 547, 106 Pac. 834.]

**BILLS AND NOTES—Effect of Conditional Delivery.**—If the maker of a note delivers it to the payee with the agreement that it shall not take effect until the happening of a certain contingency or the performance of a certain condition, the note never becomes operative where neither the contingency has occurred nor the condition been performed, and an action thereon by the payee or his assignee with notice cannot be maintained. (By the editor.) (p. 933.)

**BILLS AND NOTES—Collateral Agreement—Bona Fide Holder.**—A negotiable promissory note was executed in payment of the premium on some life insurance policies. At the time of the delivery of the note to payee, who was agent for the insurance company, the payee executed a written agreement that if the maker of the note within a stipulated time investigated the company and found it not

satisfactory or as represented, the note or the amount thereof in cash would be refunded to the maker by the payee. Held, that the contemporaneous agreement did not constitute the delivery of the note a conditional delivery or deny to the payee the right to transfer the same, and that one who purchased the note in due course of business, before maturity, for a valuable consideration, could recover in an action thereon, although at the time of the transfer he had notice of the contemporaneous agreement. (pp. 933, 935.)

(Syllabi by the court, except when stated to be by the editor.)

Action by the bank against Nichols. There was a judgment for defendant and plaintiff brought error.

Clinton A. Galbraith and Tom D. McKeown, for the plaintiff in error.

Duke Stone, for the defendant in error.

<sup>548</sup> HAYES, J. This is an action upon a promissory note for the sum of \$438.20, executed by defendant in error on the twentieth day of August, 1907, to one R. M. Carter, a life insurance agent, in payment of a premium on a policy of life insurance, the same being payable on January 1, 1908. After the execution of the note and before maturity thereof, it was assigned by the payee to the Farmers' Bank of Roff, plaintiff in error, who brought this action and alleged in its petition in substance the foregoing facts, and that the note is due and unpaid.

The defense relied upon by defendant in substance is: That at the time of the execution and delivery of the note by him a contract in writing was executed and delivered by the payee of said note to defendant as follows:

"I, R. M. Carter, agree to refund note given by said I. D. <sup>549</sup> Nichols, for policies No. 1124, 1125, 1126 in the Great Western Life Insurance Co. of Kansas City, Missouri, the amount of note being \$438.20, the said Carter gives said I. D. Nichols, until the first day of Jan. 1908, to investigate the said Great Western Life Insurance Co., and if not found satisfactory or as represented to be, the note for \$438.20 or the amount in cash \$438.20 shall be refunded to the said I. D. Nichols. This August the 20th, 1907."

That defendant investigated the insurance company and found the same not as represented and not satisfactory to him, and that before January 1, 1908, he gave notice of these facts to the payee. That prior to the purchase of the note by plaintiff he notified the officers of the plaintiff bank of the foregoing contract relative to said note, and exhibited said contract and the contents thereof to the officers of the bank, who conducted the transaction for it, by which the note was purchased from the payee.

The verdict of the jury and the judgment of the lower court was in favor of defendant.

Several assignments of error have been made by plaintiff in his petition and urged in its brief, but they present in substance but one question, and that is whether the plaintiff is a bona fide holder of the note sued upon. The written contemporaneous agreement relied upon by defendant in his answer is not denied. The note is negotiable in form, and that the same was assigned to plaintiff before maturity in the due course of business for value is not questioned. Whether plaintiff had notice of the contemporaneous agreement and its contents the evidence is in irreconcilable conflict, but, for the purpose of this proceeding, it must be considered that plaintiff had knowledge at the time of its purchase of the note of the contents of the agreement. The sole question to be determined is, What is the effect of the contemporaneous agreement upon the rights of plaintiff who acquired the note with knowledge of such infirmity of payee's title, if any, as existed by reason of said agreement?

It is contended by defendant, and it appears that the trial court proceeded upon the theory, that by the terms of the contemporaneous <sup>550</sup> agreement the delivery of the note by defendant to Carter was conditional, and that Carter could not become the absolute owner of the note until January 1, 1908, and not then if defendant, after having investigated the insurance company, found same not as represented and not satisfactory. The authorities hold that where the maker of a note delivers it to the payee with the agreement that it shall not take effect until the happening of a certain contingency or the performance of a certain condition, and where neither the contingency has occurred nor the condition been performed, the note never becomes operative, and an action thereon by the payee or his assignee with notice cannot be maintained: *Johnson v. First Nat. Bank of Morrison*, 24 Ill. App. 352; *Mendenhall v. Ulrich*, 94 Minn. 100, 101 N. W. 1057. See, also, *Myrich v. Purcell*, 5 Ann. Cas. 148. And this is true although the contemporaneous agreement be parol: *Graham v. Remmel*, 76 Ark. 140, 88 S. W. 899, 6 Ann. Cas. 167; *Mehlin v. Mutual Res. Fund Life Assn.*, 2 Ind. Ter. 396, 51 S. W. 1063; *Joyce on Defenses to Commercial Paper*, sec. 310. But we are unable to concur with the trial court in construing the contract in this case as imposing a condition upon the delivery of the note made by defendant to Carter that it should not become operative except upon certain contingencies. He sold the defendant some insurance policies, and took in payment of the premium thereon the note. He agreed with defendant that defendant should have a stipulated time in which to investigate the insurance company, and, if he found it not as represented or unsatisfactory, the note should be refunded to him, either by the return of the note or by payment of the amount of the note in cash. Defendant re-

ceived the policies of insurance and retained them until the latter part of November or the first part of December following the execution of the note, when, after having investigated the company, he notified Carter that he was not satisfied, and that the company was not as represented, and demanded his note be restored to him. There was not an entire failure of consideration. Defendant received the policies of insurance and retained them for a time, and his right <sup>551</sup> to have the note refunded to him was not dependent upon a return of the policies. In order to have his note refunded, all that was necessary was that he investigate the company and find that it was not satisfactory or not as represented. The note was made to Carter, and not to the company which issued the policies. The language used in the contract is, not that the note shall be returned, but, as provided in the first sentence, that Carter agrees to "refund the note." To refund a thing does not necessarily mean to return the identical property received. To refund means: "To return in payment or compensation for what has been taken; to repay; to restore": Century Dictionary and Encyclopedia, p. 5041. The agreement between these parties provides that upon certain contingencies the note parted with should be refunded to him, and provided how it should be done, to wit, either by a return of the note or by payment of the amount thereof in cash. If it had been intended by the parties that Carter should hold the note until the first day of January, 1908, and not dispose of same, it could have been by a stipulation to that effect easily so provided in the contract, and it would not have been provided that he could refund it by the return of the note or by payment in cash of the amount of the note. We think from the language of the agreement it was the intention of the parties that, upon delivery of the note to Carter, he should become the owner of the same; being negotiable, that he should have the right to transfer it if he so desired; but that if defendant, after investigating, became dissatisfied with the company, Carter should restore him to the condition in which he was before the execution of the contract, by refunding the note by a return thereof if he had not disposed of it, or by the payment of the amount of the note in cash if he had disposed of it. Any other construction of this agreement, it appears to us, would render that portion of it which provides for a refunding of the note by payment of the amount in cash meaningless. It was not contemplated that the note would be paid by the maker before the expiration of the time during which he should have the right to investigate the company, because the note matured on the date of the expiration of <sup>552</sup> that period. Defendant, by having executed and delivered to Carter a negotiable note payable to his order, must be held to have intended that it might be put in circulation by



him, and that no defenses against it existed unless this intention is rebutted by the provisions of the contemporaneous agreement, which we do not think is the case. There is no contention that plaintiff has been guilty of any bad faith in this transaction. It paid fair value for the note in question in the usual course of business before maturity. There is no evidence or contention that it is guilty of collusion in any attempted fraud. The note was purchased by plaintiff within two days after its execution, and at that time there had been no violation by Carter of his agreement, and plaintiff, of course, was without notice of any such violation. Its knowledge of the contents of the agreement at the time it purchased the note gave to it notice only of such infirmities in Carter's title as the contract itself created; for at that time no other infirmities existed which could have been discovered by inquiry.

It is not stipulated in the agreement that upon the happening of the contingencies therein provided for the note shall be invalid, in which respect the facts in this case differ from the facts in *Johnson v. First Nat. Bank of Morrison*, 24 Ill. App. 352, cited and relied upon by defendant. That was an action upon a promissory note that was given for seed oats in connection with an agreement that it was not to be paid until the crop matured, and the payee had sold for the maker a certain quantity of the oats at a stipulated price. The agreement in that case by express terms provided that the note should not be paid until the contingency provided for therein transpired, and the payee had performed the conditions imposed. The plaintiff in that case, as assignee, had notice at the time he purchased the note not only of the terms of the contemporaneous agreement, but that such agreement had been violated by the payee. The contract in the case at bar does not provide that the note shall not be paid or shall never become operative if the maker within the time fixed shall, upon investigation, become dissatisfied with the company. <sup>553</sup> It provides only for a repayment of the consideration parted with by the maker by either a return of the note or by the payment to defendant of the amount thereof in cash. And for similar reasons this case may be distinguished from *McFarland v. Sikes*, 54 Conn. 250, 1 Am. St. Rep. 111, 7 Atl. 408, wherein the note was delivered upon a contemporaneous parol agreement that it should be returned to the maker upon a certain day if he should demand it, no alternative being given by the agreement to return the note or to pay the amount of it in cash. The instrument is negotiable, and plaintiff acquired it for a valuable consideration in due course of business from one having a right to transfer it, and a new trial should have been granted.

The admission of certain evidence and an instruction given by the court have been urged as errors. The actions of the court complained of could be sustained only upon the theory that the agreement destroyed the right of Carter to negotiate the note. But, in view of the foregoing opinion as to the effects of the agreement upon the right of Carter to assign the note, we deem it unnecessary to consider separately these assignments.

The judgment of the trial court is reversed, and the cause remanded for further proceedings in accordance with this opinion.

All the justices concur.

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*A Written Contract may be Delivered upon Condition*, and it does not become a binding obligation until the condition upon which its delivery depends has been fulfilled: *McFarland v. Sikes*, 54 Conn. 250, 1 Am. St. Rep. 111. As to what constitutes a conditional oral acceptance of a negotiable instrument, see *Burns etc. Lumber Co. v. Doyle*, 71 Conn. 742, 71 Am. St. Rep. 235.

*That the Delivery of a Promissory Note was Conditional* may be shown, under some circumstances, by parol evidence: *Central Sav. Bank v. O'Connor*, 132 Mich. 578, 102 Am. St. Rep. 433, and cases cited in the cross-reference note thereto. See the note to *Hughes v. Crooker*, 128 Am. St. Rep. 609, on parol conditions in bills and notes.

Said the court in *Hunter v. First Nat. Bank*, 172 Ind. 62, 87 N. E. 737: "Evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible. A promissory note, like any other written instrument, has no legal inception or valid existence until it has been delivered in accordance with the purpose and intention of the parties, and in support of a plea denying its execution it is competent to show, as between the parties to it or others having notice, that the manual delivery of the instrument to the payee was accompanied by a condition which was never fulfilled: *Swope v. Forney*, 17 Ind. 385; *Whitcomb v. Miller*, 90 Ind. 384; *Deering Harvester Co. v. Peugh*, 17 Ind. App. 400, 45 N. E. 808; *Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. Rep. 816, 38 L. ed. 698; *Hopper v. Eiland*, 21 Ala. 714; *Graham v. Remmel*, 76 Ark. 140, 88 S. W. 899, 6 Ann. Cas. 167; *McFarland v. Sikes*, 54 Conn. 250, 1 Am. St. Rep. 111, 7 Atl. 408; *Belleville Sav. Bank v. Bornman*, 124 Ill. 200, 16 N. E. 210; *Central Sav. Bank v. O'Connor*, 132 Mich. 578, 102 Am. St. Rep. 433, 94 N. W. 11; *Ricketts v. Pendleton*, 14 Md. 320; *Watkins v. Bowers*, 119 Mass. 383; *Smith v. Mussetter*, 58 Minn. 159, 59 N. W. 995; *Higgins v. Ridgway*, 153 N. Y. 130, 47 N. E. 32; *Sweet v. Stevens*, 7 R. I. 375; *McCormick etc. Machine Co. v. Faulkner*, 7 S. D. 363, 58 Am. St. Rep. 839, 64 N. W. 163; *Wheeler & Wilson Mfg. Co. v. Briggs (Tex.)*, 18 S. W. 555; *Alexander v. Wilkes*, 11 Lea (Tenn.), 221; *Harris v. Harris*, 23 Gratt. (Va.) 737, 778; *Ewell v. Turney*, 39 Wash. 615, 81 Pac. 1047; *Johnson on Bills and Notes*, p. 151, note; *Norton on Bills and Notes*, 3d ed., p. 70."



**REED v. ROCKLIFF-GIBSON CONSTRUCTION COMPANY.**

[25 Okl. 633, 107 Pac. 168.]

**MUNICIPAL CONTRACT—Competitive Bids.**—The true intent and purpose of that part of section 4, article 1, chapter 10, page 171, Session Laws of 1907-08, which provides that, "At the time and place specified in such notice, the mayor and council shall examine all bids received, and without unnecessary delay award the contract to the lowest and best bidder," is to secure economy and protect the public from collusive contracts or favoritism or fraud, and to promote actual, honest, effective competition. (p. 941.)

**MUNICIPAL CONTRACT—Use of Patented Material for Pavement.**—Where the mayor and council of a city of the first class pass a resolution stating the material to be used in certain street improvements shall be "Hassam pavement," a patented material or process, and the notice to contractors published pursuant to said resolution contains a statement that the owner of all patents and process covering the laying of such Hassam pavement will furnish to any bidder to whom the contract may be awarded the right to lay said pavement and furnish to such bidder an expert to give proper advice as to the laying thereof, at a stipulated price, and a written offer by said owner to this effect is on file in the office of the city clerk during all the time said notice is being published and up to the time a contract for doing said work is let, such contract involving in its execution the use of such patented material or process is not invalid in the absence of actual fraud or deception. (pp. 937, 941.)

(Syllabi by the court.)

Mauntel & Stevens, for the plaintiff in error.

Horace Speed, E. W. Snoddy and Fulkerson, Graham & Smith, for the defendants in error.

**634 KANE, J.** This was a suit commenced by the plaintiff in error, plaintiff below, in the superior court of Logan county, praying for **635** a temporary injunction against the defendants in error, defendants below, enjoining them from carrying out the terms of a certain paving contract entered into between them and the city of Alva, a city of the first class. A temporary injunction was allowed by the court below, and thereafter the defendants filed a motion to dissolve the same, which motion coming on to be heard was sustained, and an order entered dissolving the temporary injunction formerly granted. To reverse the order dissolving the temporary injunction this proceeding in error was commenced in this court.

It appears from the record that the mayor and council of the city of Alva in complying with chapter 10, article 1, Oklahoma Session Laws of 1907-08, adopted a resolution stating the material to be used should be the Hassam pavement, and setting out at length specifications for the manufacture of the material and the construction of the work. Pursuant to this

resolution, a notice to paving contractors was published in words and figures as follows:

"In accordance with a resolution passed by the mayor and council of the city of Alva, Oklahoma, May 3rd, 1909. known as Resolution Number 30, sealed bids will be received and may be filed at the office of city clerk, in said city up to 8 o'clock P. M. on the 22nd day of June, 1909, for furnishing the materials and performing the work necessary in the paving, curbing, and otherwise improving the following street according to the plans and specifications now on file in the office of said city clerk: Sixth street, commonly known as College avenue, from the south side of Normal street to the new main line of the Atchison, Topeka & Santa Fe Railway Company, by preparing the roadway, by doing the necessary grading and paving, the same with a six (6) inch concrete curb, all as provided in said plans and specifications. Each bid must be accompanied by a certified check on some local bank in the sum of three (3) per cent of the amount bid, to be forfeited to the city in case the successful bidder fails to enter into a contract and give the required bond in the sum of twenty (20) per cent of the contract price, for the faithful performance of said work, and the holding of the city harmless from any and all damages that might occur. Also, the contractor will be required to give bond in the sum of fifteen (15) per cent of the contract <sup>and</sup> price as a guarantee for keeping the pavement in a state of good repair for a period of ten (10) years. The Hassam Paving Company, of Worcester, Massachusetts, is the owner of all patents and processes covering the laying of the pavement known as Hassam pavement, and the said Hassam Paving Company have filed with the city clerk of the city of Alva, Oklahoma, their agreement, in writing, to furnish to any bidder, to whom the contract may be awarded, the right to lay said pavement on the street above designated, under the patents and processes owned and controlled by said Hassam Paving Company, and said Hassam Paving Company also agreed, in writing, to furnish such bidder an expert, who will give proper advice as to the laying of said pavement, also a double Hassam grout mixer and a steam roller. The price at which such rights and services will be furnished by said Hassam Paving Company to bidders, that is to say, the price at which the right to lay said pavement on said street under said patents and processes, the services of said expert, the furnishing of said Hassam grout mixer and the said steam roller, is 42 cents per square yard for the finished pavement, and said rights and services will be furnished by said Hassam Paving Company to any and all bidders at the same stipulated price, to wit, 42 cents per square yard of finished pavement. Said agreement is on file in the office of said city clerk of Alva, Oklahoma, for the in-

spection of all bidders. At the time and place last aforesaid all bids filed in pursuance hereto, will be considered by the mayor and city council of said city of Alva. The contractor shall receive for the above work street improvement bonds according to house bill number 231, approved April 17, 1908. Said city reserves the right to reject any and all bids. This done by order of said mayor and city council, this 8th day of June, 1909."

During the time the foregoing notice was running the written offer therein referred to of the Hassam Paving Company was on file with the city clerk. On the twenty-third day of June, 1909, no other bids having been made, the bid of the defendant in error, who is not, as far as the record discloses, the owner or agent of the owner of the patented process or material, was declared to be the lowest and best bid by the mayor and city council, and on the same day the paving contract herein involved was entered into.

The contention of counsel for plaintiff in error is that this <sup>637</sup> notice for bids is repugnant to that part of section 4, article 1, chapter 10, supra, which provides that, "at the time and place specified in such notice, the mayor and council shall examine all bids received, and without unnecessary delay award the contract to the lowest and best bidder," for the reason that the selection by the city authorities of a patented process or material made competitive bidding impossible. As stated by counsel in their brief, the vital question involved is: "Can a patented material be used in carrying out the provisions of chapter 10, article 1, Laws of 1907-08?" While the contention of counsel for plaintiff in error is supported by respectable authority, the modern text-writers and a great many courts maintain that the great weight of authority and reason sustain the opposite view. In discussing what is known as the Wisconsin rule, McQuillan on Municipal Ordinances, section 554, says: "While this view has received judicial support, the tendency of the courts appears to be to adopt the opposite view."

Elliott on Roads and Streets, second edition, section 571, discusses the same proposition as follows: "The question whether a patented process can be used in the improvement of a street at the costs of the property owners has given rise to some discussion, but we think the better opinion is that it may be so used. If it were to be held otherwise, then progress might be arrested, and the property owners deprived of the best and most lasting improvement. There is, however, not a little to be said on the opposite side of the question, for if a patented process can be used, there can be no real competition. But the law as a practical science chiefly regards utility, and this consideration turns the scale."

*Hobart v. City of Detroit*, 17 Mich. 246, 97 Am. Dec. 185, seems to be the pioneer case favoring this side of the proposition. Mr. Chief Justice Cooley, who delivered the opinion of the court, says: "But it is not, I apprehend, strictly correct to say that because the patented invention which must be made use of is owned by one person exclusively, therefore no one else can be bidder. Everyone has a right to bid, and to take upon himself the risk <sup>638</sup> of being able to procure the right to make use of the invention. Certainly the showing that Smith, Cook & Co. owned the right to put down the Nicholson pavement in the city of Detroit does not go far enough to show that they alone could bid on a contract for the purpose. If that firm held the privilege of putting down the pavement for sale at a regular price per square foot or yard, the opportunity to bid for a public contract would be as much open to public competition as for any other work requiring skilled labor. For aught we know, this was the case; and we may well take notice of the fact that it is frequently by thus selling the royalty that the owners of new inventions expect to obtain their reward. . . . True, the owner may at any time withdraw the royalty from sale in order to drive hard bargains; but, if he does, the public still retain a security in the power to refuse to contract with him, . . . and to my mind it is very clear that the legislature would not intentionally have so tied up the hands of the city authorities as to preclude their making use of new and valuable inventions."

In the case at bar the owner of all patents and processes covering the laying of the Hassam pavement filed with the city clerk of Alva an agreement in writing to furnish to any bidder to whom the contracts might be awarded the right to lay said pavement, and to furnish to such bidder an expert to give proper advice as to the laying thereof and a double Hassam grout mixer and a steam roller at a stipulated price.

In *Mayor of Baltimore v. Flack*, 104 Md. 107, 64 Atl. 702, it was held that: "Whilst the courts of some of the states have held upon grounds which do not seem to us to be satisfactory that municipalities which are by their charters required to contract for materials, supplies, and public works with the lowest and best or the lowest responsible bidder are prohibited from purchasing or specifying a patented or monopolistic article or process, there is practically a unanimity upon the proposition that a contract involving in its execution the use of a patented material or process is not invalid when the contract for performing the work and furnishing the materials is let to the lowest bidder, with the understanding that the patentee would allow the use of his patent and <sup>639</sup> superintend its construction in consideration of a certain specified sum paid him by whoever secured the contract."

We think there can be no doubt that the true intent and purpose of section 4 of chapter 10, supra, was to secure economy and protect the public from collusive contracts or favoritism or fraud, and to promote actual, honest, effective competition. Indeed, such was the holding of this court in construing a statute of like import in *Hannan v. Board of Education of the City of Lawton*, 25 Okl. 372, 107 Pac. 646. But we think the law is complied with in the absence of actual fraud or deception, when specifications are submitted to competitive bidders, although some article is specified which by reason of the patent on it is in the hands or under the control of a single bidder, when the contract for performing the work and furnishing the material is let to the lowest and best bidder with the understanding that the patentee would allow the use of his patent and superintend the construction of the work for whoever secured the contract. This doctrine is sustained by *Saunders v. Iowa City*, 134 Iowa, 132, 111 N. W. 529, 9 L. R. A., N. S., 392; *La Coste v. City of New Orleans*, 119 La. 469, 44 South. 267; *Holmes v. Common Council of Detroit*, 120 Mich. 226, 77 Am. St. Rep. 587, 79 N. W. 200, 45 L. R. A. 121; *State v. Board of Commissioners of Shawnee County*, 57 Kan. 267, 45 Pac. 616; *Kilvington v. Superior*, 83 Wis. 222, 53 N. W. 487, 18 L. R. A. 45; *Bye v. Atlantic City*, 73 N. J. L. 402, 64 Atl. 1056; *Perine C. & P. Co. v. Quackenbush*, 104 Cal. 584, 38 Pac. 533; *Mayor of Baltimore v. Flack*, 104 Md. 107, 54 Atl. 702; *Dillingham v. Spartanburg*, 75 S. C. 549, 117 Am. St. Rep. 917, 56 S. E. 381, 8 L. R. A., N. S., 412, 9 Ann. Cas. 329; *Hastings v. Columbus*, 42 Ohio St. 585; *Holbrooks v. City of Toledo*, 28 Ohio C. C. 284.

The judgment of the court below is affirmed.

Hayes, Turner and Williams, JJ., concur; Dunn, C. J., being disqualified, not sitting.

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*The Letting of Public Contracts to the Lowest Responsible Bidder* is discussed in the note to *State v. Rickards*, 50 Am. St. Rep. 489; *Chippewa Bridge Co. v. City of Durand*, 122 Wis. 85, 106 Am. St. Rep. 131; *Anderson v. Fuller*, 51 Fla. 380, 120 Am. St. Rep. 170. In the absence of fraud or gross abuse, courts will not interfere with the exercise of discretion by administration boards or officers in their determination of who is the lowest responsible bidder for a municipal contract: *Inge v. Board of Public Works*, 135 Ala. 187, 93 Am. St. Rep. 20.

*Bids and Contract for Paving Streets With Patented Material* may be legally advertised for, if all the competition is permitted of which the situation allows: *Dillingham v. City Council*, 75 S. C. 549, 117 Am. St. Rep. 917.

In the case of *Hannan v. Board of Education*, 25 Okl. 372, 107 Pac. 646, the court construed section 8027 of the Compiled Laws of Oklahoma of 1909, relating to school districts in cities of the first class, and providing that "no contract involving an expenditure of more than five hundred dollars for the purpose of erecting any public buildings

or making any improvements shall be made except upon sealed proposals and to the lowest responsible bidder." The court was of the opinion that the true intent and purpose of this statute was to secure economy and to protect the public from collusive contracts, favoritism, and fraud, and to promote actual, honest, effective competition in the construction of public work by requiring of boards the presentation of a common standard previously ascertained, to the end that each proposal or bid received and considered may be in competition with all others, and to preclude the consideration and acceptance of proposals or bids on plans and specifications not open alike to all.

The court was also of the opinion that the statute contemplates that, before advertising for bids, a plan or plans open to all shall be prepared with specifications, not of a general character, but so definite and detailed as to disclose the specific thing to be undertaken. Furthermore, that the requirement of the statute that the contract shall be let to the lowest responsible bidder involves a consideration by the board of more than merely which bid was the lowest in price. It requires the ascertainment of the ability of bidders to respond in the discharge of all the obligations assumed in accordance with what is expected or may be demanded under the terms of the contract. It was also decided that a resident taxpayer, although he shows no special private interest, may invoke the interposition of a court of equity to present an illegal disposition of the money of the municipality, or the illegal creation of a debt which he, in common with the other property owners, may otherwise be compelled to pay. In connection with the question of bidders, see the note to *State v. Rickards*, 50 Am. St. Rep. 489, showing who are responsible bidders and how to enforce their rights.

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## **SUPERIOR OIL AND GAS COMPANY v. MEHLIN.**

[25 Okl. 809, 108 Pac. 545.]

**SPECIFIC PERFORMANCE—Unfair or Unjust Contract.**—Specific performance will not lie, unless the agreement is certain, fair and just in all its parts; and in such an action any element showing that the contract is unfair, unjust and against good conscience will justify the court in refusing such decree, although the contract, had it been executed, might offer no sufficient ground for cancellation. (p. 947.)

**SPECIFIC PERFORMANCE—Executory Optional Contract.**—An executory contract, which under its terms leaves it optional with one party whether or not he will proceed with the contemplated enterprise, makes the same likewise optional with the other, and specific performance will not be decreed. (p. 948.)

**OIL AND GAS LEASE—Construction in Favor of Lessor.**—A different rule of construction obtains as to oil and gas leases from that applied to ordinary leases or to other mining leases; and, owing to the peculiar nature of the mineral, and the danger of loss to the owner from drainage by surrounding wells, such leases are construed most strongly against the lessee and in favor of the lessor. (pp. 949, 950.)

**OIL AND GAS LEASE—Specific Performance.**—Defendant, an intermarried citizen, allottee, of the Cherokee Nation, June 24, 1904, executed a contract with plaintiff in which he agreed to make an oil and gas lease on his allotment in accordance with the terms and conditions required by the Secretary of the Interior, or if they be not



required, a regular oil and gas lease such as was used in the state of Kansas. Action brought for specific performance, in which the lease agreed on and sought to be enforced was shown to contain a proviso allowing plaintiff fifteen years from its execution within which to begin operations, and, for an unspecified consideration, license to extend such term indefinitely; decree by the court denied. Held not error. (pp. 948, 952.)

**EQUITY.**—The Relief Granted in Equity is such as the nature of the case, the law and the facts, demand, not at the beginning, but at the time the decree is entered in the litigation. (p. 947.)

**SPECIFIC PERFORMANCE—Compensation—Lien for Reimbursement.**—When specific performance cannot be decreed, compensation will be allowed to the extent of the purchase money actually paid upon the alleged contract, and, if the facts show that the plaintiff is entitled to have a lien declared upon the premises for reimbursement, the court may retain the case for the purpose of affording such relief, and compensation may be awarded for improvements made in good faith. (By the editor.) (p. 951.)

**SPECIFIC PERFORMANCE—Compensation on Denial of Equitable Relief.**—In a case where specific performance requiring execution of a contract is not decreed by reason of a want of equity growing out of the peculiar character of the contract involved, it is the duty of the court to retain jurisdiction of the action, and to decree compensation to the plaintiff to the extent of the money by him paid, and interest thereon, and also for all beneficial and lasting improvements which in carrying out the terms of the alleged contract he may have in good faith made upon the premises. (p. 952.)

**SPECIFIC PERFORMANCE—Compensation on Denial of Equitable Relief.**—Where, in an action for specific performance of a lease, the same is found to be of a class which will not support a decree, but there is no fraud, and plaintiff has paid a money consideration thereon, and has in good faith entered under the same and made valuable and lasting improvements, a court in denying specific performance will grant plaintiff an opportunity to establish his right to compensation from defendant, and decree the same a lien upon the premises involved. (p. 953.)

(Syllabi by the court, except when stated to be by the editor.)

Eugene B. Lawson, for the plaintiff in error.

W. H. Kornegay, for the defendant in error.

**§10** DUNN, C. J. November 6, 1906, the Superior Oil and Gas Company filed its complaint in equity against James G. Mehlin in the United States court for the northern district of the Indian Territory, sitting at Nowata, for the purpose of securing the reformation of a certain contract and its specific performance. The lower court denied plaintiff's prayer, and the cause has been brought to this court for review. For a correct understanding of the matters placed at issue and necessary for determination, we will set forth the material averments of the complaint and the answer.

**§11** In its amended complaint the plaintiff avers that on the twenty-fourth day of June, 1904, the defendant was a citizen of the United States, a white man not of Indian blood, and an adopted citizen of Cherokee Nation. That having full and

complete power and authority in the premises, he entered into the following written agreement:

“This agreement made and entered into this the 21st day of May, A. D. 1904, by and between James G. Mehlin, party of the first part, and Superior Oil & Gas Co., a corporation, duly organized and existing under the law of Arkansas, applicable to the Indian Territory, party of the second part, witnesseth: That whereas the said James G. Mehlin has filed as a duly enrolled citizen of the Cherokee Nation on the following lands: The NE/4 of SE/4 sec. 19; and the W/2 of the NW/4 of the SW/4 of sec. 20; and S/4 of the SE/4 of sec. 19. And whereas the legal rights of said Mehlin to receive the allotment of said land is not settled; it is mutually agreed as follows: That as soon as the rights of the said Mehlin are settled in his favor, he will at once make an oil and gas lease to the party of the second part, in accordance with the terms and conditions required by the Secretary of the Interior or if they be not required, a regular oil and gas lease such as is used in the state of Kansas. In the event, however, that within a reasonable time from date hereof the case has not been settled, or the party of the second part may desire to drill for oil, said Mehlin agrees to provide for filing of some one else on the land who will execute said lease.”

That under and by virtue of the terms of said contract the defendant agreed with plaintiff that he would execute to plaintiff an oil and gas lease on the lands selected in allotment by him whenever his rights as a citizen of the Cherokee Nation were fully and finally established. That at the time of entering into the said contract there was a mutual mistake made by plaintiff and defendants in describing the said lands in said contract, in this, to wit: (Herein is set out the alleged error, with a description of the lands intended to be included.) That the rights of defendant as a citizen of the Cherokee Nation were finally decided in his favor by the supreme court of the United States on the fifth day of November, A. D. 1906, and at any time thereafter the defendant <sup>812</sup> could have made a good and valid lease to plaintiff in accordance with the terms and conditions of the contract entered into on the twenty-fourth day of June, 1904. That in accordance with the terms and conditions of the said contract, plaintiff, after the rights of defendant had been settled in his favor by a decision of the supreme court of the United States, caused to be presented to defendant for his signature a regular oil and gas mining lease on commercial forms, such as is used in the state of Kansas, and which form was agreed to by the parties when the contract was entered into, covering that portion of defendant's allotment known as his surplus lands, which lease defendant refused to sign, copy of said lease being hereto attached, and marked Exhibit “B,” and made a part hereof.



Plaintiff states that said lease was drawn in conformity to the contract entered into between plaintiff and defendant on the twenty-fourth day of June, 1904, and that no objections of any kind whatsoever were made by defendant to the form of leases presented to him for his signature, or to the terms and conditions of the same.

Attached to plaintiff's amended complaint and made a part thereof are forms of all leases provided for in the contract. The plaintiff further pleads that the consideration for the making of the lease was six hundred dollars in stock in the plaintiff corporation, which it avers it delivered to, and that the same was received by, the defendant; also, three hundred dollars in cash, being the amount of money expended by defendant in the digging of a well on the premises, and that as a further consideration defendant was to receive ten per cent of the product produced under the lease.

The answer of defendant virtually admitted every averment of plaintiff's complaint, either by direct admission or by failure to controvert: Ind. Ter. Stats., sec. 3277 (Mansfield's Digest, sec. 5072); 2 Ency. of L. & P. 175. The only material elements of fact which it denied was the averment of the payment of the consideration mentioned therein, the other questions raised by the answer being almost altogether of law; there being contained therein such general averments as that the instrument created no obligation on <sup>§13</sup> the part of defendant to make an oil and gas lease, for the reason that there was no consideration for the same moving from plaintiff to defendant, and that there was no obligation provided for therein on the part of plaintiff to do anything for the benefit of the defendant. That under said demand it is wholly optional with the plaintiff to work the land for oil and gas, and that the instrument is too indefinite to create any obligation. That the same is against public policy, and that at this time it would be unjust and inequitable for the court to reform said instrument and to require said defendant to make a lease to the plaintiff; that the prevailing rate of royalty in the community at the present time far exceeds ten per cent of the product mined, and that the contract sought to be enforced was not sufficient under the statute of frauds.

The actual issues made by the pleading were in a great measure ignored and abandoned by the parties on the trial, and evidence covering the entire subject matter of the controversy, without reference to whether the same was put in issue or not, was generally without objection offered, heard and by the master and court adjudicated. The consideration as averred in the complaint was established by proof, and so found by the court, except possibly the final consideration as shown by the evidence in reference to the stock in the plaintiff company. The term of the lease, which is neither pleaded

in the complaint nor shown by the exhibit, was fixed under the evidence, and found by the court, at fifteen years. Evidence likewise showed that the defendant had, prior to the trial of the cause, entered into a lease with another concern, and that the prevailing rate of royalty and compensation for oil and gas leases was eight per cent of the product, and over two hundred dollars bonus per acre. The plaintiff, it seems, had by and through the assistance of the defendant secured a large number of leases of the defendant's relatives, and others in the immediate vicinity of his land, and on his failure and refusal, on the determination of his rights in and to his allotment, to consummate the proposed agreement to execute a lease, this suit was brought to compel it.

Defendant testified that he intended by his contract to cover <sup>814</sup> his entire allotment, and if this were all that was involved in the action, there could be no doubt that a decree for a reformation would follow as a matter of course; but, as reformation is sought solely for the purpose of securing specific performance in the execution of the lease provided for therein, the contract will not be reformed, unless the remedy of specific performance can likewise be awarded. Under these circumstances we turn to the record to ascertain whether or not specific performance of the lease contracted for will be decreed. The provisions of the contract in reference to the lease is that the same will be made in accordance with the terms and conditions required by the Secretary of the Interior, or, if they be not required, a regular oil and gas lease such as is used in the state of Kansas, and the lease to be thus made was to be executed as soon as the rights of Mehlin to his land were settled in his favor. The construction which the parties placed upon this particular portion of the contract was shown in the evidence by testimony that it was the intention to have a regular oil and gas lease such as was used in the state of Kansas, rather than one under the terms required by the Secretary of the Interior. It was asserted that it was intended to have a commercial lease instead of being bound up by rules and regulations of the Interior Department, if possible. The condition thus referred to necessarily contemplated the exercise of Mehlin's rights as they existed at the time he was called on to act; that is, if his rights were such at the time of making the lease that the law would require the sanction of the Secretary of the Interior to validate any lease made, then it was to conform thereto. On the other hand, if a commercial lease should at that time be valid, this was the kind agreed on. It is virtually conceded by counsel that at the time of the execution of this contract any valid lease made by the defendant on his homestead would require the approval of the Secretary of the Interior (see section 72, Cherokee Agreement [Act July 1, 1902, c. 1375, 32 Stat. 726];

section 131, Bledsoe's Indian Land Laws; and Act April 21, 1904, c. 1402, 33 Stat. 189), while under Act May 27, 1908, c. 199, 35 Stat. 312 (Bledsoe's Indian Land Laws, sec. 600), any and all restrictions upon the leasing by the defendant of his entire allotment were removed, <sup>815</sup> and he would at this time be able to make a lease on his homestead, as well as his surplus, without the approval of the Secretary of the Interior. While a judgment in a court of law always relates to the condition of facts as they exist at the commencement of the action, such is not the rule in equity, as here the relief administered is such as the nature of the case and the facts justify at the close of the litigation: 16 Cyc. 479; *Pennsylvania Co. v. Bond*, 99 Ill. App. 535; *Peck v. Goodberlett*, 109 N. Y. 180, 16 N. E. 350. This consideration is essential for the reason that to the complaint are attached as exhibits two forms of leases; one such as the pleader assumed and averred contained terms such as would be approved by the Secretary of the Interior, and the other a regular oil and gas lease such as is used in the state of Kansas. The removal of all restrictions on defendant and his allotment, and the agreement of the parties as manifested by the contract, the pleadings, and the evidence, leaves, then, for our consideration solely the latter lease, the execution of which we are asked to specifically decree and enforce.

Mr. Pomeroy, in his work on Equity Jurisprudence, at section 1405, says in substance that a contract to be subject to specific performance must be reasonably certain as to its subject matter, its stipulations, its purposes, its parties, and the circumstances under which it is made. It must be, in general, mutual in its obligations and in its remedy, perfectly fair, equal, and just in its terms and its circumstances, and be such that the remedy of specific performance will not be harsh or oppressive. A rule of unexceptional application is that specific performance will not be awarded unless the contract is certain, fair and just in all its parts, and any fact showing that the contract is unfair, unjust and against good conscience will justify the court in refusing such decree, although the same, if duly executed, would present no sufficient ground for cancellation, or would be enforceable at law: *Dalzell v. Dueber Watch Case Mfg. Co.*, 149 U. S. 315, 13 Sup. Ct. Rep. 886, 37 L. ed. 749; *Federal Oil Co. v. Western Oil Co.*, 112 Fed. 373. A form of a regular oil and gas lease such as was used in the state of Kansas was appended as an exhibit to the complaint, <sup>816</sup> and the terms thereof material to be here considered, relating to the time for which it was to run and the conditions under which plaintiff could be required and compelled to operate under it, are in three paragraphs, which are as follows:

"That the party of the first part, for and in consideration of one dollar (\$1.00) cash in hand paid, and the royalties, covenants, stipulations and conditions hereinafter contained, and hereby agreed to be paid, observed and performed by the party of the second part, its successors and assigns, does hereby grant, demise, lease and let unto the said party of the second part, its heirs, successors and assigns, for the term of fifteen years from the date hereof, and as long thereafter as oil or natural gas, or either of same is produced from said land by the said party of the second part, all the oil deposited and natural gas in and under the following described tract of land, lying and being within the Cherokee Nation," etc.

"The said party of the second part further covenants that it will commence operations upon the above described land within the term aforesaid, and to operate the same in good and workmanlike manner; to commit no unnecessary waste upon said land in its occupancy or use; to take good care of the same and to promptly surrender and return the premises upon the termination of this lease to the party of the first part or to whomsoever shall be lawfully entitled thereto," etc.

"It is also hereby stipulated that, in case operations as aforesaid are not commenced within the term aforesaid, the said party of the second part shall pay to the said party of the first part the sum of \$——, in advance, for each additional year such commencement is delayed from the end of the term aforesaid until a well is completed," etc.

From the foregoing it will be noted that the lessee under the terms of the lease could delay the beginning of any well upon the land described for practically fifteen years, and then if at the end of that period of time he desired to delay longer, there was a proviso allowing it (for a consideration not specifically named) to hold the land indefinitely, without beginning any operations whatsoever. Thus, while by a decree defendant might be compelled to enter into this lease, no court could under its terms exercise any power to compel the lessee to operate. Under its terms it is left entirely to <sup>817</sup> the option of the lessee to either drill for oil or gas, or not drill, and there is no forfeiture or burden provided for during this fifteen year term in which the lessee may deprive the owner of any of the benefits whatsoever of having his land exploited. The general rule in such cases is that contracts unperformed, optional as to one of the parties, are optional as to both: *Venture Oil Co. v. Fretts*, 152 Pa. 451, 25 Atl. 732; *Huggins v. Daley*, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320; *Reese v. Zinn*, 103 Fed. 97; *Federal Oil Co. v. Western Oil Co.*, 121 Fed. 674, 57 C. C. A. 428.

The favorable presumptions which are usually indulged in behalf of ordinary lessees are not enjoyed by those holding leases of the character whose enforced execution is sought by

plaintiff in this action, for the doctrine seems to be fundamental that, on account of the peculiar nature of the subject matter upon which they operate, and the danger of loss to the lessor through the movement of the oil and gas to surrounding lands, and its withdrawal from neighboring wells, oil and gas leases are construed most strongly against the lessee and in favor of the lessor: Costigan on Mining Law, sec. 127, p. 475; Bryan on Petroleum, sec. 146; 6 Pomeroy's Equity Jurisprudence, sec. 787; Donahue on Petroleum and Gas, p. 149; Thornton on the Law Relating to Oil and Gas, sec. 78; 2 Snyder on Mines, sec. 1181; Southern Ry. Co. v. Franklin & Pittsylvania Ry. Co., 96 Va. 706, 33 S. E. 485, 44 L. R. A. 297; Huggins v. Daley, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320; Venture Oil Co. v. Fretts, 152 Pa. 451, 25 Atl. 732; Berry v. Frisbie, 120 Ky. 337, 86 S. W. 558; Kelley v. Ohio Oil Co., 57 Ohio St. 317, 63 Am. St. Rep. 721, 49 N. E. 399, 39 L. R. A. 765; Munroe v. Armstrong, 96 Pa. 307.

The circuit court of appeals of the fourth circuit, in the case of Huggins v. Daley, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320, says: "There is, perhaps, no other business in which prompt performance is so essential to the rights of the parties, or delays so likely to prove injurious—no other class of contracts in which time is so much of the essence. There is no other branch of mining where greater damage is done by delay. Coal and precious <sup>818</sup> metals lie either in horizontal veins or in pockets. They remain where they are until removed. Oil and gas are the most uncertain, fluctuating, volatile, and fugitive of all mining properties. They lie far below the surface, beyond the control of human will, and beyond the reach of any legal process, whence they may flow unrestrained if the owner of adjoining land bores a well down to the strata which hold them; and there is no law which can provide adequate, or indeed any, compensation for such results. This is a matter of common knowledge, and 'courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction.' . . . In Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. ed. 328, the facts were, to some great extent, the converse of those here; but Mr. Justice Miller comments on the fluctuating character and value of this class of property, and asserts the injustice 'of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit,' and, referring to the distinction between real estate whose value is fixed, says: 'The class of property here considered is subject to the most rapid, frequent and violent fluctuations in value of anything known as property, and requires prompt action in

all who hold an option whether they will share its risks or stand clear of them (and that), no delay, for the purpose of enabling the defrauded party to speculate upon the chances which the future may give him of deciding profitably for himself whether he will abide by his bargain or rescind it, is allowed in a court of equity.' ”

Bryan on Petroleum, at page 146, speaking on the question of the light in which these leases are viewed by the courts, especially where they present elements of unfairness, whereby under their strict terms a lessee may await at lessor's risk the event of oil or gas discovery, says: “The trend of decisions touching questions of forfeiture arising out of oil and gas leases has been almost uniformly in favor of the lessor. Generally it is the lessee who is favored, and, after a substantial compliance by him with the terms of the contract, equity will not regard a technical breach. But, with mining leases, it is otherwise. This is due principally, if not entirely, to the nature of the business of mining, and more specifically oil mining; to the temptation offered the shrewd operator to purchase at a nominal <sup>\$19</sup> price the right of developing the lands, the owner of which is ignorant of their real value for any purpose, and then to hold them indefinitely should it suit his purpose, neither working them himself nor permitting another to do so. . . . But the lessee, where the instrument presents a semblance of inequalities or unfairness, will find that he has a thorny road to travel before reaching a judicial establishment of his claims.”

And at this point the supreme court of Pennsylvania, in the case of *Munroe v. Armstrong*, 96 Pa. 307, said: “In the rapid development and exhaustion of oil lands, cessation of work for nine months is a long period. Often, in far less time, the fluctuations in prices of lands and leaseholds is very great. Perhaps in no other business is prompt performance of contracts so essential to the rights of the parties, or delay by one party so likely to prove injurious to the other.”

The lease contract here sought to be enforced presents terms which precludes its favorable consideration at our hands. The principles enunciated in the foregoing authorities, to our minds, are conclusive of plaintiff's rights. Under this lease defendant would be required to turn his land over to plaintiff, so far as oil and gas exploitation was concerned, and defendant could be deprived of this valuable property right forever.

“Certainly the contract is most unfair, and it would be unconscionable for a court of equity to place the appellant in a position to forever deprive the owner of the soil of the right to use his land, or to drill for such treasures as the



earth may contain: *Munroe v. Armstrong*, 96 Pa. 307"; *Federal Oil Co. v. Western Oil Co.*, 121 Fed. 674, 57 C. C. A. 428.

Notwithstanding the fact, however, that we are unable to grant to plaintiff the primary relief for which it prays, there is no fraud shown, and there are manifest equities in its behalf which we cannot pass without noticing. Plaintiff had paid defendant money in an effort on its part to carry out the terms of the contract as it assumed them to be, and defendant has received and retained this money, and apparently has made no offer of return. In addition thereto plaintiff, with the consent of defendant, entered upon his allotment, and erected a house on the same for a residence <sup>820</sup> or office building, the exact cost of the same being uncertain. Plaintiff's petition contains a prayer for general relief, and in such cases the trend of authorities is that, where the equitable relief specifically prayed for cannot be given, the plaintiff's action will not be dismissed, but in some proper manner he will be given an opportunity to obtain relief to the extent to which he is shown a right: 16 Ency. of Pl. & Pr. 801; *Seibert v. Thompson*, 8 Kan. 65; *Martin v. Martin*, 44 Kan. 295, 24 Pac. 418. And numerous authorities support the rule that, when specific performance cannot be decreed, compensation will be allowed to the extent of the purchase money actually paid upon the alleged contract, and where in such case facts are shown entitling plaintiff to have a lien declared upon the premises for reimbursement, the court may retain the case for the purpose of affording such relief, and compensation may be awarded for improvements made in good faith: 20 Ency. of Pl. & Pr. 494, 495. The rule thus laid down finds support in many authorities: 26 Am. & Eng. Ency. of Law, p. 85; *Johnston v. Glancy*, 4 Blackf. 94, 28 Am. Dec. 45; *Hug v. Van Burkleo*, 58 Mo. 202; *Devore v. Devore*, 138 Mo. 181, 39 S. W. 68; *Fry on Specific Performance of Contracts*, 3d ed., secs. 1276-1279; and at section 1454 it is said that: "The lien is not strictly confined to a case of simple purchase; it extends to a case of a lease, and entitles an intended lessee who has entered under the contract and expended money to a lien on the lessor's interest."

Under the judgment of the court plaintiff's complaint would be dismissed. On this account we believe a new trial should be ordered.

In the consideration of a similar proposition the court of appeals of the state of New York, in the case of *Sternberger v. McGovern*, 56 N. Y. 12, said: "The remaining question is whether the general term ought not to have ordered a new trial instead of giving final judgment dismissing the complaint. It appears from the opinions that the

latter course was adopted for the reason that it appeared, upon <sup>821</sup> the trial that the plaintiffs were aware, at the time of the commencement of the action, that the defendant could not perform the contract, and that in such a case equity would not retain the suit for the purpose of awarding damages which could be recovered in an action at law. This was the rule prior to the adoption of the code: *Morss v. Elmendorf*, 11 Paige, 277. But the code authorizes the uniting of causes of action, both legal and equitable, arising out of the same transaction in the complaint: *Bradley v. Aldrich*, 40 N. Y. 504, 100 Am. Dec. 528. The facts constituting these causes of action must be stated in the complaint. The court held in that case that no facts constituting a legal cause of action were stated in the complaint, and that, as the plaintiff failed to prove the equitable cause of action stated, the complaint was properly dismissed. This shows that, when the complaint states facts giving an equitable cause of action and also a legal cause of action, arising out of the same transaction, the party is entitled to have both tried, if necessary to obtain his rights, . . . . True, the mode of trial may be different. The former must be tried by the court or a referee, unless some question or questions of fact involved are ordered by the court to be tried by jury. Either party has the right to a jury trial of the latter. This creates no practical difficulty. The one issue may be tried by the court and the other by jury if the ends of justice require the trial of both, or both may be tried by the court or a referee if the parties so desire."

There is no evidence offered, and no fact asserted, testified to, or found, upon which a conclusion of active bad faith would be justified. The money paid defendant, the improvement of his property by the construction of a house thereon, both of which were incident to and referable solely to the assumed contractual relation between the parties, were made under such circumstances that this complaint, on the denial of specific performance, ought not to be dismissed, but should be by the court retained for the adjustment of the remaining differences between the parties. It is no good reason to our minds why plaintiff should be driven out of court, and compelled to institute a new proceeding to have its manifest rights adjusted, because it asked for relief to which the facts showed it was not entitled.

The cause is therefore remanded to the district court of Nowata <sup>822</sup> county, with instructions to set aside the order denying plaintiff's motion for a new trial and take evidence upon plaintiff's claim for compensation and damages against the defendant, making any judgment, should one be obtained, a lien on the land involved. Should the pleadings herein be insufficient, amendments should be allowed, and



issues framed, with the costs of the litigation abiding and following the judgment.

All the justices concur.

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*Though Specific Performance cannot be Enforced*, where the contract is one to purchase lands, and the vendee in possession has made valuable improvements upon the faith of his purchase, the vendor may be compelled to refund the purchase money, and pay the actual value of the improvements, if the vendee is free from fault. So, if specific performance is denied because of some technical defect in a contract for the sale of land, the court may retain the bill and adjudicate and adjust any other equities which have arisen between the parties: *Chabot v. Winter Park Co.*, 54 Fla. 258, 43 Am. St. Rep. 192. To the same effect see *Jones v. Gainer*, 157 Ala. 218, 131 Am. St. Rep. 52; *Taylor v. Florida East Coast Ry. Co.*, 54 Fla. 635, 127 Am. St. Rep. 155. But it is said that where the court refusing to decree specific performance may retain the bill for the purpose of giving relief in damages, it is not bound to do so, but may dismiss the suit, leaving the plaintiff wholly to his remedy at law: *Banaghan v. Malaney*, 200 Mass. 46, 128 Am. St. Rep. 378.

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## EMMERSON v. BOTKIN.

[26 Okl. 218, 109 Pac. 531.]

**PLEADING.**—A General Demurrer to a Petition, which attempts to state several causes of action, should be overruled if any of the statements of causes of action contained in said petition are good. (p. 954.)

**PLEADING—Demurrer Sustained—Failure to Amend.**—In a case where a pleading is challenged before trial by demurrer, its language, where doubtful, will be construed against the pleader upon the ground that, as he selects the language, he should make his meaning clear, and where in such a case a demurrer is sustained on account of the insufficiency of a pleading, and no application for amendment is made, it will be presumed that the facts to justify it do not exist. (p. 956.)

**PLEADING.**—Essential Facts Necessary to be Shown in order to entitle a party to the relief demanded and to which he supposes himself entitled should be stated in the pleadings by allegation or averment, and not by way of recital. (p. 957.)

**CONTRACT FOR SERVICES—Meretricious Relation of Parties.**—An express contract for services to be rendered by a woman for a man as housekeeper and servant is valid and enforceable, although the parties entering into it live together in a state of concubinage during the time the services are being rendered, unless the contract was made in contemplation of such illicit relationship; and in a case where the claim for compensation is based on a contract and grows out of the lawful services actually rendered, and no part of the same has reference to the meretricious relationship existing between the parties, the same is enforceable. (p. 961.)

(Syllabi by the court.)

Action by Mary A. Botkin against H. S. Emmerson, administrator of Joseph D. Morris. There was a judgment for the plaintiff, and the defendant brought error.

M. D. Owen and C. A. Neeley, for the plaintiff in error.

Hoffman & Robertson, for the defendant in error.

**219** DUNN, C. J. This case presents error from the district court of Lincoln county. Defendant in error, who will hereafter be denominated "plaintiff," filed her action against H. S. Emmerson, as administrator of the estate of Joseph D. Morris, deceased, to recover on two causes of action, in the first of which she alleges that Joseph D. Morris, deceased, during his lifetime, was indebted to her for personal services as housekeeper and servant beginning November 1, 1887, and terminating on his death, March 6, 1906; that said services consisted of general housework, farmwork, nursing and caring for him during his various sicknesses, and were reasonably worth the sum of three dollars per week, or two thousand eight hundred and fifty-nine dollars. The petition then recites the death of said Morris, the appointment of Emmerson as administrator, the submission to and the allowance by him of plaintiff's claim in the sum of fourteen hundred dollars, and the rejection of said claim by the probate court. The second cause of action relates to certain services which plaintiff alleges she performed in caring for and protecting the estate of decedent, for which she prays a judgment of one hundred dollars. To this petition defendant filed a general demurrer, which was by the court overruled, to which exception was saved. Counsel insist that this demurrer should have been sustained at least to the second cause of action. The rule in reference to demurrers of this character, where there is more than one count in a petition, is stated in the case of *Hanekratt v. Hamil*, **220** 10 Okl. 219, 61 Pac. 1050, wherein the supreme court of the territory held: "A general demurrer to the whole of a petition, which contains several statements of causes of action, should be overruled if any of the statements of causes of action contained in said petition are good."

Counsel does not contend that the first cause of action is not well stated; hence no error was committed by the court in overruling the demurrer.

To this petition defendant then filed answer: First, a general denial, and, second, a plea of the statute of limitations; and in a supplemental answer stated, in substance: 2. That Mary A. Botkin, plaintiff below, formerly resided on a farm in the state of Iowa, and in a residence near the place and upon the same farm where Joseph D. Morris and his wife and family resided. That the two residences were only a short distance apart, and that the plaintiff and decedent, Morris,

became intimate with each other and for several years sustained criminal relations, each with the other, at that place. 3. That the friendly and criminal relations of the plaintiff and the deceased became so notorious as to impel Morris and his wife to separate—Morris' wife going to Illinois, where she resided upon property owned by Morris until the time of her death shortly thereafter; that the notorious relations between the plaintiff and the deceased occasioned a separation of Mrs. Botkin and her husband, whose whereabouts is unknown. 4. That Morris disposed of his farm in Iowa, and together with the plaintiff and her two children removed to Oklahoma and purchased a farm near the town of Sparks, in Lincoln county, which is now a part of the estate of the deceased of which plaintiff in error is administrator; and that afterward the deceased purchased a residence in the town of Sparks, in said county and state, and that from the time of the removal of the plaintiff and the deceased from the state of Iowa, until the recent death of said Morris, said plaintiff and deceased lived and cohabited together unlawfully and in contravention of the laws of the land and the statute in such cases made and provided; that no children were begotten and born <sup>221</sup> of this immoral relation. 5. The administrator alleges a setoff against the plaintiff by claiming that Joseph D. Morris maintained and supported her for a period of eighteen years, and did pay for and provide the sustenance and education of her two children for a period of eighteen years, and during all the said time the said Joseph D. Morris, prior to the commencement of the aforesaid action, did provide for said Mary A. Botkin and her two children all the necessities of food and clothing and comforts of life consistent with said Morris' means and station in life in the amount of, to wit, three hundred dollars per annum, during said eighteen years, aggregating in all five thousand four hundred dollars. 6. That plaintiff and deceased continued to reside together and cohabit unlawfully until the death of the said Joseph D. Morris, on the sixth day of March, 1906, at which time he died in his residence in Sparks. 7. That any contract or agreement made between the plaintiff and the said Joseph D. Morris, wherein and whereby he was to pay her, or expend on her account, any money, funds, or emoluments, whatsoever, in consideration of the immoral relation set forth in her petition, is invalid and void, as contrary to law and against public policy.

To the supplemental answer thus filed the plaintiff filed a demurrer, which was by the court sustained, except to that portion contained in paragraph 5, relating to the alleged indebtedness of plaintiff for the care, education and the maintenance of herself and children. To this ruling defendant excepted. A reply was then filed, whereupon defendant filed

an affidavit for a continuance, which was by the court denied and to which exception was saved. Trial was then had to a jury, which resulted in a verdict for the plaintiff in the amount of fourteen hundred dollars, and the case has been brought to this court for review.

The principal assignment relied on in this court is that the trial court erred in sustaining the plaintiff's demurrer to paragraphs 2, 3, 4 and 6 of the supplemental answer. It will be noted that plaintiff's first cause of action avers that Morris was indebted to her for services as housekeeper and servant, extending over the period named, and that the specific services rendered were general <sup>222</sup> housework, farmwork, and nursing and caring for the defendant during his various illnesses. The general denial filed by the defendant necessarily put in issue all of the material allegations of the petition essential for plaintiff to establish in order that she might recover. Considering this denial in conjunction with the statements contained in the answer which were stricken out, defendant probably intended to plead that the relationship existing between plaintiff and the deceased was not that of master and servant, but was an immoral relationship, and that the contract which it is alleged was entered into was for this purpose, and not for the lawful one pleaded. Counsel for defendant in his brief argues the case on the assumption that this is the effect of that portion of the supplemental answer which was stricken out. Our statute provides (Okl. Comp. Laws 1909, sec. 5655) that "in the construction of any pleading for the purpose of determining its effect, its allegations should be liberally construed with a view of substantial justice between the parties." While under this the actual allegations and averments of all pleadings must be so construed that substantial justice may be done between the parties, yet this cannot be held to require that essential averments lacking in a pleading shall be construed into it, or that a necessary averment be supplied on inferences drawn from other facts alleged unless such averment must logically and necessarily be so inferred therefrom: *Reddick v. Webb*, 6 Okl. 392, 50 Pac. 363. The supreme court of Kansas, with this same statute before it, has held that within it, where a pleading is challenged before trial by demurrer, its language, if doubtful, is construed against the pleader upon the ground that, as he selects the language, he it is who should make his meaning clear: *Beadle v. Kansas City etc. Ry. Co.*, 48 Kan. 379, 29 Pac. 696; *Draper v. Cowles*, 27 Kan. 484. It is reasonable to presume that when a pleading is challenged by a demurrer which is sustained on account of its insufficiency, if the pleader's case will admit of a further statement, he will make it, and, where he does not, that the facts to justify it do not exist. <sup>223</sup> See cases cited under the following

declaration in volume 4, Encyclopedia of Pleading and Practice, page 746: "In the construction of a pleading nothing will be assumed in favor of the pleader which has not been averred, as the law does not presume that a party's pleadings are less strong than the facts of the case will warrant."

Paragraph 7 of the answer referred to contains no averment that the contract or agreement made between the parties on which plaintiff relies in her petition was in consideration of the immoral relation referred to, or that it was an incident thereto or grew out of it, but contains merely a recital based upon an assumption not justified by any statement made either previously or in the paragraph itself, and the rule in such cases is that essential facts necessary to be shown in order to entitle a party to the relief demanded and to which he supposes himself entitled should be stated in pleadings by allegation or averment, and not by way of recital: Bliss on Code Pleading, 2d ed., sec. 318.

Taking the entire stricken portion of the answer together, nothing more is contained therein than a statement of a number of facts showing that, during the time covered by the services for which plaintiff seeks compensation, the deceased and plaintiff were living in a state of adultery, or, as counsel puts it in their brief, plaintiff was living with deceased as his housekeeper and mistress, and that she is not entitled to recover because the law will not imply any promise to pay for services of one living as housekeeper and mistress of a party. While this statement of the law is correct, yet it does not follow that the law will not enforce an express contract for services so rendered, notwithstanding the fact that outside the contract the parties were living as stated. Plaintiff's petition contained no statement as to the unlawful relationship contended for, and was sufficient in its terms to admit evidence of the express contract which was proved on the trial.

To sustain their contention, reliance is placed by counsel upon two cases: Walraven v. Jones, 1 Houst. (Del.) 355, and McDonald v. Fleming, 51 Ky. 285. The plaintiff in the case of Walraven v. Jones, as in the one at bar, claimed compensation for work and <sup>224</sup> labor as a domestic servant covering a period of twenty-seven years at the rate of three dollars per week. The man for whom she claimed to have worked died, and his administrator was made defendant. The plaintiff proved that she had performed the services alleged in decedent's family during the whole period mentioned, and that deceased had declared a short time before his death that he had provided for her in his will; but no will was discovered after his death. The defense to the action was that at the time when plaintiff entered the service of deceased, if she ever was in his employ as a domestic servant, he was a married man, and his wife and several children were living with him

as his family; that an improper intimacy existed between him and the plaintiff, on account of which his wife left him; and that this improper relationship continued until the time of his death. Under these facts, the court held that no express contract was proved, and that under the circumstances the law would imply no contract or promise to pay for her services.

The case of *McDonald v. Fleming*, 51 Ky. 285, is similar to a number of other cases found in investigating this question, but it is not in point, as in that case the plaintiff and defendant had for a number of years lived together and cohabited as husband and wife, and the rule in such cases was announced by the court that: "As she [the plaintiff] occupied the attitude of a wife without having been one, the services she performed in acting as housekeeper resulted from the position in which she had placed herself, and do not in law entitle her to any compensation."

Another similar case arose in the state of Massachusetts: *Robbins v. Potter*, 11 Allen, 588. In that case the woman offered to prove that, although she lived with defendant as his wife, the marriage was void because she had a former husband living. She sued for compensation for services which she had rendered while so living with the defendant, and the supreme court held that: "Her offer to prove that the marriage was void, because she had a former husband living at the time, and that he knew it, had no tendency to prove an agreement by him to pay for the services rendered in his family while living with him as his wife. That the pretense of being his wife was a mere cover for her adultery and bigamy, and that he was equally guilty with her, did not<sup>225</sup> make the value of the services which she rendered in that relation a debt from him to her. The facts negatived the implication of a contract. The offer to prove that the labor was performed without any reference to their cohabitation, and that the cohabitation did not form any part of the consideration for the labor, was unavailing, because she had already admitted that it was for the work done in his family while thus living with him."

This same case was again before the supreme court of Massachusetts and is reported in 98 Mass. 532, and in passing on the same the court held: "There is no contract implied by law to pay for services rendered between parties living together as husband and wife."

The same principle was also enunciated in the case of *Cooper v. Cooper*, 147 Mass. 370, 9 Am. St. Rep. 721, 17 N. E. 892.

The court, having eliminated from the answer all reference to the alleged unlawful cohabitation and living together between the parties, likewise excluded all evidence in reference



to it. Evidence was admitted, however, which established an express contract between the decedent and plaintiff to pay her for such services as she was required to render, and the rule in such cases appears to be that such a contract is valid and enforceable, although the parties entering into it live together in a state of concubinage during the time the services are rendered, unless the contract was made in contemplation of such illicit relationship. In other words, if the claim for compensation arises and grows solely out of the lawful services actually rendered, and no part of the same depends on or has reference to the meretricious relationship existing between the parties, the same is enforceable; but if the relationship between the parties is brought about and exists for the purpose of unlawful and immoral association, then the fact that services are also rendered will afford no ground for recovery for their value. This rule appears to be supported by the only authorities we have found on the subject, among which we note the following: *Lytle v. Newell* (Ky.), 68 S. W. 118; *Rhodes v. Stone*, 63 Hun, 624, 17 N. Y. Supp. 561. The foregoing are declarative of the common law and support the rule we have announced, but under the civil law it <sup>226</sup> seems a contract will even be implied to sustain a claim for such services. See the following cases from Louisiana: *Simpson v. Normand*, 51 La. Ann. 1355, 26 South. 266; *Succession of Pereuilhet*, 23 La. Ann. 294, 8 Am. Rep. 595; *Viens v. Brickley*, 8 Mart., O. S. (La.), 11.

The syllabus to the case of *Lytle v. Newell* (Ky.), 68 S. W. 118, is as follows: "A contract between plaintiff and defendant, by which plaintiff undertook to render services as defendant's housekeeper for a stipulated money consideration, is valid and enforceable, though the parties live together in a state of concubinage during much of the time the services were being rendered, unless the contract was made in contemplation of such illicit relationship."

In the case from the supreme court of New York (*Rhodes v. Stone*, 63 Hun, 624, 17 N. Y. Supp. 561), the plaintiff brought action against the administrator of the estate of a man for whom she claimed to have worked for over thirty years. The court allowed recovery notwithstanding the fact that the parties had lived and cohabited together apparently as husband and wife, and were known and recognized as such by their neighbors and acquaintances, on the theory that the relationship existing between them did not preclude an express contract to pay for the services rendered, but placed the burden upon her to prove that such a contract existed, holding that "where a woman cohabits with a man, keeps house for him, and assists on the farm, in order to recover for the work and labor done, she must prove an express contract." In the consideration of the case the court said: "The respond-

ent cannot rely upon an implied agreement to pay her for her labor. Unless the evidence proves an express promise of the intestate to pay her, the verdict cannot be sustained; and, if the illicit commerce between the parties was any part of the basis of the promise to pay for respondent's labor, the agreement was void. The relations of the parties did not necessarily forbid an express contract between them that the intestate would pay respondent for her labor: *Cooper v. Cooper*, 147 Mass. 372, 9 Am. St. Rep. 721, 17 N. E. 892. There is no suggestion in the evidence that the illicit relations were to form any part of the consideration of the contract. Notwithstanding the improper manner of her life with the intestate, she was at liberty to make an <sup>227</sup> agreement with the intestate, to perform labor for him for pay. There was sufficient evidence of such an agreement to sustain the verdict of the jury."

In holding that opponent was entitled to recover notwithstanding the fact showed she lived with decedent as his mistress, the supreme court of Louisiana, in the case of *Succession of Pereuilhet*, 23 La. Ann. 294, 8 Am. Rep. 595, said: "An employer cannot pay off a female employee by robbing her of her virtue. Such a method of extinguishing an obligation is not known to the law. If concubinage had been alleged and proved to have been the motive and cause of the parties living together in the same house in the first instance, and the services in question to have been merely incidental to such a state of living, our conclusion might have been different; but such is not the allegation, much less the proof; and we certainly will not presume that such was the fact."

The evidence in the record unobjected to shows that plaintiff began her services for the deceased as his servant, but that they had never had a settlement, and it is stipulated by the parties that just prior to his death deceased requested a deed conveying to her the farm upon which they then lived and certain other property which he owned in the town of Sparks should be made and delivered to her, but that his near approach to death was such that the notary declined to have him sign and execute the instrument. She testifies that she and her husband went to work for deceased by the week, in November, 1887; that the decedent's wife left him some time in the previous June; that all parties were at that time living in Iowa. She states that the exact amount she was to receive was not agreed upon, but that decedent said that whatever she and her husband charged he would pay. They remained in Iowa for five years, moving to Oklahoma in December, 1892, she bringing with her a son and daughter. In March, 1893, they moved to a farm, where she did general housework and made garden, did the cooking, washing, sewing, ironing, scrubbing, milking, churning, and everything



belonging to a farm. When she came she brought with her about three hundred dollars which her husband gave her, which was used on the place, Morris investing some of it for her. <sup>228</sup> During the last three or four years prior to his death the deceased was feeble, and about eighteen months before he died had a stroke of paralysis, and during all of his illness she nursed and took care of him to the day of his death, at the age of seventy-one years.

There was no objection to, or denial of, the evidence given by plaintiff that her original contract with the deceased was to serve him as a domestic for such wages as she charged and as might be agreed upon between them, and, under these facts, plaintiff was entitled to recover the compensation to which she could show under her contract she was entitled. The mere fact that she may also have lived with deceased in a state condemned by law gives no license to those who are justly in her debt to deny her just deserts. Her earnings and accumulations lawfully provided for between herself and her employer are as sacredly her own, notwithstanding the alleged illicit association, even if it be true, as if she were as pure and as virtuous as any, and the estate against which she is proceeding should not be gratuitously enriched to her detriment and spoliation except in response to a legal edict, clear and uncertain.

The application for a continuance was addressed to the sound discretion of the trial court, and, as it related to evidence calculated to support the rejected portions of the answer, its denial was not error.

The judgment of the trial court is, therefore, accordingly affirmed.

All the justices concur.

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*A Demurrer to a Complaint is Properly Overruled* if the complaint contains one good cause of action: *McCook County v. Kammoss*, 7 S. D. 558, 58 Am. St. Rep. 854. So, a general demurrer to an answer should be overruled if any part of the answer presents a valid defense to the suit, either in whole or in part: *Oliphant v. Markham*, 79 Tex. 543, 23 Am. St. Rep. 363.

*Recovery Where Immoral Acts Do not Form Any Part of the Contract.*—No recovery will be allowed for the labor and services of a woman as housekeeper and mistress; but the fact that a man and woman maintain illicit relations does not preclude the woman from recovery for her labor under an express contract to pay for it, where the illicit relations did not form any part of the contract: *Note to State v. Wilson*, 117 Am. St. Rep. 512. See, further, the note to *Deeds v. Strode*, 96 Am. St. Rep. 276, 277.

**SCHOOL DISTRICT No. 39, POTTAWATOMIE COUNTY,  
v. SHELTON.**

[26 Okl. 229, 109 Pac. 67.]

**APPEAL—Failure of Defendant in Error to File Brief.**—Where plaintiff in error has completed his record and filed it in this court, and has served and filed a brief in compliance with the rules of the court, and defendant in error has neither filed a brief nor offered any excuse for such failure, the court is not required to search the record to find some theory upon which the judgment may be sustained, and, where the brief filed appears reasonably to sustain the assignments of error, the court may reverse the judgment in accordance with the prayer of the petition of plaintiff in error. (p. 962.)

**SCHOOL BOARD—Contract by Individual Members With Teacher.**—The power to make or alter contracts for a school district is vested in a board of directors, and in order to bind the district and to make or alter a valid contract in respect to the hiring of teachers, it is necessary that the members of the board act as a board in its capacity as such. In such a case the acts and declarations of individual members of the board, independent and apart, will not create a contract enforceable against the district. (pp. 963, 964.)

(Syllabi by the court.)

Action by Lettie Shelton against School District No. 39, Pottawatomie county. There was a judgment for the plaintiff, and the defendant brought error.

Dudley B. Madden and W. L. McFall, for the plaintiff in error.

**229 DUNN, C. J.** This case presents error from the county court of Pottawatomie county. Plaintiff in error within due time completed its record and filed it with its petition in error in this court, and has prepared, served and filed a brief in compliance with the <sup>230</sup> rules of this court. This brief was filed November 5, 1908, but counsel for defendant in error have filed no brief in support of the judgment obtained in the trial court, nor have they offered any excuse for their failure. In such a case the rule which we have uniformly followed in this court is that: "Where plaintiff in error has completed his record and filed it in this court, and has served and filed a brief in compliance with the rules of the court, and defendant in error has neither filed a brief nor offered any excuse for such failure, the court is not required to search the record to find some theory upon which the judgment may be sustained, and, where the brief filed appears reasonably to sustain the assignments of error, the court may reverse the judgment in accordance with the prayer of the petition of plaintiff in error": *Reeves & Co. v. Brennan*, 25 Okl. 544, 106 Pac. 959; *Buckner v. Oklahoma Nat. Bank*, 25 Okl. 472, 106 Pac. 959; *Ellis v. Outler*, 25 Okl. 469, 106 Pac. 957; *Butler v. McSpadden*, 25 Okl. 465, 107 Pac. 170.

An examination of the brief so filed appears to reasonably sustain the assignments of error made therein, and justifies us in a reversal of the case. We do not, however, reverse the case on this ground alone, but have examined with care not only the questions presented by the brief, but have read the entire record, and from it we conclude that the case should also be reversed on its merits. The action is one brought by defendant in error, a school teacher, against plaintiff in error, a school district, to recover damages for a breach of a teacher's contract. It appears that defendant in error engaged herself in a written contract to teach the district school for a term of five months, two months during the summer and the balance of the time during the fall and winter. She entered into her engagement thus made and taught the school for something like ten days, when, on being taken sick and the weather being extremely hot, she appeared before the board, drew her salary for the time served, and the board employed with her consent another teacher to complete the summer session, as it may be denominated. She had some conversation with several members of the school board at different times and places in which she contends that they agreed to permit<sup>231</sup> her to teach the winter term of three months as provided in the contract, but no evidence was offered on her part to show that any such understanding was ever made with the board of directors as a board. So that at the conclusion of the testimony offered by plaintiff, so far as the school board was concerned in its official capacity, she had abandoned her contract. The board afterward employed another teacher under another contract to teach the winter term of school, and, on her presenting herself, declined to permit her to teach, whereupon she sued for her salary under the contract. To the testimony thus tendered defendant demurred, which was by the court overruled. In this we believe the court erred.

The supreme court of Kansas, in the case of Aikman v. School District No. 16, 27 Kan. 129, said: "It is an elementary principle that when several persons are authorized to do an act of a public nature, which requires deliberation, they all should be convened, because the advice and opinions of all may be useful, though all do not unite in opinion. 'It may be that all will not concur in the conclusion, but the information and counsel of each may well affect and modify the final judgment of the body': P. & F. R. Ry. Co. v. Commissioners of Anderson Co., 16 Kan. 309. We think in view of the elementary principles applicable to the duty of a body like the school district board, consisting of several persons authorized to do acts of a public nature where the power to contract with the person seeking employment as a teacher is vested by the statute in the 'board,' that all must meet together, or be notified to meet together or have the opportunity of meeting

together, to consult over the employment of the teacher, before a contract can be legally entered into by them so as to bind the district. Certainly two members would have no right to exclude the third from consulting or acting with them, and although it is not necessary that all of the members of the board should be present at a board meeting, or that all of the members should concur in the making of the contract in order to bind the district, yet the contract should be agreed upon at a meeting of the board where all are present, or have the opportunity of being present. The reasons for requiring a board meeting for all actions requiring deliberation and judgment are manifest and manifold. Many of the reasons are stated in *P. & F. R. Ry. Co. v. Commissioners of Anderson Co.*, 16 Kan. 309. The statute does not vest <sup>232</sup> the powers of the district in three persons, but in a single board, called the district board: *Whitford v. Scott*, 14 How. Pr. (N. Y.) 302; *Lee v. Perry*, 4 Denio (N. Y.), 126; *Keeler v. Frost*, 22 Barb. (N. Y.) 400; *Story v. Furman*, 25 N. Y. 214."

From the foregoing considerations it will be seen that no binding arrangement could be entered into by the teacher with the several members of the board separate and apart, which would bind it and the district. There was no evidence offered on the part of defendant which supplied any deficiency in the evidence offered on the part of plaintiff, hence on both grounds the judgment of the court below is reversed and the case remanded.

Kane, Hayes and Turner, JJ., concur.

Williams, J., dissenting as to paragraph No. 1 of syllabus, concurs in balance of opinion.

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*The Appellate Court will not search the Record for Alleged Errors, and unless the page and line where such rulings may be found are cited in the brief, they will not be considered: Providence Washington Ins. Co. v. Wolf*, 168 Ind. 690, 120 Am. St. Rep. 395.

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## THREADGILL v. CROSS.

[26 Okl. 403, 109 Pac. 558.]

**INITIATIVE AND REFERENDUM—Mandamus to Secretary of State.**—In a mandamus proceeding to compel the Secretary of State to perform the purely ministerial duty imposed upon him by the statute and the constitution to file initiative petitions for the submission of an amendment to the constitution to a vote of the people, respondent will not be permitted, as a part of his defense, to question the validity of such proposed amendment upon the ground that it is violative of an act of Congress, the terms and conditions of which have been accepted by the state, and for that reason will be void, if adopted. (pp. 967, 974.)

**CONSTITUTIONAL LAW—Questioning Constitutionality of Statute.**—An act of the legislative department of the government is clothed with the presumption that it is valid, and its constitutionality will not be considered and determined by the courts as a hypothetical question. It is only when a decision upon its validity is necessary to the determination of the cause that the same will be considered, and not then at the instance of a stranger, but only upon the complaint of a party whom the alleged invalid act affects. (By the editor.) (pp. 967, 968.)

**CONSTITUTIONALITY OF STATUTE—Right of Officer to Question.**—An executive officer of the government has no authority to decline the performance of a purely ministerial duty which is imposed upon him by law on the ground that the law is unconstitutional. (By the editor.) (pp. 967, 970.)

(Syllabi by the court except when stated to be by the editor.)

Application by Threadgill and another for a writ of mandamus to the defendant.

Guthrie & Cardwell and Stuart, Gordon & Liedtke, for the plaintiffs.

H. T. Laughbaum and Devereux & Hildreth, for the defendant.

<sup>403</sup> HAYES, J. This is an original proceeding in this court for a writ of mandamus to the Secretary of State ordering and directing him to file certain initiative petitions requesting that a certain proposition entitled: "An act proposing an amendment to the constitution of the state of Oklahoma, by amending section 7, article 1, of the constitution, repealing the separate article of said constitution relating to prohibition, submitted by the constitutional convention to the people of the proposed state of Oklahoma at the election held on September 17, 1907, and adopted by the <sup>404</sup> people," be referred to the electors of the state for their approval or rejection, which petitions the Secretary of State has refused to file.

Respondent in his return to the alternative writ sets up as his defense and only reason why he has refused to file said initiative petitions tendered to him by the relators for filing that at the time of the admission of the territory of Oklahoma and Indian Territory to statehood the provisions of the enabling act (Act June 16, 1906, c. 3335, 34 Stat. 267) required the constitutional convention of the proposed state of Oklahoma to pass by an ordinance irrevocable provisions prohibiting the sale of liquors in that part of the state formerly Indian Territory for a period of twenty-one years, and thereafter until the people of the state should otherwise provide; that the constitutional convention did accept this provision of the enabling act by an ordinance irrevocable. For this reason he contends that the proposed amendment to the constitution, if submitted to the people and ratified by them, would be void.

He also contends it would be void for the further reason that certain treaties entered into by the United States with the Indian tribes prohibiting the sale of liquors in the territory formerly occupied by the Five Civilized Tribes are still in force in that territory, and that the acts which it is sought by this petition to require him to perform would tend to violate said treaties.

Section 3 of the act of Congress approved June 16, 1906, commonly known as the "Enabling Act" (c. 3335, pt. 1, 34 Stat. 367), required the constitutional convention of the proposed state of Oklahoma to provide in the constitution to be prepared and submitted by said convention that the manufacture, sale, barter, or giving away or otherwise furnishing, except as otherwise provided in the act, of intoxicating liquors within those parts of the proposed state known as the Indian Territory and the Osage Indian reservation and within any other parts of the said state which existed as Indian reservations on the first day of January, 1906, shall be prohibited for a period of twenty-one years from the date of <sup>405</sup> the admission of the state into the Union, and thereafter until the people of the state shall otherwise provide by amendment of the constitution and proper state legislation. Section 22 of the same act provides that the constitutional convention shall by ordinance irrevocable accept the terms and conditions of the act. The constitutional convention did accept the terms and conditions of this act as required by said section, and, in full compliance therewith, adopted as a part of the constitution section 7, article 1, which is almost in the exact language of the enabling act, relative to the prohibition of the sale of intoxicating liquors in certain parts of the state.

There is no difference between counsel upon the questions of law which this proceeding presents for our determination. Those questions are as follows: 1. Will the proposed amendment which relators seek to have referred to the people of the state for their approval or rejection be void if ratified by the people, because it is in conflict with the terms and provisions of the enabling act? 2. May respondent in this proceeding for mandamus to compel him to perform a purely ministerial duty set up as a defense that said proposed amendment will be void if ratified?

Since it will be unnecessary to determine whether the proposed amendment would be void although ratified by the electors, if it be determined that respondent may not plead as a defense the invalidity of the proposed amendment, we shall consider the second question first. Section 11, article 2, constitution (page 17, Snyder's Constitution of Oklahoma), being the first section of the Bill of Rights, declares that all political power is inherent in the people, and that they shall have the right to alter or reform the government whenever the public



good may require it; provided, such change be not repugnant to the constitution of the United States. The constitution also provides the procedure by which such alterations in the government may be made. Fifteen per centum of all the legal voters have the right to propose amendments to the constitution by petition (section 2, article 5, page 135, Snyder's Constitution), or such <sup>406</sup> change may be proposed by a majority of all members elected to each of the two houses of the legislature (section 1, article 24, page 378, Snyder's Constitution of Oklahoma); and, when any amendment proposed by either of said methods has been ratified by a majority of those voting at the election at which it is submitted, it becomes effective. When initiative petitions submitting a proposed measure to the people for their ratification or rejection are offered to the Secretary of State for filing, it is his duty to file same: Okl. Comp. Laws 1909, sec. 3678; Snyder's Const. Okl., sec. 3, art. 5, p. 146. This duty imposed upon the Secretary of State is purely ministerial, and is mandatory: *Norris v. Cross*, 25 Okl. 287, 105 Pac. 1000. About the nature of this duty there is no controversy between counsel, and can be none. The validity of the statute or of the constitutional provision which imposes upon the respondent the duty of filing initiative petitions offered by the electors of the state in the exercise of their power to amend the constitution or to initiate or refer legislative propositions is not questioned, but it is insisted that the Secretary of State, when such petitions are presented to him for filing, has the right to look to the contents of the proposed measure to be submitted to ascertain whether the same, when ratified, will be void because in violation of a compact with the federal government or of the federal constitution, or some law enacted in pursuance thereof; and if it will be void for such reason, to refuse to discharge the duty prescribed by the statute.

Whether respondent in a mandamus proceeding may set up the unconstitutionality of a statute as his defense there is some conflict among authorities. That a provision of a state constitution or a legislative enactment of a state that violates the constitution of the United States is no law at all, and binds no one, is too elementary to require argument to establish, but there is another equally well established and recognized rule that provisions of state constitutions and statutes are presumed by the court to be valid, until the contrary is made plainly to appear, and that a person who seeks to have such enactment declared unconstitutional <sup>407</sup> must show that his rights are affected by the alleged invalid act, and that he has an interest in defeating it.

Courts do not lightly declare invalid legislative enactments made by the people or by their authorized representatives. An act of the legislative department of the government is

clothed with the presumption that it is valid, and its constitutionality will not be considered and determined by the courts as a hypothetical question. It is only when a decision upon its validity is necessary to the determination of the cause that the same will be considered, and not then at the instance of a stranger, but only upon the complaint of a party whom the alleged invalid act affects: Cooley's Constitutional Limitations, 7th ed., p. 232.

In *Wellington v. Petitioners*, 16 Pick. (Mass.) 87, 26 Am. Dec. 631, Mr. Chief Justice Shaw, speaking for the supreme court of Massachusetts, said: "Prima facie, and upon the face of the act itself, nothing will generally appear to show that the act is not valid; and it is only when some person attempts to resist its operation, and calls in the aid of the judicial power to pronounce it void, as to him, his property or his rights, that the objection of unconstitutionality can be presented and sustained. Respect for the legislature, therefore, concurs with well-established principles of law in the conclusion that such an act is not void, but voidable only; and it follows, as a necessary legal inference from this position, that this ground of avoidance can be taken advantage of by those only who have a right to question the validity of the act, and not by strangers. To this extent only is it necessary to go, in order to secure and protect the rights of all persons against the unwarranted exercise of legislative power, and to this extent only, therefore, are courts of justice called on to interpose."

*County Commrs. of Franklin Co. v. State ex rel. Patton*, 24 Fla. 55, 12 Am. St. Rep. 183, 3 South. 471, was a mandamus proceeding to require the county commissioners to comply with a statute requiring them to receive and keep election returns of an election at which the question was submitted whether the sale of intoxicating liquors should be prohibited in the county. The board of county commissioners refused to receive the returns, <sup>408</sup> and attempted to defeat the action against them upon the ground that the statute imposing the duty was unconstitutional. The court said: "The duty of the commissioners being merely to receive and keep in their official custody the returns, as indicated, such duty involves no consideration by them of the legality of the election held under their call, nor does it permit them to raise before us the question of such legality as a reason for not performing their stated function; nor does its performance decide or conclude anything as to the legality of the election, but merely preserves the evidence of the actual result of the same as shown by the returns. The statute has not given, even if it could do so under our constitution, to them the power to decide any such question, nor is this a proceeding for us to decide it in, nor are the proper parties before us. As county



commissioners they are not charged with the duty of raising the question in behalf of those who may have personal interests which the enforcement of the nineteenth article of the constitution may affect. If they have such personal interests themselves, these interests do not attach to their official duties as commissioners, and cannot be permitted to stand in the way of their performance. If there be any person in Franklin county whose personal interests the enforcement of such article affects, the county commissioners are not the tribunal authorized to pass upon either the validity of the act or the legality of its enforcement. The validity of such act, and of the proceedings thereunder, will be considered when parties having interests affected by either are before us."

In *Commonwealth v. James*, 135 Pa. 480, 19 Atl. 950, respondent, who was clerk of the court of quarter sessions, was compelled to act under the provisions of a statute authorizing the formation of school districts and file the resolution of the board of school directors accepting the provisions of the act, and the court refused to permit him in his defense to question the constitutionality of the act making it his duty to perform such duty.

In *Jones v. Black*, 48 Ala. 540, the court said: "A party who seeks to have an act of the legislature declared unconstitutional must not only show that he is or will be injured by it, but he must also show how and in what respect he is or ~~400~~ will be injured and prejudiced by it. Injury will not be presumed. It must be shown."

In *State ex rel. New Orleans Banking Co. v. Heard*, 47 La. Ann. 1679, 18 South. 746, 47 L. R. A. 512, it was held that an executive officer of the government has no authority to decline the performance of a purely ministerial duty which is imposed upon him by law on the ground that the law is unconstitutional.

In *Thoreson v. State Board of Examiners*, 19 Utah, 18, 57 Pac. 175, the state board of examiners refused to receive, audit and allow certain claims which it had been directed to do by statute of the territory of Utah. In answer to the refusal of the board to discharge its duty upon the ground that the statute was void the court said: "To allow mere ministerial officers, who have no direct personal interest in the matter, to refuse to perform an act clearly pointed out and made their official duty by a statute, on the ground that the performance of the act would violate the constitution, would be establishing a very dangerous precedent, and one not warranted by the authorities. It would be deciding a constitutional question, affecting the right of third parties, at the instance of officers whose duties are merely ministerial, and who have no direct interest in the question, and cannot in any event be made responsible. We are of the opinion that this ground of

objection furnishes no excuse for the failure of the board to perform a plain ministerial duty prescribed by the governor and legislative assembly of the state, and that we are not authorized to pass upon the constitutional question so raised in a proceeding by mandamus."

Among the other authorities supporting the rule of the foregoing cases may be cited the following: *Smyth v. Titcomb*, 31 Me. 273; *Wright v. Kelley*, 4 Idaho, 624, 43 Pac. 565; *People ex rel. Attorney General v. Salomon*, 54 Ill. 39; *State ex rel. Nichols v. City of New Orleans*, 41 La. Ann. 156, 6 South. 592; *Ames v. People*, 26 Colo. 83, 56 Pac. 656; *State ex rel. Dillion v. County Court*, 6 W. Va. 339, 55 S. E. 382; *Capito v. Topping*, 65 W. Va. 587, 64 S. E. 845, 22 L. R. A., N. S. 1089. In the last-mentioned case it was said: <sup>410</sup> "When a mandamus is sought to compel an officer to perform a duty enjoined by statute, the court will not generally permit the officer to ascertain that the statute is unconstitutional"; citing several cases from that court.

*Brackston County Court v. State*, 208 U. S. 192, 28 Sup. Ct. Rep. 275, 52 L. ed. 450, was a proceeding for mandamus brought by certain residents and taxpayers of Brackston county, West Virginia, to compel the county court of that county to change the assessment of property to conform to the requirements of certain acts of the legislature of that state. The county court made answer, in which one of the grounds of defense was that the act sought to be enforced impaired the obligation of contracts in violation of the federal constitution. Mr. Justice Brewer, delivering the opinion of the court, said: "It is evident that the auditor had no personal interest in the litigation. He had certain duties as a public officer to perform. The performance of those duties was of no personal benefit to him. Their nonperformance was equally so. He neither gained nor lost anything by invoking the advice of the supreme court as to the proper action he should take. He was testing the constitutionality of the law purely in the interest of third persons, viz., the taxpayers, and in this particular case the case is analogous to that of *Caffrey v. Oklahoma*, 177 U. S. 346, 20 Sup. Ct. Rep. 664, 44 L. ed. 799. We think the interest of an appellant in this court should be a personal, and not an official, interest, and that the defendant, having sought the advice of the courts of his own state in his official capacity, should be content to abide by their decisions."

There is a line of cases in which the validity of statutes have been determined in mandamus proceedings at the instance of the respondent without it having been questioned or decided that the respondent had the right to have such questions determined in that character of proceeding. The following cases belong to that class: *State ex rel. Hunt v. Meadows*, 1 Kan. 90; *Williams v. Taylor*, 83 Tex. 670, 19 S. W. 156;

**Citizens' Bank v. Wright**, 6 Ohio St. 318; **State ex rel. Eastman v. Warren County**, 17 Ohio St. 558; **Humbolt County v. Churchill County**, 6 Nev. 30.

The foregoing cases can have no application to the case at <sup>411</sup> bar, for the reason that in this case the right of respondent to question the validity of the proposed measure is questioned and opposed vigorously by relators. There are cases, however, in which the right of a respondent to question the legality of a statute as a part of his defense has been directly passed upon, and in which it is held that such right exists. Of this class of cases **Van Horn v. State ex rel. Abbott**, 46 Neb. 62, 64 N. W. 365, is a leading case. The court in that case planted its decision that an officer may refuse to perform a plain ministerial duty imposed by an unconstitutional statute upon the ground that an unconstitutional statute is no law and can bind no one. The court in that case gave no notice to and made no discussion of the other rule of law which permits courts to declare a statute unconstitutional only at the instance of a party whose rights are affected. If the rule of that case should be adopted as the law applicable to this case, the most petty ministerial officer of the state may ignore any law which he deems to be invalid; and if he happens to be an election officer, he may, upon the eve of an election, stop the machinery of a state for making effective the right of the people to amend their fundamental law or to enact any legislative provision under the initiative or referendum provisions of our constitution, because he may think the law prescribing his duty is invalid, or that the proposed measure will be invalid. We do not believe the rule of that case to be supported by the weight of authority, or by the better reason. There is a large number of cases in which the validity of a statute has been determined at the instance of the relator in a mandamus proceeding who is seeking to enforce some right which he will not be entitled to if the statute questioned is valid; but these cases may generally be distinguished from the cases which deny this right to a respondent, because of the fact that in the former class of cases the person complaining of the statute is affected in his rights or property by the statute, and he has a personal interest in having it declared invalid.

There are other cases which in effect hold that if the nature of a respondent's office is such that he is required to raise the question <sup>412</sup> of the validity of a statute imposing a duty upon him, or if his personal interest is such as will be affected by the statute, he may contest its validity in a mandamus proceeding brought to enforce the performance of the duty; but we do not deem it necessary to cite or comment upon those cases, for we do not regard them in point in the case at bar. There is nothing in the statutes of this state that expressly or by implication makes it the duty of the Secretary of State

to question the validity of any proposed legislative enactment offered by means of the initiative or referendum as an amendment to the constitution or for adoption as a statute of the state. Nor has it been shown in this case that respondent will in any way be affected in his rights or property by the proposed amendment, if it be adopted. He has no interest in the matter whatever other than that of a public officer. That interest is not such as the law recognizes as giving him the right to question the validity of the proposed measure.

There is another reason why respondent cannot be heard to complain that the proposed amendment will be invalid which involves the structure of the state government and the relation of its three several departments. One of the fundamental principles of the republican form of government as it exists in the several states of the Union is that the powers of the state government are divided into three departments, which are separate, equal and independent of each other. Section 1, article 4, page 119, Snyder's Constitution of Oklahoma, provides that the powers of the government of this state shall be divided into three separate departments, the legislative, executive and judicial, and, except as provided in the constitution, the legislative, the executive and judicial departments shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others. In the legislative department of the government is vested the power of enacting all laws. To that department is intrusted the determination of what laws shall be enacted, and what laws shall not be enacted. It must, in the first instance, determine whether a proposed measure is valid or invalid, and in doing so it will not be presumed that the members <sup>418</sup> of that department, whether they be the electors at the polls or the members of the legislature, will enact or attempt to enact legislative measures that they know are violative of the state constitution or of the federal constitution, but that they will act from patriotic motives and endeavor to adopt such laws only as will best serve the public good, keeping in mind the limitation upon their powers fixed by the constitution of the state and the federal constitution as the supreme law of the land. When such department has acted upon a proposed measure and adopted same, it thereby becomes clothed with the presumption that it is a valid enactment, and with its validity the executive and judicial departments have nothing to do, until it becomes the duty of these respective departments to participate in the construction or enforcement of such statute. The duty of determining what law shall be enacted and what law shall not be enacted rests neither upon the executive nor the judicial department. When the people of a state are engaged in proposing and adopting a constitution or amendments thereto, they are exercising a legislative power and

function of the highest order; and, while so engaged, they constitute part of the legislative department of the state: *Frantz v. Autry*, 18 Okl. 561, 91 Pac. 193; *State ex rel. Cranmer v. Thorson*, 9 S. D. 149, 68 N. W. 202, 33 L. R. A. 582. The authorities are numerous which hold that the courts cannot control by injunction or any other writ the exercise of a purely legislative or executive power, and the principle which underlies all of such decisions is stated by the court in *Wright v. Defrees*, 8 Ind. 298, to be: "The powers of the three departments are not merely equal. They are exclusive in their respective duties assigned to each. They are absolutely independent of each other."

In *State ex rel. Cranmer v. Thorson*, 9 S. D. 149, 68 N. W. 202, 33 L. R. A. 582, it was sought to enjoin the Secretary of State from certifying to the county auditors a question proposed by a joint resolution of the legislature as an amendment to the constitution, upon the ground that the submission would be inoperative. The court in the opinion said: <sup>414</sup> "Power to amend the constitution belongs exclusively to the legislature and electors. It is legislation of the most important character. This court has power to determine what such legislation is, what the constitution contains, but not what it should contain. It has power to determine what statutory laws exist, and whether or not they conflict with the constitution, but it cannot say what laws shall or shall not be enacted. It has the power, and it is its duty, whenever the question arises in the usual course of litigation, wherein the substantial rights of any actual litigant are involved, to decide whether any statute has been legally enacted, or whether any change in the constitution has been legally effected, but it will hardly be contended that it can interpose in any case to restrain the enactment of an unconstitutional law."

In the procedure for amending the constitution of this state, which can only be effected by an election thereon, it becomes necessary for the people of the state to call into their service certain of their executive officers, and require them to perform certain ministerial duties. If the placing of such duties upon such ministerial officers gives in turn to them the right and power to question the validity of any or all the amendments proposed, and to refuse to act when they decide that any such proposed measure will be invalid, then the most subordinate ministerial officer of the state having any duties to perform in connection with such an election may himself do indirectly that which he could not have, nor any other citizen of the state have the courts do by proceeding instituted for that purpose, to wit, pass upon the validity of the proposed measure and stay the election by a judicial decree, if it be determined that the proposed measure is invalid.

We have not overlooked the argument that if the proposed amendment in the case at bar will be void because in conflict with any compact between the state and Congress, authorized by the federal constitution, and if the Secretary of State may not refuse to file the petitions, a great expense will be incurred to the people of the state in holding a useless election. The same argument could be applied with equal, if not greater, force, to sustain the right of the courts to enjoin the enactment of any void act of the legislature, because it not infrequently happens that a legislature <sup>415</sup> consumes much time and incurs much expense to the state in passing laws which they think to be valid, but which the courts determine at the instance of some interested suitors whose rights have been encroached upon to be invalid. It may be that a government all of whose powers are administered by one department may be administered with less expense than a government of the kind existing in this state and in the other states of the Union, in which the powers are exercised by different departments; but, if so, it must be presumed that the people in adopting the present form of government did so with knowledge of that fact and notwithstanding preferred that the powers of their government be administered by these separate and independent departments, and that the legislative department be given power in the first instance to determine what laws shall be passed, leaving it to the other departments to question or determine the validity of such laws only when they come to be enforced against someone whose rights they affect. The people of the state in the exercise of their legislative power to amend the constitution have not yet expressed their opinion upon the proposed amendment. They will do that at the election to be held thereon. If, in the exercise of their legislative discretion, they conclude that the proposed amendment violates any valid compact with the federal government or any provision of the federal constitution, they will no doubt in the observance of the duties of good citizenship, for that reason alone, reject the measure. If, on the other hand, they determine it to be a valid measure and adopt it, then, and not until then, will the judicial and executive departments have the power and duty devolving upon them to determine its validity and enforce its provisions.

Having decided that respondent may not defend against this proceeding by questioning the validity of the proposed amendment, we refrain from expressing any opinion whatever upon what the effect of such amendment will be, if adopted. That question can and will be determined only when it is presented to this court in <sup>416</sup> the course of litigation by some litigant whose rights are involved thereby.

The peremptory writ is awarded.

All the justices concur.



*Courts must Decline to Pass upon the Constitutionality of a Statute* under consideration unless it is necessary to do so to properly dispose of the question presented for determination: *McDonnell v. De Soto Sav. etc. Assn.*, 175 Mo. 250, 97 Am. St. Rep. 592. Nor do they entertain objections to the constitutionality of a statute unless the objection is made by one whose rights have been in some way affected: *People v. McBride*, 234 Ill. 146, 123 Am. St. Rep. 82; *Bonnett v. Valliers*, 136 Wis. 193, 128 Am. St. Rep. 1061. For circumstances, however, under which a person whose rights are not affected may question the constitutionality of a statute, see *Greene v. State*, 83 Neb. 84, 131 Am. St. Rep. 626.

*Mandamus as a Remedy Against Public Officers* is discussed in the note to *State v. Gardner*, 98 Am. St. Rep. 863.

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## EDWARDS v. THRASH.

[26 Okl. 472, 109 Pac. 832.]

**MUNICIPALITY—Power to Change and Improve Streets.**—The trustees of an incorporated town or village organized under the laws of Oklahoma Territory as extended in force in the state after its erection are authorized and empowered to lay out, open, grade, and otherwise improve the streets, alleys, sewers, sidewalks, and crossings therein, and to keep them in repair, and to vacate the same. Such trustees are authorized in the exercise of such municipal authority to change the grade of a street. (pp. 976, 987.)

**MUNICIPALITY—Injunction Against Improvements Until Damages are Paid.**—The jurisdiction of equity may not generally be invoked by an abutting lot owner to restrain a municipality from making upon a street previously dedicated to public use public improvements such as paving and the construction of sidewalks, until such abutting owner has first been compensated for any consequential damages arising solely from the change of a grade. Such abutting lot owner has an adequate remedy at law for such damages. (p. 987.)

(Syllabi by the court.)

Action by Edwards against Thrash and others. There was a judgment for the defendants, and the plaintiffs brought error.

Henry Bulow, for the plaintiff in error.

A. J. Welch, for the defendants in error.

472 WILLIAMS, J. The following questions are raised on this record: (1) As to whether the trustees of an incorporated town or village in the improvement of a street are authorized in the exercise of their municipal authority to change a previously established grade of a street, and (a) will an injunction lie to prevent such change until the abutting property owner has been previously compensated for any consequential damages arising therefrom?

<sup>473</sup> Section 942, Compiled Laws of 1909 (section 610, Wilson's Revised and Annotated Statutes of Oklahoma of 1903), provides: "Any city, town or village organized under and by virtue of a special act or charter or under and by virtue of any general law of Oklahoma is hereby authorized and empowered by and through its proper municipal officers to lay out, open, grade, and otherwise improve the streets, alleys, sewers, sidewalks, and crossings therein and to keep them in repair and to vacate the same."

Paragraph 9, section 847 (section 512, Wilson's Revised and Annotated Statutes of Oklahoma of 1903), Compiled Laws of 1909, provides that the board of trustees shall have the power "to lay out, open, grade, and otherwise improve the streets, alleys, sewers, sidewalks, and crossings, and to keep them in repair and to vacate same."

Section 531, Wilson's Revised and Annotated Statutes of 1903, provides that the board of trustees (of an incorporated town) shall superintend the grading, paving, and improving of streets and the building and repairing of sidewalks.

Section 24, article 2, of the constitution of this state provides: "Private property shall not be taken or damaged for public use without just compensation. Such compensation, irrespective of any benefit from any improvements proposed, shall be ascertained by a board of commissioners of not less than three freeholders, in such manner as may be prescribed by law. The commissioners shall not be appointed by any judge or court without reasonable notice having been served upon all parties in interest. The commissioners shall be selected from the regular jury list of names prepared and made as the legislature shall provide. Any party aggrieved shall have the right of appeal, without bond, and trial by jury in a court of record. Until the compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner divested. When possession is taken of property condemned for any public use, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice to the right of either party to prosecute further proceedings for the judicial determination of the sufficiency or insufficiency of such compensation. The fee of land taken by common carriers for right of way, without the consent of the owner, shall remain in such owner subject only to the use for <sup>474</sup> which it is taken. In all cases of condemnation of private property for public or private use, the determination of the character of the use shall be a judicial question."

Section 15, article 2, of the constitution of Colorado of 1876, reads as follows: "That private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained by a board of



commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein devested; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use alleged be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.''

The only difference in the portion of this provision applicable to this case and the corresponding part of the provision of the Oklahoma constitution is the addition to the Colorado provision of the word "needlessly."

In *Denver & Santa Fe R. Co. v. Domke*, 11 Colo. 247, 17 Pac. 777, this section of the Colorado constitution was construed, wherein it is said: "We shall assume, without, however, determining the matter, that the laying of the third rail and doing the business of a standard gauge trunk line is an additional burden of servitude imposed upon the street; also, that those acts may result in injury to the abutting lot owner, for which, under the constitution, he is entitled to compensation. Should a court of equity at his suit, in view of the facts of this case, grant an injunction forbidding the acts in question? As we have already seen, the fee to Willow lane and Clark street is by law vested in the city in trust for the use of the public. It is not, and never was, in the present plaintiffs, who are purchasers of lots subsequent to the dedication of the streets. There is no evidence to show that the grants to them included the reversionary interest or reserved rights, if any such interest or rights there be, of the dedicatory in this fee. If the street should be abandoned by the municipality, or for any other reason the trust should fail, and the fee pass out of the city, it would not revert to <sup>475</sup> plaintiffs: *Gebhardt v. Reeves*, 75 Ill. 301. It follows, therefore, that the increased burden mentioned would not constitute an actual taking of plaintiff's property, though their peculiar interest in the street as abutting owners might entitle them to compensation for injuries inflicted. Besides, it is suggested that, where such a qualified fee in the city as we are now considering exists, 'the reversionary right of the owner of the fee in the surface of the street is too remote and contingent to be of any appreciable value, or to be regarded as property, which, under the constitution, is required to be paid for when its use is appropriated by the public': *Spencer v. Point Pleasant etc. R. R. Co.*, 23 W. Va. 406, and cases cited. But where the fee of an individual is not sought to be taken, though an abutting lot owner, he cannot enjoin the construc-

tion and operation of a railroad merely because the damages to his premises are not compensated in advance, provided the company act under sufficient legislative and municipal authority: 1 High on Injunctions, 2d ed., sec. 637. . . . The authority for injunctive relief in cases like the one at bar must therefore be found, if it exist at all, in the eminent domain statute. Under a statute similar to ours in this respect, and with a constitutional provision in force substantially the same as ours, with the exception of the clause last above construed, the supreme court of Illinois denied this relief to abutting owners. It is held by that court that the corresponding statutory expression directing an assessment in condemnation proceedings, or compensation for damages to property not taken, must be construed as referring 'to contiguous lands of the same owner not actually taken': *Stetson v. Chicago etc. R. R. Co.*, 75 Ill. 74; *Patterson v. Chicago etc. R. R. Co.*, 75 Ill. 588; *Peoria etc. Ry. Co. v. Schertz*, 84 Ill. 136. The reasoning of these opinions on this point is satisfactory."

Section 21 of article 2 of the constitution of Missouri of 1875 (Annotated Statutes of 1906, p. 148) is as follows: "That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein devested. The fee of land taken for railroad tracks without consent of the owner thereof shall remain in such owner, subject to the use for which it is taken."

<sup>476</sup> This provision, as far as it goes, is substantially the same as section 24, article 2, *supra*. The case of *Clemens v. Connecticut Mut. Life Ins. Co.*, 184 Mo. 46, 105 Am. St. Rep. 526, 82 S. W. 1, 67 L. R. A. 362, was an appeal from the circuit court of the city of St. Louis perpetually enjoining the defendants from changing the grade of Arkansas avenue in said city between the north line of Cherokee street and the south line of McKean avenue, and from changing the grade of the alley running from Gravois road or Gratiot avenue to Arkansas avenue through a certain block in said city. Said provision of the constitution was there considered. The case of *Denver & Santa Fe R. Co. v. Domke*, 11 Colo. 247, 17 Pac. 777, is cited and quoted with approval, and it was held "that whether plaintiff was an abutting owner or not, he was not entitled to have the improvements which were being made pursuant to an ordinance of the city and clearly within its charter powers enjoined; that plaintiff has not brought himself within any recognized head of equity jurisdiction, and,

if he has any cause of action, it is against the city for damages."

Article 156 of the constitution of Louisiana of 1879 (Const. 1898, sec. 167) is as follows: "Private property shall not be taken nor damaged for public purposes without just and adequate compensation being first paid."

In *McMahon & Perrin v. St. Louis etc. R. Co.*, 41 La. Ann. 827, 6 South. 640, it was held that "an injunction to prohibit the construction of a public work, the building of which involves no taking or invasion of plaintiff's property, but only an alleged consequential damage to its value, which is conjectural and incapable of ascertainment until after the construction, may be properly bonded, notwithstanding the provision of article 156 of the constitution." On page 830 of 41 La. Ann., on page 641 of 6 South., it is said: "Prior to the constitution of 1879 the organic law of this state, like that of all the states of this Union, simply provided that 'private property shall not be taken for public purposes without adequate compensation,' etc. Under this rule, in absence of other <sup>477</sup> special provision, a taking of the property was a condition precedent to liability and the measure of compensation due was the value of the property taken. Mere consequential damage to property, when the property itself was not taken, was not recoverable; and much less any damages resulting to individual owners, in the way of discomfort, inconvenience, loss of business, and the like, as such injuries, inasmuch as they resulted only from the exercise by another of his legal right, were *damna absque injuria*. The article 156 of the present constitution, in providing that 'private property shall not be taken nor damaged for public purposes without adequate compensation, etc.,' only extended its protecting shield over one additional injury and required compensation, not only for property taken, but also for property damaged. As in the case of a taking the measure of compensation is the value of the property taken, so in the case of damage the measure of compensation is the diminution in the value of the property. There is no warrant for extending the liability one whit beyond this. We are simply to inquire what damage has been done to the property; i. e., to its value for rental and sale. Mere consequential injuries to the owners arising from discomfort, disturbance, injury to business, and the like remain, as they were before, *damna absque injuria*, particular sacrifices which society has the right to inflict for the public good. Such is the view taken by the supreme court of the United States in applying an identical provision of the constitution of the state of Illinois. We quote from the opinion: 'The jury were instructed that although the occupant may have found it difficult to haul coal out of this lot, that did not weigh upon the question as to the value of the lot in the

market.' . . . . The scope of the charge is fairly vindicated in the following extract: 'The real question is, Has the value of the property to sell or rent been diminished by the construction of this viaduct? It may be that it cannot long be used for the purpose of a coal-yard, or for any purpose for which it has heretofore been used, but that would not be material, if it can be rented or sold at as good a price for other purposes, . . . . except that if the proof satisfies you that any of the permanent improvements put on this lot for the particular business carried on there have been impaired in value, and you can from the proof determine how much these improvements are damaged, the plaintiff would be entitled to recover for such damage to the improvements,' etc. The supreme court fully approves this <sup>478</sup> charge, which contains much more of similar import: *Chicago v. Taylor*, 125 U. S. 161, 8 Sup. Ct. Rep. 820, 31 L. ed. 638."

Section 8 of article 16 of the constitution of the state of Pennsylvania of 1873 is as follows: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction."

In *Delaware Co.'s Appeal*, 119 Pa. 159, 13 Atl. 62, "a land owner filed a bill to restrain the county commissioners from the erection of a new bridge, wholly within the lines of the old bridge and public roadway. Held, that as damages for whatever injuries were suffered were within section 8, article 16, of the constitution (Pa. 1873), and recoverable in an action at law, with sufficient security in the power of municipal taxation, the bill should be dismissed."

Section 9, article 3, constitution of West Virginia of 1872. is as follows: "Private property shall not be taken or damaged for public use, without just compensation; nor shall the same be taken by any company, incorporated for the purpose of internal improvements until just compensation shall have been paid or secured to be paid, to the owner. . . ."

In *Spencer v. Point Pleasant etc. R. R. Co.*, 23 W. Va. 406. it was held: "If a railroad company without taking the land damages it by the construction of its road, the owner of such land cannot as a matter of right enjoin said company so proceeding with the construction of its road till such damages are ascertained, and paid; for section 9 of article 3 of our constitution, while it gives a right in such case to recover of a railroad company such damages in an action at law, does not give a right to such injunction, as it does not require such damages to be paid or secured to be paid before such damages actually arise by the construction of the road." See,

also, *Ohio River R. R. Co. v. Gibbons*, 35 W. Va. 57, 12 S. E. 1093; *Ward v. Ohio River R. R. Co.*, 35 W. Va. 481, 14 S. E. 479 142; *Maxwell v. Cent. Dist. & Print. Tel. Co.*, 51 W. Va. 121, 41 S. E. 125; *Arbenz v. Wheeling & H. R. Co.*, 33 W. Va. 1, 10 S. E. 14, 5 L. R. A. 371.

Paragraph 1, section 3, article 1, constitution of Georgia of 1877, provides: "Private property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid."

In *Moore v. City of Atlanta*, 70 Ga. 611, the Illinois case hereinafter referred to was cited with approval, and the court further said: "But the stoppage of all the improvements of the city by the stern writ of injunction is another and vastly more important question. Has he or any other citizen the right absolutely to stop the entire system of grades of a whole street, or of two streets, because his property will be damaged if the contemplated improvement, in the judgement of the authorities, be carried into effect? Is it not better that one man's property be incidentally damaged than that the city authorities be absolutely prohibited from grading the streets? Is it not more in harmony with all law and reason that this be so, especially when whatever damage the one man sustains the municipality will be made to pay? It might damage the one man one thousand dollars to make the contemplated grade. It might damage the march of improvement in a great and growing city millions of money not to make it. It is therefore more equitable—better, in every sense better—to pay the one citizen his comparatively small damage than to impede the course of the city at the expense of millions, which the one citizen could not, and ought not to be asked to, pay. We do not mean to say that in this case the march of improvement would be so stopped and at such injury to the city. But the principle would embrace all cases where the private property of any one citizen would be damaged by a contemplated grade of the streets by him. He could also arrest and enjoin the city, and the result would be disastrous. An injunction granted to one must, under like circumstances, be granted to all others, and the wheels of the municipal government, so far as improvements of streets is concerned, would be most effectually blocked."

And the writ of injunction to enjoin the municipal authorities from grading or changing the grade of a street in front of the complainant's house on the ground that the grade had been fixed by the city some years before was denied: See, also, *Fleming v. City* 480 of Rome, 130 Ga. 383, 61 S. E. 5; *Brown v. Atlanta Ry. Co.*, 113 Ga. 476, 39 S. E. 71.

Section 17, article 1, constitution of Texas of 1876, is as follows: "No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate com-

pensation being made, unless by the consent of such person; and when taken, except for the use of the state, such compensation shall be first made, or secured by a deposit of money.

...  
In *Gray v. Dallas Terminal R. & Union Depot Co.*, 13 Tex. Civ. App. 158, 36 S. W. 352, it was held: "The appropriation by a railroad company of a right of way over the streets of a city under a valid city ordinance granting such privilege is not, as to damages thereby occasioned to abutting property, a taking of such property within the meaning of section 17, article 1, of the constitution, requiring that adequate compensation to the owners of property taken shall be first made or secured by deposit of money."

On page 165 of 13 Tex. Civ. App., on page 355 of 36 S. W., the court said: "This suit does not involve a question of damages, but is based purely upon the equitable remedy by injunction, . . . appellants denying the right of appellee to construct its railway along the streets named. If appellee has obtained the consent of the city council, the owners of the majority of front feet, exclusive of street intersections, being willing, it has acquired the legal right to construct and operate its road, and the question of damages to an abutting property owner is one which can be settled hereafter. The court will not enjoin merely because some one may be damaged. It is well said by Chief Justice Fuller, in the *Osborne* case, above: 'But where there is no direct taking of the estate itself, in whole or in part, and the injury complained of is the infliction of damages in respect to the complete enjoyment thereof, a court of equity must be satisfied that the threatened damage is substantial, and the remedy at law inadequate in effect, before restraint will be laid upon the progress of the public work. And if the case-made discloses only a legal right to recover damages, rather than to command compensation, the court will decline to interfere.'" And the writ of injunction was refused.

Section 13, article 2, constitution of Illinois of 1870, provides: <sup>481</sup> "Private property shall not be taken or damaged for public use without just compensation."

In the case of *Stetson v. Chicago etc. R. R. Co.*, 75 Ill. 74, this provision was construed, wherein it said: "Whatever damages, if any, the complainant has suffered, are consequential, and arise from the lawful use of the adjoining street, in which he has no interest except an easement in common with the public. The question, therefore, of most importance is whether equity will assume to enjoin the use of the railroad upon the street until the land owner's damages shall have been assessed and paid under the eminent domain law, or will be remitted to his remedy at law. . . . Manifestly, all proceedings for the condemnation of private property for public



use are at law, and accordingly the General Assembly has provided by general law how such proceedings shall be commenced and conducted: Eminent Domain Act of 1872. The mode of procedure is definitely pointed out. Where the right to take private property for the construction of any railroad or other public use or which may damage property not actually taken has been conferred upon any corporate authority, and such corporation cannot agree with the owner as to such just compensation, it is made the duty of the party authorized to take or damage such property to file a petition describing the property and asking to have the compensation assessed. What construction shall be given to the words in this act, 'which may damage property not actually taken,' involves some difficulty, unless they are understood to refer to contiguous lands of the same owner not actually taken. A portion of the land having been taken, the remainder may be damaged in consequence of the taking. Where the party, seeking to make the condemnation has not embraced all of the owner's contiguous lands not actually taken, but damaged, the owner may file a petition in the nature of a cross-petition, and have his damages for land not actually taken assessed in the same proceeding: *Mix v. L. B. M. R. R. Co.*, 67 Ill. 319. It must be in this sense the word 'damaged' is employed in the act to provide for the exercise of the right of eminent domain. The damages are direct and physical and result from taking a portion of the land. But where no portion of the land is taken, and the damages suffered are consequential, by reason of what the corporation does upon its own land or that of another, it does not seem there is any warrant for instituting proceedings for the ascertaining of such damages. <sup>482</sup> In the case at bar, one allegation in the bill is, the company denies the owner of the adjacent land has sustained any damage, and it seems absurd the company shall be required to file a petition alleging the owner has sustained damage. Without such allegation, what would there be to try? No land is sought to be condemned, and the company contest the fact of consequential damages. Where land itself is taken, it is always of some value, and that gives the court jurisdiction of the cause. It would be a singular proceeding if the corporation should file a petition alleging the owner of land in proximity to a public improvement had sustained no damage, and ask the court to adjudicate upon it." And after an exhaustive discussion of the question, the court held that there was no ground for the invoking of the jurisdiction of a court of equity, and an injunction was denied: See, also, *D. M. Osborne & Co. v. Missouri Pac. Ry. Co.*, 147 U. S. 253, 13 Sup. Ct. Rep. 299, 37 L. ed. 155, 37 Fed. 830; and *Horse Ry. Co. v. Cable Tramway Co. of Omaha (C. C.)*, 32 Fed. 730.

The only cases cited holding to the contrary are as follows: *Montgomery v. Lemle*, 121 Ala. 609, 25 South. 919; *Brown v. Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161; *Donovan v. Allert*, 11 N. D. 289, 95 Am. St. Rep. 720, 91 N. W. 441, 58 L. R. A. 775; *Searle v. City of Lead*, 10 S. D. 312, 73 N. W. 101, 39 L. R. A. 345; *McElroy v. Kansas City (C. C.)*, 21 Fed. 257.

Section 7, article 14, constitution of Alabama of 1875, which was in force at the time when said action arose, provides: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for the property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements, which compensation shall be paid before such taking, injury or destruction."

We are unable to see how a decision holding an injunction may be granted to prevent a municipality from changing the grade of a street until the injury to the abutting owner has first been assessed and paid to such owner, based on the foregoing constitutional <sup>483</sup> provision, would be in point in the consideration of such a question in this state.

Section 16, article 1, of the constitution of the state of Washington of 1889, provides: "No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner."

Section 13, article 6, constitution of South Dakota of 1889, provides: "Private property shall not be taken for public use, or damaged, without just compensation as determined by a jury, which shall be paid as soon as it can be ascertained and before possession is taken. No benefit which may accrue to the owner as a result of an improvement made by any private corporation shall be considered in fixing the compensation for property taken or damaged."

Section 14, article 1, constitution of North Dakota of 1889, is the same as section 13, article 6, constitution of South Dakota, *supra*.

It will be observed that the provisions of the constitutions of North and South Dakota and the state of Washington, as above set out, are different from that of Oklahoma, Missouri and Colorado. However, the supreme courts of Louisiana, Georgia and Pennsylvania, with constitutional provisions fully as strong, by unanimous decisions, have held that the provision requiring compensation to be first paid to the owner does not include consequential damages. It is further to be considered that in the Washington case, *Brown v. City of Seattle*, 5 Wash. 35, 32 Pac. 214, 18 L. R. A. 161, the opinion was not delivered by a unanimous court, only three judges, to wit, Stiles, Anders, and Dunbar, sustaining the majority opinion; Judges Scott



and Hoyt dissenting. The Washington and South Dakota cases were actions to enjoin the city from changing the grade of streets and the North Dakota case to prevent a telephone company from using a certain street under a franchise until the constitutional requirement in regard to compensation for damaging property for public use had been complied with. In the North Dakota case the court said: "This brings us to the real question in this case: To what public purpose were the streets originally dedicated? Is the use of <sup>484</sup> the street for telephone posts and wires within the purposes of the original dedication to the public by the original proprietors? The primary use of a street or highway is confined to travel or transportation. Whatever the means used, the object to be attained is passage over the territory embraced within the limits of the street. Whether as a pedestrian, or on a bicycle, or in a vehicle drawn by horses or other animals, or in a vehicle propelled by electricity, or in a car drawn by horses or moved by electricity, the object to be gained is moving from place to place. The same idea is expressed by courts and text-writers, that 'motion is the primary idea of the use of the street.' The defendants claim that the use of the street for telephone poles is within the use contemplated, as it facilitates the transmission of intelligence, and makes intercommunication between persons possible without the use of the street, and thus lessens travel by persons on the streets, and thereby renders travel thereon free from the annoyance and inconvenience of crowded streets. There is force in the contention, and several courts have adopted the view that the use of poles for such purposes is within the purpose of the original dedication, and therefore not a new use nor an additional burden on the street, because such use pertains to travel on the street. That it lessens travel on the street is admitted. That, however, is hardly the test. The question is: Does it lessen travel on the street by such means as cause a permanent obstruction of the street for a purpose not within the original dedication? The plaintiff is entitled to free access to his house, and to light and air for his house, without obstruction. If, for any public purpose inconsistent with the grant to the public of the use of the street, the street is obstructed in front of his lot abutting on such street, such use entitled him to compensation. If within the original purpose, and he is deprived of light or air, he is not entitled to relief or to compensation. The city had the right to authorize the defendant to construct a telephone system in the manner described, if it did not infringe upon any of the property rights of the plaintiff to the street by virtue of his ownership of the lot. Neither the city council nor the legislature could deprive the plaintiff of compensation for his property rights in such lot, if the telephone poles set thereon are not a use of the street within the purposes for

which the easement was originally conveyed to the public. The legislature cannot deprive the plaintiff of his property rights without his consent and without compensation. The constitution prohibits such taking or damaging of his property, even <sup>485</sup> for public purposes, without first procuring his consent or first compensating him. The legislature may authorize the use of the easement of the public in the street, but not to the damage of the owners of real estate fronting on such street, unless condemnation or consent or compensation is first made or given. The streets of said city were given to the public for public use."

From this reasoning it does not follow that an injunction would have been sustained by that court against a municipal corporation when changing the grade of street in making a street improvement in the lawful exercise of its municipal power.

Whilst the first clause of section 24, article 2, *supra*, provides that private property shall not be taken or damaged without just compensation, an accompanying clause in the same section provides that, until compensation shall be paid to the owner or into court for the owner, the property of the owner shall not be disturbed or the proprietary rights of the owner devested. Does this latter clause require compensation to be paid to the owner or into the court for the owner where the damages are merely consequential? The word "disturb," according to Mr. Webster, means "to interrupt a settled state of," and according to the same authority "proprietary" means "belonging or pertaining to a proprietor, considered as property, owned"; and the words "the property shall not be disturbed or the proprietary rights of the owner devested" seem to mean that possession thereof shall not be taken, nor his property taken, nor shall the title thereof be devested, until compensation therefor has been first paid to the owner or into court for the owner. This was the controlling construction in the state of Missouri at the time of the adoption of this clause in the Oklahoma constitution, and when there was no such provision in force in any other state where a contrary construction prevailed, that of the highest court of Missouri should be especially persuasive.

All the courts seem to hold that, under such constitutional provisions, consequential damages arising from the change of an established grade may be recovered by the abutting owner: See, also, Sess. Laws 1907-08, art. 1, c. 10, sec. 1, and Wils. <sup>486</sup> Rev. & Ann. Stats. 1903, sec. 443. The only difference seems to be as to whether same shall be ascertained in an eminent domain proceeding or in an action at

law for damages. The majority of the courts having passed on the question appear to hold the latter.

The first legislature of the state after its erection passed an act entitled, "An act amending section 28 of article 9 of chapter 17 of the Statutes of Oklahoma, 1893, and regulating the method of procedure in the condemnation of private property for both public and private use": Sess. Laws 1907-08, art. 1, c. 20, pp. 258, 261. Neither the eminent domain act as brought over from the territory of Oklahoma nor as thus amended provides for the assessment of consequential damages in the case of public improvements made by a municipality. This evident legislative construction of section 24 of article 2 accords with that placed on the similar provision of the Missouri constitution by the supreme court of that state. Consequential damages would be difficult to ascertain before the improvement had been made. This is one of the reasons given by many of the courts as to why it was not intended by the constitution and statute makers that provisions providing for compensation first to be made for the taking or damaging of property by virtue of eminent domain proceedings did not include consequential damages, and we agree with the supreme court of Missouri, in *Clemens v. Connecticut Mut. Life Ins. Co.*, 184 Mo. 46, 105 Am. St. Rep. 526, 82 S. W. 1, 67 L. R. A. 362, in holding that where the property of the citizen is not taken and his proprietary right not disturbed, but the damage to his property is purely consequential, he is not entitled to have same ascertained and paid before the proposed public work is done, and is not entitled to have the work done in pursuance of valid municipal and legislative authority enjoined, but his remedy is one at law for damages.

As to whether this rule will be extended to cases where the consequential damages may be occasioned other than through municipal agencies, not being involved in this case, is not determined.

The judgment of the lower court is affirmed.

All the justices concur.

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*The Power to Improve Streets*, like other legislative powers, is a continuing one, and the municipal authorities are the exclusive judges of the necessity and propriety of its exercise: *Chicago etc. R. R. Co. v. Quincy*, 136 Ill. 563, 29 Am. St. Rep. 334. As to the nonliability of a municipal corporation for consequential damages to abutting land owners, arising from grading or changing the grade of its streets, see note to *O'Brien v. Philadelphia*, 30 Am. St. Rep. 835; *Leiper v. City and County of Denver*, 36 Colo. 110, 118 Am. St. Rep. 101. For municipal liability in such cases, see *Less v. City of Butte*, 28 Mont. 27, 98 Am. St. Rep. 545.

*Injunction Against Change of Grade*: See *Clemens v. Connecticut etc. Ins. Co.*, 184 Mo. 46, 105 Am. St. Rep. 526; *Town of New Decatur*

v. Scharfenberg, 147 Ala. 367, 119 Am. St. Rep. 81. That an action for damages after the completion of the improvement is the proper remedy of one whose property is subjected merely to consequential damages, see Clemens v. Connecticut etc. Ins. Co., 184 Mo. 46, 105 Am. St. Rep. 526.

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**ALLISON v. BRYAN.**

[26 Okl. 520, 109 Pac. 934.]

**DISMISSAL—Mistake in Docketing Case.**—In the absence of a showing of prejudice, a petition filed in the office of the clerk of the district court, the object and purpose of the action being to secure the right of visitation on the part of a parent deprived of the custody of a child, will not be dismissed because entitled in, and by the clerk given, the same docket number as a former case between the same parties, which had been finally closed in that court. (p. 991.)

**PARENT AND CHILD—Custody—Jurisdiction of Court.**—The district court is a court of general jurisdiction in which jurisdiction of actions both legal and equitable is vested, and in the exercise of its equity powers it has jurisdiction to entertain, hear and determine the question of the right of visitation on the part of a parent denied the custody of a child. (p. 991.)

**PLEADING—Failure to File Reply—Waiver.**—Where a defendant voluntarily goes to trial without a reply being filed to the answer when he is not bound to do so, he is thereby held to have waived it, and is regarded as consenting to go to the proof of the answer, as if it were denied. (p. 992.)

**APPEAL—Failure to Urge Error—Waiver.**—It is essential that all points upon which counsel rely for a reversal of a cause be made in the brief and properly made; if not so made they are waived. It is not enough to assert in general terms that a ruling of the trial court is wrong; a fair effort must be made to prove that it is wrong, or the point will not be considered as having been made. (p. 993.)

**ILLEGITIMATES—Mother's Right to Custody.**—At common law, so long as the mother of an illegitimate child was living, she was entitled to its custody as against all the world. (By the editor.) (p. 993.)

**ILLEGITIMATES—Adoption—Necessity of Consent of Mother.** Under section 4900, Compiled Laws of Oklahoma of 1909, the mother of an illegitimate, unmarried minor child is entitled to its custody, service, and earnings, and under section 4919, such child cannot be adopted without her consent, if she be living and has not forfeited her rights therein, and an adoption sought to be made without her consent is not valid as to her, notwithstanding the consent of the father of the child, who, acting under section 4931, had previously received the child into his home and in a lawful manner effected its legitimation. (pp. 993, 995.)

**ILLEGITIMATES—Effect of Legitimation on Mother's Rights.** All rights on the part of the mother of an illegitimate child, consistent with its best interests, are not lost in the mere exercise by the father of his right of legitimation. (By the editor.) (p. 995.)

**ILLEGITIMATES—Legitimation by Father—Visitation by Mother.**—The mother of an illegitimate, unmarried minor child which

has been legitimated by its father under the provisions of section 4931 of the Compiled Laws of Oklahoma of 1909, does not by reason of such legitimation, where same will not conflict with the best interests of the child, forfeit the right to visit the child or to have it visit her, and failure and neglect without sufficient cause on the part of the father to observe a valid order of a court enforcing such right is punishable as a contempt, and in such a case it is no defense that his wife objected or refused to consent to his obedience to the same. (pp. 1001, 1002.)

(Syllabi by the court except when stated to be by the editor.)

Consolidated actions by Anna Bryan against Kenner Whittaker Allison, Sr. The plaintiff obtained judgments and the defendant brought error.

Milton Brown and Flynn, Ames & Chambers, for the plaintiff in error.

J. B. Dudley and Giddings & Giddings, for the defendant in error.

<sup>521</sup> DUNN, C. J. Plaintiff in error has appealed to this court two cases in which judgments have been rendered against him in the district court of Cleveland county. As they are closely associated, they have been consolidated and will be considered together. The primary facts out of which they grow are set forth and considered in the case of Allison v. Bryan, 21 Okl. 557, 97 Pac. 282, 18 L. R. A., N. S., 931, 17 Ann. Cas. 468, an opinion of this court delivered June 25, 1908, and they will not be reviewed here further than is necessary to state the subsequent acts out of which the controversies in these cases arose.

Under the judgment rendered in the opinion mentioned, exclusive custody of the child involved (a boy of tender years) was taken by Kenner Whittaker Allison, Sr. No provision or arrangement was entered into between him and the child's mother to permit her to visit it, and on August 10, 1909, she filed, as plaintiff, her petition in the district court of Cleveland county, the home of plaintiff in error, in which she charged him, as defendant, with <sup>522</sup> having had the sole custody of the child since the first day of October, 1908, and that she had never had it in her possession since that time, nor had she been permitted to see it or exercise any rights of a mother over it for a period of eleven months. That she had applied to the defendant for permission to see her said child, which was being gradually estranged from her, and that owing to its tender years, she would soon pass from its memory and become unto it as a stranger. That she had a deep affection for her offspring and a longing for permission to see and commune with it, but that unless the court made an order requiring defendant to produce the child and to permit her to visit and enjoy its society, de-

fendant would continue to refuse it. She then prayed the court to make an order requiring defendant to produce the child, and to make an order for such temporary custody as might be just and proper. This petition was by the clerk of the district court given the same number as that of the former case above referred to, which likewise arose in that court. Defendant filed a motion to strike the petition from the files, for the reason that the former case had been finally concluded by the judgment of this court, and for the further reason that plaintiff was in contempt by having unlawfully kidnaped and removed from the jurisdiction of both courts the child in question, after the rendition of judgment by the supreme court, and had taken no steps whatever to exonerate herself from the contempt involved. This motion was by the court overruled.

Thereafter, and on September 21, 1909, an answer was filed in which the defendant admitted that plaintiff was the mother of the child, and set up that he had the exclusive custody under the judgment and decree of that court, based on the facts and judgment directed and handed down by the supreme court; that the plaintiff was in contempt of both courts of which she had not purged herself, and that the best interests of the child required the exclusive custody and control of the defendant over it, and required that it be not disturbed, and that the court had no jurisdiction to grant the relief prayed for.

528 A trial was had on this petition and answer without a reply, and the court, after hearing the evidence and considering the same, rendered judgment requiring defendant to produce the said child on the first and third Sundays in each and every month thereafter at the town of Norman, Cleveland county, and deliver the child to its mother for a period of from 9 o'clock A. M. until 3:30 P. M. on each of said Sundays, in order that the said mother might have the privilege of seeing the child alone and in the absence of any other person. It was further provided that said mother should not remove the said child from the town, and in no wise attempt to prejudice the child against its father or his wife. From this judgment, proceedings in error have been duly prosecuted to this court.

After the judgment in the foregoing case had been entered, and during the time it was in force, defendant ignored the same, and on the fifth day of October, 1909, plaintiff filed her affidavit in the district court of Cleveland county, in which she recited the judgment, and that at the appointed time and on the day set she was present for the purpose of enjoying the society of her child under the order made, but that the defendant, in violation and in contempt of the order of the court, failed and refused to produce said child or



cause the same to be produced at Norman, but willfully kept said child away from said town of Norman, and from defendant. Whereupon the court made an order requiring defendant to appear on the eighth day of November, 1909, at the courthouse in Norman and show cause why he should not be punished for contempt for a violation of said order. The defendant for his answer set up that the court had no jurisdiction to make the order dated September 21, 1909, for the several reasons set forth therein. Second, he denied that he had willfully violated the previous order of the court, because of the fact that circumstances under which he had been situated since it had been rendered made it practically impossible to comply therewith. Thereafter a change of judge was asked for and allowed, and on a hearing the court entered judgment <sup>524</sup> against defendant, assessing a fine in the sum of one dollar and the costs of said proceeding.

It is first contended that the court was without jurisdiction to entertain this action, for the reason that the petition filed was by the clerk given the same number as the old case which had been finally closed. In the case of *Holt v. Holt*, 23 Okl. 639, 102 Pac. 187, the converse of this proposition was presented; the contention in that case being that the petition should have been filed in the original action, but that the clerk, although it was entitled as in the original case, had given it a separate number and filed it as an original case. This court held that this fact would not divest the court of jurisdiction to try the same, although the statute was susceptible to the construction contended for, as there was no prejudice shown to have occurred to the adverse party, and, in our judgment, the same rule is entirely applicable in the case at bar. We cannot see that had the petition been entitled differently, and filed as an original action, the issue presented would have been different, nor can we see that the trial or the rights of the parties were in any way affected by the fact that it was filed or sought to be filed in the old case, which had been finally terminated. There being no prejudice, there was no error.

The next question which is presented is that the court, independent of this fact, is without jurisdiction to entertain the case and grant the relief demanded. The action which was here brought, as is noted, was for the purpose of requiring the defendant, who had effected the legitimation of this child (*Allison v. Bryan*, 21 Okl. 557, 97 Pac. 282, 18 L. R. A., N. S., 931), to permit its natural mother to visit and have access to it. The district court is a court of general jurisdiction in which jurisdiction of actions, both legal and equitable, is vested, and in the exercise of its equity powers it would have jurisdiction to entertain, hear and determine the questions presented in this case. It is held in

the case of *Rossell v. Rossell*, 64 N. J. Eq. 21, 53 Atl. 821. that: "Under proceedings invoking the general power of the chancellor over the affairs of infants and their custody during minority, <sup>525</sup> . . . . the chancellor may, by decree or order, award the custody of an infant child of parents living in a state of separation without being divorced, to one of them, and incidentally provide for the access of the other parent to the child under proper restrictions."

The supreme court of Arkansas, in the case of *State v. Grisby*, 38 Ark. 406, says: "The jurisdiction of a court of chancery extends to the care of the person of an infant so far as necessary for his protection and education; and whenever it appears that a father is guilty of gross ill-treatment or cruelty toward his infant children, or that he is in constant habits of drunkenness and blasphemy, or low and gross debauchery, or that he professes atheistical or irreligious principles, or that his domestic relations are such as tend to the corruption and contamination of his children, or that he otherwise acts injuriously to their morals or interest, in every such case a court of chancery will interfere and deprive him of their custody and appoint them a suitable guardian to take care of them and superintend their education; and this jurisdiction is not taken away by the like power conferred by statute on the probate court." To the same effect, see *Bowles v. Dixon*, 32 Ark. 92; *In re Lundergan* (Sup.), 8 N. Y. Supp. 924; *Commonwealth v. Strickland*, 27 Pa. Super. Ct. 309; *State v. Baird*, 21 N. J. Eq. 384.

Nor is it true, as contended, that the failure to reply to the answer in the case admitted the allegations thereof, and thereby concluded the plaintiff as to the jurisdiction of the court. The case went to trial and was tried in all respects as if a reply had been filed, and the rule is that where a defendant voluntarily goes to trial without a reply when he is not bound to do so, he is thereby held to have waived it, and is regarded as consenting to go to the proof of the answer, as if it were denied: *Holt v. Holt*, 23 Okl. 639, 102 Pac. 187.

The defense set up in the motion and answer that plaintiff could not be heard in this action, because of her alleged contempt, is waived by counsel not insisting thereon and urging it in their brief. It is not claimed that any proceedings have been taken <sup>526</sup> against her or judgment had therefor, nor is there any argument or citation contained in the brief insisting thereon, and the same, if possessing any merit, is considered waived. The rule in such cases being stated by Judge Elliott, in his work on Appellate Procedure (sections 444, 445), as follows: "It is essential that all points be made in the brief, and properly made; if not so made they are waived. . . . It is not enough to assert in gen-



eral terms that a ruling of the trial court is wrong; a fair effort must be made to prove that it is wrong or the point will not be considered as having been made. Counsel cannot make a point in an appellate tribunal by a naked general assertion, for such an assertion will not be heeded. . . . But, in order to secure so much as notice of the point stated, they must support it by a fair effort, adducing arguments, and, if they can, citing authorities. A bare designation of a ruling as erroneous, without discussion, is not sufficient to entitle counsel to successfully insist that he has made a point."

We now come to the consideration of the merits of the case. To defeat the claim of right in the plaintiff to be permitted to have the right of visitation and to be permitted at reasonable intervals to enjoy the society and to see and be with her child, aside from contending that it was against the best interests of the child, defendant relies upon an alleged adoption which it is contended took place on the eighth day of December, 1905, in the probate court of Cleveland county, wherein the defendant and his wife joined in a decree of adoption, thereby making the said child, in addition to being legitimated, the child of himself and wife by adoption. And it is argued that by reason of the fact that the defendant had legitimated the child, it was no longer illegitimate, and that being its legitimate father by virtue thereof, he had the power and the right to give consent to its adoption by himself and wife. This claim, in our judgment, cannot be sustained. At common law, so long as the mother of an illegitimate child was living, she was entitled to its custody as against all the world: *Inhabitants of Petersham v. Inhabitants of Dana*, 12 Mass. 429; *Young v. State ex rel. Converse*, 53 Ind. 536; *Robalina v. Armstrong*, 15 Barb. (N. Y.) 247; *People v. Mitchell*, 44 Barb. (N. Y.) 245. <sup>527</sup> The infant was said to be the child of no one, and its putative father had no common-law right so long as the mother was living; his right attached only after her death, whereupon he became entitled as against the world to the care and custody of the child: *Pote's Appeal*, 106 Pa. 574, 51 Am. Rep. 540; *Aycock v. Hampton*, 84 Miss. 204, 105 Am. St. Rep. 424, 36 South. 245, 65 L. R. A. 689.

The common-law principles annunciated in the foregoing authorities find expression in our statute, section 4900, Compiled Laws of Oklahoma of 1909, as follows: "The mother of an illegitimate, unmarried minor is entitled to its custody, services and earnings."

This is a statutory recognition of the right of the mother in an illegitimate child, as it existed at common law, and

which cannot be denied her, except by force of some statute or by a court acting in the interest of the infant. Section 4919, Compiled Laws of Oklahoma of 1909, provides: "A legitimate child cannot be adopted without the consent of its parents, if living, nor an illegitimate child without the consent of its mother, if living, except that consent is not necessary from a father or mother deprived of civil rights or adjudged guilty of adultery, or cruelty, and for either cause divorced or adjudged to be an habitual drunkard, or who has been judiciously deprived of the custody of the child, on account of cruelty or neglect."

The mother of this child was living at the date of the alleged adoption, and it is not claimed that she gave her consent to the adoption mentioned, nor that she had ever been adjudged guilty of adultery or any of the other grounds contained in the statute. But, as is seen, it is contended, by the circuitous route mentioned and the fact that the legitimation of the child could be accomplished without the consent of the mother, that the child could then be adopted by securing the consent of the legitimating parent, and in this way validate an adoption which could not otherwise be effected.

By adoption, a child in law ceases to be the child of its natural parents; they cease to have any legal rights therein; and it no <sup>528</sup> longer owes to them any duty. So declares the statute, section 4930, Compiled Laws of Oklahoma of 1909, which is as follows: "The natural parents of a child so adopted shall be deprived by the decree of all legal rights as respects the child, and the child shall be decreed from all obligations of maintenance and obedience as respects such parents."

The statute of legitimation, section 4931, Compiled Laws of Oklahoma of 1909, contains no such terms, but provides that the father of an illegitimate child by acknowledging it as his own, etc., and treating it as if it were a legitimate child, thereby adopts it as such, and such child is thereupon deemed legitimate from the time of its birth. The word "adopts" is used in the sense of "legitimizes," and the child is legitimated rather than adopted: *Allison v. Bryan*, 21 Okl. 557, 97 Pac. 282, 18 L. R. A., N. S., 931; *Blythe v. Ayres*, 96 Cal. 532, 31 Pac. 915, 19 L. R. A. 40. The effect of such legitimation on the child is noted in a discussion contained in the case of *Pratt v. Pratt*, 5 Mo. App. 539: "A legitimate child has, from the moment of its birth until the day of its legal majority, a common-law right to a support from the father. It is entitled to bear his name, even though never acquired by common reputation. If designated in a grant or devise as the child of a named person, who is known as its father, the identification is established

and the acquisition made secure. It may inherit, not merely from the father, but from remoter ancestors and from collateral kindred. It may also be inherited from, in an ascending, descending, or collateral direction. These and other incidents are the legal insignia of legitimate birth. Bastardy has none of them. The illegitimate son is *filius nullius*. He has no claim to a support from his father, unless by statutory provision. He cannot take his father's name, or any name, except such as may be appropriated through common reputation. He can acquire nothing from a grant or devise in which he is only designated by a reference to his putative father. He cannot inherit, either from his father, or from any remoter ancestor, or from a collateral kinsman. He cannot be inherited from, except by his own descendants. All these several adjuncts or incidents, in either classification, make up the status or condition which is called legitimacy, or bastardy, as the case may be."

<sup>529</sup> Adoption, as we see, cannot be legally made where the parents of a legitimate, or the mother of an illegitimate, child are living, except through and by their consent, and while doubtless all parental rights are yielded in the case of adoption, we have found no foundation for the claim that all rights on the part of the mother of an illegitimate child, consistent with its best interests, are lost in the mere exercise by the father of his right of legitimation. The interests of the child are of first and controlling importance; some mothers of illegitimate children, considering solely their best interests, might be willing to waive all rights of every kind and character which they possessed therein in order to have them adopted and thereby enabled to enjoy the privilege of legitimate persons. Others, seemingly forgetful or indifferent to the best interests of the child, or even taking a different view, might refuse an opportunity of this character, the result of which would be to the child's detriment, and it was to provide for cases of this character that the law, in its great interest in the child's welfare, empowered the father to exercise the rights given under the legitimating statute.

But no case has been called to our attention, and a most diligent search has failed to reveal one, which has gone to the extent of holding that the father after having, against the mother's wishes and will, legitimated the child, could then further ignore the mother's affection and interest in it, and again act against her consent and effect an adoption with all its legal consequences. It is true that, acting under the statute, the father has completely legitimated the child; it now enjoys all of the rights and privileges of a legitimate child, as mentioned in the case of *Pratt v. Pratt*, 5 Mo.

App. 539, and "the father of a legitimate unmarried minor child is entitled to its custody, services and earnings" (section 4899, Compiled Laws of Oklahoma of 1909), and the reciprocal rights and duties between the father and the child are the same as those existing between legitimate parents and their legitimate children; still, as to its mother, when her rights are involved, it is an illegitimate <sup>530</sup> child, and the law is that an illegitimate minor child cannot be adopted without the mother's consent, and that which cannot be done directly cannot be done indirectly. Except for the legitimating statute, no one could have disturbed this woman's complete right of custody in and to her child, and in our judgment it would be a strained and unnatural construction of this statute and the rights of the parties under it to yield to the contention of counsel for defendant, for "the law should never receive such a construction as would tend to dry up the sources of natural affection": *Barela v. Roberts*, 34 Tex. 554. If the mother desires to give her consent to adoption, she, of course, may do so, but she cannot be lawfully stripped of her inherent right to say no.

In conjunction with the foregoing we notice the claim of counsel that the father made, executed and had recorded a deed of adoption in Kansas City, Missouri, in June, 1903. This, it is contended, was done with the consent of plaintiff, and the claim is made she thereby yielded the right she now asserts. We do not so construe this instrument; that deed was effectual merely to constitute of the infant an heir of his father, and to vest in him a right to look to him for support. This is the specific limitation contained in the deed. It contains the proviso: "With all the right as heir or devisee, and with the same rights as if he had been born to me in lawful wedlock, and with all the privilege and obligation existing between parent and child according to the provision of an act of the General Assembly of the state of Missouri, the same being chapter 90 of the Revised Statutes of Missouri of 1899, and as construed by the decision of the supreme court of Missouri in the case of *Foshburg v. Rogers*, reported in the 114th volume of the reports of the said court, at page 122 [21 S. W. 82, 19 L. R. A. 201], which act and decision expresses the intention of the parties and by which they will be governed."

An inspection of the case referred to verifies the limitation we here place on the instrument, as it related solely to the child's right of inheritance. The particular section of the statute under which this deed was executed received a construction at the hands <sup>531</sup> of the supreme court of Missouri in the case of *In the Matter of Chas. B. Clements*, 78 Mo. 352, and of its effect in reference to the rights of the natural parents the court said: "The statute in question, it

must be confessed, is quite imperfect and very unskillfully drawn, but when carefully considered, we think it will be found to contain enough to effectuate its general purpose. The first section (section 599, Revised Statutes of 1879) is complete and perfect in itself, and authorizes any person to adopt the child of another so as to make him his heir, without the consent of the parents or other person: *Reinders v. Koppelman*, 68 Mo. 499, 30 Am. Rep. 802. This the legislature, having undoubted power to enact a statute of descents, may lawfully authorize to be done. This section, it will be perceived, does not undertake to create or establish the relation of parent and child between the adopter and the adopted, further than to give the child adopted a right of inheritance to the same extent as if he or she were the child of the adopter. The privilege thereby conferred may be of no pecuniary or other benefit to the recipient until the death of the adopter. But the third section (section 601) goes further, and gives the child adopted a right during the life of the adopter to have and receive from him or her, support, maintenance, and proper and humane treatment. The devolution of these parental duties upon the adoptive father necessarily implies that he is to have the custody and control of the child adopted. But as the legislature has no power to authorize one person, whether acting from motives of charity, benevolence or caprice, to transfer to himself at his own election, the custody and control of the children of another, it is declared in the last clause of this section that 'this provision,' meaning the whole of the third section, wherein the rights, express or implied, hereinbefore mentioned, are conferred, 'shall not extend to other parties, but is wholly confined to parties executing the deed of adoption.' That is to say, parties who do not join in the deed of adoption shall not be affected by anything contained in the third section; or, to state the matter differently, the natural relations of parent and child, and the rights and duties springing therefrom, are not to be disturbed without the consent of the natural parent."

The mother was not a party to the deed, and even had she <sup>532</sup> consented to its execution, it deprived her of no right she now asserts.

We do not dissent from the law of the cases of *In re Hope*, 19 R. I. 486, 34 Atl. 998, and *Ousset v. Euvrard* (N. J. Ch.), 52 Atl. 1110, relied on by defendant. Each of these cases state the conceded proposition that the custody of the child, either legitimate or illegitimate, where a controversy arises in reference thereto, is granted wherever its best interests and welfare direct. This is virtually all that was passed on in the *Hope* case. In the *Ousset v. Euvrard* case, the

mother of certain illegitimate children, by an instrument in writing, transferred all of her interest and custody in and to them to their father, who, with the consent of his wife, had taken them into his household. He was wealthy and the children had a good home. The mother sought to set aside this instrument and take the children, remove them from the state to a tenement in New York City, where she and her husband lived, both of whom were engaged in gainful occupations for a daily livelihood. The court found specifically that the mother was unfit and the prospective home unsuited for the children, and for this and other reasons refused to set aside the instrument. For sufficient reasons and facts which are made apparent in the case, the mother was denied the custody of the children and also the right to visit them at the home of their father and his wife. The issues presented in that case and in this were likewise in other ways dissimilar, so much so that it can scarcely be considered an authority to a further extent than presenting a recognition of the conceded doctrine that the best interest of the child is the controlling element in all of these cases.

We have made an exhaustive examination of the authorities wherein the question of the right of parents to visit children whose custody had been taken from one or the other or both, and from them, without detailing the facts of each, we cull the following declarations of the rule laid down by the courts on this subject: "The privilege of visiting accorded to the mother is a plain dictate of humanity, in the absence of any reason to suppose that <sup>533</sup> the privilege would be abused to the injury of the boy. There was none in this case. The charges of immorality against the mother were not sustained. She is shown to be an industrious, hard-working woman, and a good woman, by all the witnesses, except the defendant. But had it been otherwise, the permission to visit would not be necessarily erroneous. The courts should regard the maternal instinct in the veriest trull that walks the streets, taking proper care that it do not lead to the corruption of the offspring. It is the strongest and holiest sentiment of humanity; the freest from selfishness or impurity, and often the last hope of redemption for fallen natures": *Haley v. Haley*, 44 Ark. 429.

"Under our statutes, the father is given the right to the custody of his minor children, yet this right is not an absolute legal right, beyond the control of the courts. The cardinal principle in such matters is to regard the benefit of the infant paramount to the claims of either parent. While the courts will not lightly interfere with what may be termed the 'natural rights' of parents, yet the primary object of all courts, at least in America, is to secure the welfare of the child, and not the special claims of one or the other



parent. Under the facts of this case, we cannot see that the trial court at all abused its judicial discretion in giving the custody of this infant to its mother, subject to the conditions, however, that she should not remove it from the city, and that the father should have the right to visit it at seasonable hours three times a week, and to take it to his home or for a walk or drive for five hours every Sunday. Of course, all such orders are merely provisional and temporary, and may be changed at any time when conditions change": *State v. Flint*, 63 Minn. 187, 65 N. W. 272.

"The future welfare and happiness of the child is entitled to the highest regard, if not the paramount consideration. Her worldly prospects in life are mainly dependent upon her father, and it is not to be disguised that there is great danger from the existing state of things that his natural love and regard for her may by degrees become weakened, and be followed by alienation and estrangement. The daughter is now of a suitable age to be placed at a boarding-school, under the especial charge of some lady of character; and while I cannot assent to any plan which will deprive her mother of her care, or of her society, so far as is compatible with her position in a school, yet I am persuaded that a <sup>534</sup> scheme may be framed upon that position, which will enable her father to visit her with more freedom, and with more advantage to her cherishing due respect and affection for him, than can be afforded in her present situation": *Ahrenfeldt v. Ahrenfeldt*, 4 Sand. Ch. (N. Y.) 493.

"As a matter of strict law, it cannot be denied that in this state, as at common law, the general rule is that the claim of the father to the persons of his infant children is paramount to those of the mother. This rule is so entirely axiomatic that it would be idle to cite authorities in its support. But this rule has only a subordinate application whenever a court of equity is called upon to exercise its authority in that branch of its capacity just referred to. On such an occasion it is not the dry, technical right of the father, but the welfare of the child, which will form the substantial basis of judgment. The legal right of the father will not be passed by, except when, in the opinion of the court, the well-being of the child requires such supersedure. . . . Provision should be made in the decree for the reasonable access of the parents, respectively, to the children, and a privilege should likewise be reserved that either party, in case of any material change of circumstances, should be permitted to come into court for further directions or assistance": *State v. Baird*, 21 N. J. Eq. 384.

"The general rule is that the father is entitled to the custody of his child; but the chancellor will look to the

happiness and comfort of the child, and will confide his custody to the parent whose time and attention can be best devoted to its care and welfare: See *Irwin v. Irwin*, 96 Ky. 318, 28 S. W. 664, 30 S. W. 417, and *McBride v. McBride*, 1 Bush (Ky.), 15. We are of opinion that the court did not err in awarding the custody of the child to its mother, it being of tender years and in delicate health; but the court erred in not providing in the order that the appellee, the father, should be permitted at reasonable times and places to visit and enjoy its society": *Barlow v. Barlow*, 28 Ky. Law Rep. 664, 90 S. W. 216.

"The enforcement of the prima facie right of Mrs. Smith to the custody of her minor children is resisted upon the ground of her unfitness, arising from excessive use of intoxicating drinks. The existence of this deplorable habit at one period of her life is admitted in the traverse by the petitioner of the return of the respondent; but she also asserts that she has reformed this habit, <sup>535</sup> and that for months before filing this petition she had abstained from the use of liquor; and that she conquered this appetite upon her promise of the respondent that upon effecting this reformation her children would be given her. . . . Mrs. Smith must not, however, be denied access to her children. At reasonable times she must be permitted to visit them, and to have them to herself on such occasions if she desires it. It is right that her offspring should be taught to love their mother, and it depends upon herself whether the legal right to which I have referred shall at a future day be granted to her": *Commonwealth v. Smith*, 1 Brewst. (Pa.) 547.

"Our decision is that for the present, at least, the child be allowed to remain with the mother. We wish to add, however, a single monitory remark. The mother should remember that this decision is not necessarily definitive, and that while the custody of the child is confided to her, the father's right has not been forfeited. It will be her duty to respect his right and allow him every proper opportunity to cultivate the affection of the child. Especially will it be her duty to refrain from any attempt to alienate the child from the father, or to instill into her mind any thought or feeling which a daughter ought not to cherish for her father. A failure to observe this monition may be good ground for another application on the part of the petitioner for the custody of his child": *McKim v. McKim*, 12 R. I. 462, 34 Am. Rep. 694.

And finally, this court in its former opinion, after holding that the father by virtue of his acts under the legitimating statute was entitled, as against the mother or to the world, to the possession of the child, in consonance with the holding of all the courts, declared: "We would not have it un-



derstood, however, that in thus declaring the law we hold he should not see his mother, be with her, or be permitted to enjoy her society, nor she his. Not at all. Under the judgment rendered in this cause in the lower court provision was made for the father to visit the child, and the successful respondents should not be deaf to those common promptings of humanity which dictate that the child and the mother be granted the utmost possible latitude for social communion consistent with the new duties placed upon all. In case of sickness or accident the mother should be promptly notified, and, if she desires, permitted <sup>536</sup> to attend, care for, and nurse. The treatment to be accorded the child is that usually accorded legitimate children. Such children are frequently permitted to go from home to visit their friends and kindred, and friends and kindred are frequently permitted to visit them, and this is the treatment that the father, in this instance and in this case, should accord to this child, and which should now establish its relationship toward its mother."

From the foregoing it will be seen that under practically every and all conditions the parent, in some instances the father and in others the mother, while losing the right of custody of their children, have in every instance received at the hands of the court recognition of their right of visitation. It is true the foregoing cases, other than the opinion of this court, present those only in which the question arose between parents of legitimate children, but the underlying reason for the rule was in each instance that the one accorded the right was a parent, and that it was in accord with humanity and right living and the best interests of the child that it should not forget and be estranged. The father of this child has perforce of the law in this state been enabled to take from this mother, against her will, this child and to take to himself its care and custody. We have no doubt of his sincere affection for it, nor do we question that he and his wife desire to retain it in their home, nor do we doubt that when the best interests of the child are taken into consideration that the force and effect of this law and their action under it will result in effecting the best interests of the child. While granting the foregoing, there is no law, either written or unwritten, which denies to its mother, where it will not conflict with the interest of the child, the right of visitation accorded by the courts to all other parents.

Mrs. Allison is not a necessary party in either of these cases. The child by the act of the father was not made her heir: *Barnes v. Allen*, 25 Ind. 222; *Keith v. Ault*, 144 Ind. 626, 43 N. E. 924. Nor did it enter her household as her child. The statute under which it was legitimated would

have been rendered in very many instances nugatory and its effectiveness <sup>537</sup> largely curtailed, if acting under it the child to be legitimated were to take as an heir of the wife of its father, as but few, if any, wives could be found who would consent to receive into their homes such children when to do so would make them heirs equally with their own children, and in practically all of such cases the wife would refuse to permit its entrance into the family. The legitimation of the child under this statute was accomplished by the father, and the wife's sole connection with the transaction was the giving of her consent to its reception into the family, where it might be treated as if it were legitimate. It has been represented to us that Mr. and Mrs. Allison are without other children; that she is possessed of considerable means and has by will made it her heir; also that she entertains toward it a deep and sincere affection, all of which is highly praiseworthy, tending to the child's welfare and happiness, and further justifying its father in his commendable course resulting in its legitimation. The defense tendered by Mr. Allison in the contempt proceeding is that Mrs. Allison refused to permit him to comply with the order of the court; this cannot be allowed him, as his wife has no legal right to the custody and control of the child. If the best interests of the child require it, or the father contumaciously bids defiance to its orders, there is full authority in the court to take it from their household and place it with the mother or elsewhere, and if the mother's deportment is such that by permitting her to visit with the child it would be detrimental to its best interests, then this privilege may be denied her, so that the relationship of both parties to this controversy toward this child depends upon their conduct.

We desire just here to drop this word of admonition to both parties. This child is entitled to the affection of both its father and its mother, and they likewise are entitled to the affection of the child, and it is the positive, affirmative duty of each, abiding constantly with them, to say nothing to cause it to think ill of the other, nor should they permit others in its presence to harshly criticise the absent one.

<sup>538</sup> There is no evidence in this record to justify us in finding that detriment would come to the child by permitting its mother to see it for the brief period granted in the order of the court, twice each month. If a change of situation occurs justifying a change in any of its terms, the power still remains with the court on application to modify it in any particular, but neither party has a right to violate it. The happiness which has come to Mr. and Mrs. Allison in the companionship of this little child ought to cause them to reflect most seriously upon the situation in which their

privilege places its unfortunate mother, and this thought should cause them to turn a tender side to the one who has lost all, and more than that which they have gained, and they should ungrudgingly grant and permit her the small measure of happiness which she can secure by the brief opportunities afforded by this order to see her offspring. The status of this child has once more had the careful, painstaking consideration of this court, and in affirming the judgments now before us it is with the hope that it will put a finality to the controversy.

The judgment of the trial court in both cases is, accordingly, affirmed.

All the justices concur.

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*The Mother has a Superior Right to the Custody of Her Minor Illegitimate Child:* Notes to Fletcher v. Hickman, 88 Am. St. Rep. 874; Brooke v. Logan, 2 Am. St. Rep. 185.

*Consent Lies at the Foundation of Statutes of Adoption,* and when it is required to be given and submitted to the court, the court cannot take jurisdiction of the subject matter without it. Under the Oregon statute, if the parents are living, and do not belong to the excepted classes, their consent must be obtained, and is a prerequisite to jurisdiction: Furgeson v. Jones, 17 Or. 204, 11 Am. St. Rep. 808. But the consent of the parents of a child is not necessary to its valid adoption by another, where the statute upon the subject is silent respecting the assent of the natural parents: Clarkson v. Hatton, 143 Mo. 47, 65 Am. St. Rep. 635. That both parents must join in a petition for adoption, see Davis v. McGraw, 206 Mass. 294, ante, p. 398.

*Adoption Proceedings* are discussed in the notes to Van Matre v. Sankey, 39 Am. St. Rep. 210; Hockaday v. Lynn, 118 Am. St. Rep. 684.

*The Legitimation of Children* is discussed in Davenport v. Davenport, 116 La. 1009, 114 Am. St. Rep. 575.

*The Adoption of Illegitimate Children* is discussed in Estate of Gird, 157 Cal. 534, 137 Am. St. Rep. 131.

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ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY v. REYNOLDS.  
[26 Okl. 804, 110 Pac. 668.]

**CORPORATION COMMISSION — Train Service — Interstate Commerce.**—Where a railroad company has provided adequate and reasonable facilities for the accommodation of traffic to and from a certain place, an order of the corporation commission, requiring it to stop another train engaged in interstate commerce at said point is unreasonable. (p. 1006.)

**CORPORATION COMMISSION.**—The Term "Adequate Facilities" is not capable of exact definition, being a relative term, and calls for such facilities as may be fairly demanded, regard being had to the size of such station or place, the extent of the demand of

transportation, its relative location to other places, the cost of furnishing additional accommodations asked for, and all other facts which would have a bearing upon the question of convenience and cost. (p. 1005.)

(Syllabi by the court.)

From an order of the corporation commission, the plaintiff brought error.

W. F. Evans, E. T. Miller and R. A. Kleinschmidt, for the plaintiff in error.

Charles West, attorney general, and George A. Henshaw, assistant attorney general, for the defendants in error.

<sup>804</sup> TURNER, J. The order appealed from runs in the alternative. By it appellant is required by the corporation commission to stop on flag its interstate passenger trains Nos. 5 and 6 at Cameron—that is, No. 5 going south about 10 o'clock A. M. and No. 6 going north about 5 P. M.—or restore the schedule of interstate trains Nos. 11 and 12, which, until a short time theretofore, by order of the commission stopped at Cameron going south about 8 o'clock A. M. and returning stopped again at 4:25 P. M. Only two <sup>805</sup> witnesses testified at the hearing—one a resident of Cameron, the other appellant's division superintendent.

The facts found by the commission upon which this order is based are that "the evidence shows, and the commission finds therefrom, that three-fourths of the farmers of Le Flore county live north of Poteau, and are without the proper train service to meet their reasonable necessities in going to and from the county seat; that the train ordered restored in the alternative had been installed by its order in September, 1908, in response to a petition filed by the citizens of Stanley, a station on appellant's road in an adjoining county, and had run for about eleven months, but in bad faith a few weeks prior to the instant hearing had been changed so as to run south through Cameron at about 4 o'clock P. M. and north in the morning; that the citizens of Cameron and vicinity have not the proper train service to meet their reasonable requirements, and, but for the fact that sufficient local passenger trains are now run over this line to properly care for the business, the commission would not hesitate to make an order unqualifiedly requiring defendant to stop trains Nos. 5 and 6 on flag at the town of Cameron," and then, as stated, ordered appellant to elect which train it would run. In opposition to this order it was shown that trains Nos. 5 and 6 are fast limited trains from St. Louis to Texas and the southwest, and generally carry mail and express, "and it is pretty hard to make the time if any additional stops are forced"; that all of appellant's

competitive business is handled by these trains in competition with three other roads; that there were already two passenger trains each way every day which made regular stops at Cameron, one passenger train each way every day that stops there on a flag, and one freight train each way every day that stops there and carries passengers to Poteau, the county seat, seven miles south. In short, it is shown by the evidence that eight trains each day stop at Cameron to receive and discharge passengers. The schedule of none of these trains is further shown except that of the local freight which leaves Cameron at 9:10 A. M., arrives at Poteau 9:40 A. M., and, returning, leaves Poteau at 12:18 P. M., and arrives at Cameron 12:35 <sup>506</sup> P. M. It is insisted that this train enables passengers to leave Cameron at a convenient time in the morning, spend two hours and thirty-eight minutes in Poteau, and return at 12:35 the same day; or, if a longer time at Poteau is desired, passengers can remain and return on the midnight train, or on the passenger train early next morning.

That it is the duty of the company to furnish adequate facilities for the accommodation of local passenger traffic between Cameron and Poteau is conceded, but it is insisted by appellant the evidence discloses that it has lived up to the full measure of this duty, and for that reason the order is unreasonable. As to what is meant by "adequate facilities," this court, in *Missouri etc. Ry. Co. v. Town of Witcher*, 25 Okl. 586, 106 Pac. 852, in the syllabus said: "(2) The term 'adequate facilities' is not capable of exact definition, being a relative term, and calls for such facilities as may be fairly demanded, regard being had to the size of such station or place, the extent of the demand of transportation, its relative location to other places, the cost of furnishing additional accommodations asked for, and all other facts which would have a bearing upon the question of convenience and cost: *Missouri etc. Ry. Co. v. Town of Norfolk*, 25 Okl. 325, 107 Pac. 172."

Tested by this rule, does the evidence overcome the prima facie presumption that the order is reasonable—that is, the presumption that the additional facilities ordered were fairly demanded by the necessities of the situation? While the order reads: "The evidence shows, and the commission finds therefrom, that three-fourths of the farmers of Le Flore county live north of Poteau and are without the proper train service to meet their reasonable necessities in going to and from the county seat"; there is no evidence tending to prove what fractional part of the farmers of that county live north of Poteau, or that they did or would naturally travel on appellant's line to the county seat or take passage thereon at Cameron, or sought the order.

Neither does the evidence tend to prove the extent of the demand for this additional facility except that certain petitioners, whose residences are undisclosed, petitioned therefor. Neither does it tend to prove the population of either <sup>807</sup> Cameron or Poteau, the extent of the passenger traffic to or from the former or between those points, or any such data by which either the commission or this court can determine whether the exigencies thereof fairly required the extra facilities sought to be provided by the order. On the other hand, we take judicial notice that it is but seven and three-tenths miles from Cameron to Jenson, where appellant's line quits the state, and from the boundaries of the county, that it would be impossible for any considerable per cent, much less three-fourths of the farmers of the county, to naturally embark at Cameron for Poteau. Besides, it appears from the order itself that the local situation was fairly served. The order recites: ". . . . But for the fact that sufficient local passenger trains are now run over this line to properly care for the business, etc. . . . ." In view of such finding, which is supported by the evidence, and the fact that complaint is made only of the inadequacy of the local passenger service and none of the through passenger service, we do not see how the order can stand. The order is therefore an attempt to stop interstate trains at a station where the evidence discloses and the order specifically finds as a fact that sufficient local passenger trains now run over appellant's line to properly care for the business. Such order is unreasonable, and has been so expressly held in *Missouri etc. Ry. Co. v. Town of Norfolk*, 25 Okl. 325, 107 Pac. 172, where the court in the syllabus said: "Where a railroad company has provided adequate and reasonable facilities for the accommodation of traffic to and from a certain place, an order of the corporation commission, requiring it to stop another train engaged in interstate commerce at said point, is unreasonable."

The order of the commission is therefore reversed.

Dunn, C. J., and Hayes and Kane, JJ., concur; Williams, J., disqualified and not participating.

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#### STATE CORPORATION COMMISSION OF OKLAHOMA.

##### I. Powers, Duties and Regulations.

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- a. Appeal may be Taken When, 1009.
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- f. Considerations on Appeal, 1010.
- g. Affirmance and Reversal, 1011.

## **I. Powers, Duties and Regulations.**

a. **Carriers.**—Section 18, article 9, of the constitution of Oklahoma (Bunn's edition, section 222), provides in part that the corporation commission shall have the power and authority and be charged with the duty of supervising, regulating and controlling all transportation and transmission companies, doing business in that state, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the commission shall, from time to time, prescribe and enforce against such companies, "in the manner hereinafter authorized," such rates, charges, classifications or traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities and conveniences as may be reasonable and just, which rates, charges, classifications, rules, regulations and requirements the commission may, from time to time, alter or amend.

In this section the phrase, "such public service facilities and conveniences as may be reasonable and just," means everything incident to the general, prompt, safe and impartial performance of the duties to the public at large imposed by the state, in the proper exercise of its police power, upon transportation or transmission companies. Such section, however, does not require transportation or transmission companies at their own expense to provide such equal facilities and conveniences between private persons or corporations as to overcome or equalize disadvantages caused by dissimilarity of location: *Chicago etc. Ry. Co. v. State*, 23 Okl. 94, 99 Pac. 901.

On a hearing to enforce compliance with any of the orders or requirements of the commission against a transportation company, such company must be permitted to introduce evidence, when offering the same, to controvert the justness or reasonableness of the order or requirement complained of: *Atchison etc. Ry. Co. v. State*, 26 Okl. 166, 109 Pac. 218.

b. **Interstate Commerce.**—Though a petition may be filed with the corporation commission for the regulation of interstate commerce, yet, if the order made thereon has not the effect to interfere with such commerce, it has jurisdiction to enter the same; its jurisdiction not depending upon any special form of pleadings, and the test being, not the relief prayed for, but that granted: *St. Louis etc. R. R. Co. v. Williams*, 25 Okl. 662, 107 Pac. 428. If an act of the state legislature comes in conflict with an act of Congress passed in relation to the same subject matter, the state act must yield. Hence an order of the commission providing that ten days' free storage shall be allowed on less than carload shipments, when destined to consignees who live at interior points five miles or more from the railroad station, is void in so far as it applies to interstate commerce, because it is in

conflict with the Hepburn act: *St. Louis etc. R. R. Co. v. State*, 26 Okl. 62, 107 Pac. 929.

c. **One Railroad Crossing Another.**—Under said section of the constitution, the corporation commission has jurisdiction to determine the necessity for, and the propriety of, one railroad crossing another, and the place and manner in which it is to be made. On the application therefor, the only matter for determination is the necessity of the crossing, and where and how it is to be made. After such determination, the compensation to be paid is ascertained according to the laws regulating the right of eminent domain: *Missouri etc. Ry. Co. v. Richardson*, 25 Okl. 640, 106 Pac. 1108.

d. **Maintenance of Flag Station.**—Under said section the commission has the authority to require a transportation company to establish and maintain a flag station in the performance of its duties as a common carrier: *Atchison etc. Ry. Co. v. State*, 23 Okl. 510, 101 Pac. 262.

e. **Changing Name of Station.**—Under said section (Snyder's Constitution, page 238), the commission has authority to require a railway company to change the name of a station on its line of road, where the same is necessary for the proper service and convenience of the public in the transaction of its business as a common carrier: *Missouri etc. Ry. Co. v. State*, 25 Okl. 437, 106 Pac. 858.

f. **Stopping Trains at Station.**—Where a railroad company has provided adequate and reasonable facilities for the accommodation of traffic to and from a certain place, an order of the commission requiring the company to stop another train, engaged in interstate commerce, at said point is unreasonable. The term "adequate and reasonable facilities" is not capable of exact definition, being a relative expression, and calls for such facilities as may be fairly demanded; regard being had to the size of the place, the extent of the demand for transportation, the cost of furnishing the additional accommodation asked for, and to all other facts which would have a bearing upon the question of convenience and cost: *Missouri etc. Ry. Co. v. Town of Norfolk*, 25 Okl. 325, 107 Pac. 172, 29 L. R. A., N. S., 159; *St. Louis etc. R. R. Co. v. Reynolds*, 26 Okl. 804, 110 Pac. 668. For the same meaning given to "adequate facilities," see *Missouri etc. Ry. Co. v. Town of Witcher*, 25 Okl. 586, 106 Pac. 852. But when the evidence reasonably tends to show that a railway company has not provided adequate and reasonable passenger facilities at a certain station, and the commission so finds, an order of the commission requiring the company to stop another train each day engaged in interstate commerce, when the stopping of such trains will not reasonably prevent the making of their interstate connections, or interfere with the same, must on appeal be regarded as just, reasonable and correct: *St. Louis etc. R. R. Co. v. Town of Troy*, 25 Okl. 749, 108 Pac. 753. So, where a railroad company has not provided adequate and reasonable facilities for the accommodation of local traffic to and from a certain place which is within eleven miles of the county seat, a city of over thirty thousand inhabitants, located on the same railroad, an order of the commission requiring the company to stop at such point another train each way engaged in interstate commerce, when the stopping of such trains would not reasonably prevent the making of their interstate connections, or interfere with the same, will not be construed on review in the supreme court as being unreasonable: *Missouri etc. Ry.*



**Co. v. Town of Witcher**, 25 Okl. 586, 106 Pac. 852. In this case the same meaning was given to "adequate facilities" as in **Missouri etc. Ry. Co. v. Town of Norfolk**, 25 Okl. 325, 107 Pac. 172.

**g. Installing Telegraph Service.**—A railway company engaged as a common carrier in the transportation of business is not required to install and maintain telegraph stations to receive and transmit messages for commercial purposes, independent of its business as such common carrier. A railway company is required to furnish all necessary equipment and facilities for the discharge of its duties as a common carrier; but when such are not reasonable and necessary for such purpose, it is not, independent of its duties as a common carrier, to be required to furnish them, that the public may, commercially, derive convenience therefrom: **Atchison etc. Ry. Co. v. State**, 23 Okl. 231, 100 Pac. 16, 18 Ann. Cas. 102. An order of the commission requiring a railroad company to install telegraph service at one of its stations for the sole purpose of bulletining its passenger trains, made without any findings of fact or evidence as to the extent of the passenger traffic at such station, is erroneous, where it was shown that such additional service would require an increase in the expenses of the company for the maintenance of the station of from seventy-five to one hundred per cent: **St. Louis etc. R. R. Co. v. Newell**, 25 Okl. 502, 106 Pac. 818.

**h. Telephone Companies.**—The commission has the authority to supervise, regulate and control a telephone company owned solely by an individual in all matters relating to the performance of its public duties and charges: **Hine v. Wadlington**, 26 Okl. 389, 109 Pac. 301.

## II. Review of Proceedings.

**a. Appeal may be Taken When.**—Appeals from certain actions of the commission, authorized by section 20, article 9, of the constitution, may be taken, first, by any corporation whose rates, charges, or classification of traffic, schedule, facilities, conveniences, or services are affected; second, by any person deeming himself aggrieved by the action of the commission; third, by the state, if allowed by law: **Gulf etc. Ry. Co. v. State**, 26 Okl. 761, 110 Pac. 651. For the procedure on appeals from final orders, and what constitutes the record for review, see **Atchison etc. Ry. Co. v. Love**, 23 Okl. 192, 99 Pac. 1081; **Kansas City etc. Ry. Co. v. Love**, 23 Okl. 224, 100 Pac. 22. An appeal will lie to the supreme court of the state from the action of the commission prescribing rates, charges, or classifications of traffic, or affecting the train schedule of any transportation company, or requiring additional facilities, conveniences, or public service of any transportation or transmission company, or refusing to approve a suspending bond, or requiring additional security thereon, or an increase thereof. But an appeal will not lie to the supreme court to review the action of the commission in requiring all railroad companies and street-car companies operating within the state, upon the happening of an accident, to send reports thereof, both by telegraph and mail, to the commission at its office in Guthrie: **St. Louis etc. Ry. Co. v. State**, 24 Okl. 805, 105 Pac. 351.

**b. Duty to Make Findings of Fact.**—By section 22, article 9, of the constitution (Bunn's edition, section 234; Snyder's edition, page 259), it becomes the duty of the commission upon the hearing of a

petition for an order to reduce the rates charged by a telephone company for services on its local exchange, or for an order proposed to fix the rates to be charged by a railway company for services for hauling intrastate shipments, to make a finding of facts upon which the order of the commission is based, and, on appeal from such order, to certify the facts so found by it to the supreme court. If the commission, upon the making of an order prescribing the rates which a telephone company may charge for services on its exchange, or, upon making an order fixing rates which a railway company may charge for hauling intrastate freight, fails to make a finding of facts, and to certify the same to the supreme court on appeal from such order, the supreme court may, under said section of the constitution, remand the case to the commission, with directions to find the facts upon which the commission based its order, and to certify the same to the court before the appeal is finally decided: *Pioneer etc. Telegraph Co. v. Westenhaver*, 23 Okl. 226, 99 Pac. 1019; *Midland Valley R. R. Co. v. State*, 24 Okl. 817, 104 Pac. 1086; *Hine v. Wadlington*, 26 Okl. 389, 109 Pac. 301. The expression: "All the facts upon which the action appealed from was based, and which may be essential for the proper decision of the appeal," means the facts as found by the commission, and does not include the evidence introduced at the hearing: *Chicago etc. Ry. Co. v. State*, 24 Okl. 370, 103 Pac. 617, 24 L. R. A., N. S., 393.

**c. Motion for New Trial not Necessary.**—It is not necessary that a motion for a new trial be filed and presented to the commission in order to have the supreme court, on appeal, determine the reasonableness and justness of the order of the commission from which the appeal is prosecuted: *Atchison etc. Ry. Co. v. Love*, 23 Okl. 192, 99 Pac. 1081; *Kansas City etc. Ry. Co. v. Love*, 23 Okl. 224, 100 Pac. 22.

**d. Presumption in Favor of Orders.**—On appeal, an order of the commission, being made upon the facts found, is presumed to be just and reasonable; but this presumption may be overcome or rebutted by the facts in the record showing that such order is not just and reasonable: *Atchison etc. Ry. Co. v. State*, 23 Okl. 210, 100 Pac. 11, 21 L. R. A., N. S., 908; *Atchison etc. Ry. Co. v. State*, 23 Okl. 510, 101 Pac. 262; *Missouri etc. Ry. Co. v. State*, 24 Okl. 331, 103 Pac. 613; *Chicago etc. Ry. Co. v. State*, 24 Okl. 370, 103 Pac. 617, 24 L. R. A., N. S., 393; *St. Louis etc. R. R. Co. v. Newell*, 25 Okl. 502, 106 Pac. 818; *Kansas City etc. Ry. Co. v. State*, 25 Okl. 715, 107 Pac. 912; *Fort Smith etc. Ry. Co. v. State*, 25 Okl. 866, 108 Pac. 407. Where a fact material to the reasonableness, justness and correctness of an order is lacking in the finding of facts made by the commission, and is not supplied by the evidence, the presumption obtaining in favor of the order does not apply, and on review in the supreme court, such court cannot be sustained: *Chicago etc. Ry. Co. v. State*, 24 Okl. 370, 103 Pac. 617, 24 L. R. A., N. S., 393; *St. Louis etc. R. R. Co. v. Newell*, 25 Okl. 502, 106 Pac. 818.

**e. Dismissal of Appeal.**—Where a corporation or corporations appeal from a general order of the commission not directed against any specific company or companies by name, and it does not appear from the record that the rates, charges or classification of traffic, schedule, facilities, conveniences or services of such appellant corporation or

corporations are affected by the order appealed from, the appeal will be dismissed: *Gulf etc. Ry. Co. v. State*, 26 Okl. 761, 110 Pac. 651.

**f. Considerations on Appeal.**—The supreme court, in reviewing an order of the commission requiring a transportation company to establish and maintain a flag station, from which an appeal has been taken, acts in a legislative capacity. It determines whether or not the findings of the commission are correct and the order based thereon is reasonable and just, supported by the prima facie presumption in favor of the same; and in determining whether or not the order is reasonable and just, the court is not restricted to the rule that the regulation or order complained of is a taking of property without due process of law: *Atchison etc. Ry. Co. v. State*, 23 Okl. 510, 101 Pac. 262.

**g. Affirmance and Reversal.**—When the evidence in the record, considered in connection with the prima facie presumption that the finding of the commission is correct and the order made thereon is just and reasonable, fails to rebut and overcome the proof and presumption in favor of such order, the same will not be disturbed on review in the supreme court: *Atchison etc. Ry. Co. v. State*, 23 Okl. 210, 100 Pac. 11, 21 L. R. A., N. S., 908; *Atchison etc. Ry. Co. v. State*, 23 Okl. 510, 101 Pac. 262; *Missouri etc. Ry. Co. v. State*, 24 Okl. 331, 103 Pac. 613. If there is any evidence reasonably tending to support the findings of fact and the order of the commission, its order will not be disturbed: *Ft. Smith etc. Ry. Co. v. State*, 25 Okl. 866, 108 Pac. 407.

But when the order of the commission, applied to the facts found, cannot be sustained on examination in the supreme court, as being just and reasonable, the same may be set aside: *Chicago etc. Ry. Co. v. State*, 24 Okl. 370, 103 Pac. 617, 24 L. R. A., N. S., 393; *Missouri etc. Ry. Co. v. State*, 25 Okl. 437, 106 Pac. 858. An amendment to an affidavit charging a railway company with having violated a certain order of the commission, so as to make the original affidavit charge the violation of an order other than that charged in the original affidavit, must be verified, and an order of the commission directing that the original affidavit shall be amended, and thereupon, over the objection of defendant, the commission proceeds with the trial upon the theory that it has been amended, where such amendment was never made, verified, and filed, is reversible error: *St. Louis etc. R. R. Co. v. State*, 26 Okl. 62, 107 Pac. 929.

If an order of the commission is severable, and a part is without error, the other part being erroneous, the former part will be affirmed and the latter reversed: *St. Louis etc. R. R. Co. v. Williams*, 25 Okl. 662, 107 Pac. 428.

Where, on appeal from an order of the commission, evidence is lacking reasonably sustaining certain material findings, but it is made to appear in the record that the same probably exists, the said order will not necessarily be reversed and the case closed, but, where justice requires it, the same will be reversed and remanded to enable the parties to produce such evidence on which a new order may be predicated: *Tulsa St. Ry. Co. v. State*, 26 Okl. 559, 110 Pac. 373.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**SOUTH CAROLINA.**

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**EARLE v. MAXWELL.**

[86 S. C. 1, 67 S. E. 962.]

**A CONTINGENT REMAINDER** in the Proceeds of Land is personalty. (p. 1015.)

**CONTINGENT REMAINDER.**—An Assignment or Mortgage of a contingent remainder in land is good, at least in equity. (p. 1015.)

**BANKRUPTCY.**—A Contingent Remainder in Land will pass, and be subject to sale by a trustee, under a bankruptcy statute providing that all property which the bankrupt could by any means have transferred passes to the assignee. (p. 1015.)

**CONTINGENT REMAINDER**—Assignment or Mortgage.—While a paper in the form of a mortgage of a possible future interest in personal property, such as money to be realized from the sale of land by a trustee in a will, cannot operate as a mortgage, it is good in equity as an assignment. (p. 1015.)

**BANKRUPTCY.**—The Term "Property," Used in the bankruptcy act, is of the broadest possible signification, embracing everything that has exchangeable value, or goes to make up a man's wealth—every interest or estate which the law regards of sufficient value for judicial recognition. (p. 1016.)

**BANKRUPTCY**—Contingent Remainder in Proceeds of Land.—Under a bankruptcy act which provides that all "property" shall pass which the bankrupt "could by any means have transferred," a contingent remainder in land to be sold by a trustee named in a will after the death of the life tenant, the proceeds to be divided among the contingent remaindermen, is property in which the bankrupt may transfer his right before his bankruptcy, and, therefore, it passes to his trustee in bankruptcy to be sold by him. (pp. 1015, 1016.)

**QUIETING TITLE**—Personal Property.—A complaint to remove a cloud on the title to personal property, such as money to be realized from the sale of land by a trustee in a will, may be maintained. (p. 1016.)

Action by Earle, as the trustee for the creditors of F. B. Maxwell, against F. B. Maxwell and others. There was a decree overruling a demurrer to the complaint, and Maxwell appealed.

Hood & Sullivan, for the appellant.

B. F. Martin, for the appellee.

WOODS, J. This appeal is from a decree overruling a demurrer to a complaint, the material allegations of which may thus be stated: On the 24th of February, 1908, the defendant, F. B. Maxwell, made an assignment of all his property for the benefit of his creditors to J. M. Paget. Thereafter, on the eighteenth day of March, 1908, Maxwell was adjudged a bankrupt by the district court of the United States, and Martin & Earle, a partnership composed of B. F. Martin and C. B. Earle, became trustee for the bankrupt estate. This action was originally brought in the name of the partnership as trustee, but afterward the referee in bankruptcy, with the consent of a majority of the creditors in numbers and amount, substituted C. B. Earle as trustee, and the complaint was amended to conform to the change.

F. B. Maxwell, the bankrupt, is the grandson of F. C. V. Borstell, and the son of Mrs. Alice Maxwell. By his will, Borstell made the following devise:

"I will and bequeath to my daughter, Alice Maxwell, my lot on Brick Range with the store room, offices and all buildings connected therewith, and in view of the misfortunes of life which are incident to all persons, however prudent and cautious they may be, and not from any distrust of my said daughter or her husband, I have concluded to make this a trust property, and, therefore, vest the fee simple of said lot and buildings in D. S. Maxwell, as trustee for her, to have and to hold all and singular the said premises to him and his heirs and assigns. In trust, nevertheless, for the following uses and purposes: That my said daughter shall have the right to use, occupy and possess the said property, to receive the issues, rents and profits of the same, for and during the term of her natural life, and at her death, the same to be sold and the proceeds to be divided among her children, share and share alike, the share of any deceased child, or remote descendant to take the share to which the parent would be entitled if living as under the Statute of Distributions. And should the said trustee die or by any means a change should be necessary, my said daughter shall have the right to appoint a new trustee in writing without application to any court, who shall have all the rights conferred on the said D. S. Maxwell, and so continue to appoint new trustees as often as a contingency may arise."

Mrs. Maxwell, the life beneficiary of the trust, is still living, and it is, therefore, uncertain whether at her death the bankrupt will take, or his children, or their children or descendants. . Some years before Maxwell was adjudged a

bankrupt he undertook to assign his interest under the will to his aunt, Miss Von Borstell, now Mrs. Coleman, but this <sup>4</sup> assignment is alleged to be invalid for lack of record or other notice to subsequent creditors.

The trustee, believing Maxwell's interest in the trust estate to be salable, advertised it for sale, and thereupon received notice from the bankrupt that his contingent interest was not the subject of sale, and that "said sale would be contested." The allegation is made "That by reason of such notification and claim on the part of F. B. Maxwell, and on the part of others on his behalf, a cloud has been, and is now being, cast upon the title of the interest of the plaintiff as trustee, and that on account of the resultant probability of the bidding for the said interest being chilled by virtue of such claim and cloud upon the title as aforesaid, the plaintiff withdrew said interest from sale and now desires the question of title and salability of the said interest to be determined and declared by the court, and the cloud from said title removed." The relief asked is that the cloud on the title be removed; that the court determine and declare the salability of the interest of the bankrupt, and order the plaintiff as trustee to sell and convey it.

In the decree of the circuit court this statement appears: "By consent of counsel, the demurrer to the original complaint is to be considered as made to the amended complaint." The first ground of demurrer to the original complaint was: "Because it appears from the face of the complaint that the plaintiffs have not legal capacity to sue for the following reason, to wit, sections 44 and 45 of the act of Congress entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' provides that the creditors of a bankrupt estate shall appoint one or three trustees of the estate, who shall be individuals or corporations, whereas, it appears from the complaint that Martin & Earle, a partnership composed of B. F. Martin and C. B. Earle, and engaged in the practice of law, was appointed trustee of said estate by the creditors of the bankrupt estate."

<sup>5</sup> This was the only objection made to the capacity of the plaintiff to sue, and it was removed by the amendment alleging C. B. Earle to be the sole trustee and substituting his name as plaintiff for the firm name of Martin & Earle. Therefore, the point made in argument that C. B. Earle was not properly appointed trustee of the bankrupt estate was not before the circuit court, and cannot be considered by this court.

By the demurrer the bankrupt, Maxwell, submits that the complaint does not state a cause of action; first, because his interest under the will is contingent, and is, therefore,



not the subject of sale; and, second, because the will provides that the land shall be sold on the death of his mother and the proceeds divided, and, therefore, his interest is personalty, with respect to which an action to remove a cloud on title cannot be maintained.

Section 70a of the bankruptcy statute provides that the trustee of the estate of the bankrupt shall "be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt," to "all property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold by judicial process against him." The bankruptcy statute further provides for the sale of the property of the bankrupt subject to the approval of the bankrupt court.

Since, under the will, the trustee therein named was to sell the land and divide the proceeds of the sale after the death of the life beneficiary, the interest of F. B. Maxwell and the other children of Mrs. Maxwell is a contingent interest, not in the land, but in the proceeds of the land, which is personalty: *Wood v. Reeves*, 23 S. C. 382; *Walker v. Killian*, 62 S. C. 482, 40 S. E. 887.

The court held in *Pickens v. Pickens*, 13 Rich. Eq. 111, that while a contingent interest in land passes to the assignee of an insolvent, the sale must be postponed until the contingent <sup>6</sup> interest should become vested. It has been often decided in this state that an assignment or mortgage of a contingent remainder in land is good, at least in equity: *Allston v. Bank of the State*, 2 Hill Ch. 235; *Roundtree v. Roundtree*, 26 S. C. 450, 2 S. E. 474; *Bank v. Garlington*, 54 S. C. 413, 71 Am. St. Rep. 800, 32 S. E. 513. Under the bankruptcy statute, providing that all property which the bankrupt could by any means have transferred passes to the assignee, there can be no doubt that a contingent remainder in land would pass and would be subject to sale by the trustee.

The interest of the bankrupt in this case not being an interest in the land, but in personal property—the money to be realized from the sale of the land—it might have been doubtful under the authority of *Wood v. Reeves*, 23 S. C. 382, whether it could be assigned or mortgaged; for in that case the view is indicated that such a possible future interest in personal property could not be mortgaged. But in the later case of *Walker v. Killian*, 62 S. C. 482, 40 S. E. 887, it is expressly held that while a paper in the form of a mortgage of such a possible future interest in personal property cannot operate as a mortgage, it is good in equity as an assignment.

In three cases in the district court of the United States, and in one case in the circuit court of appeals, it has been held that such a contingent interest in either real or personal property, as is here involved, does not pass to the trustee in bankruptcy, because it is not property which could have been transferred by the bankrupt: *In re Hoadley*, 101 Fed. 233; *In re Gardner*, 106 Fed. 670; *In re Twaddell*, 110 Fed. 145; *In re Wetmore*, 108 Fed. 520, 47 C. C. A. 477. But these cases arose under the laws of New York and Pennsylvania. Under our law there can be no doubt that a bankrupt could transfer such an interest before his bankruptcy; and, that being so, the conclusion is inevitable that it passes to the trustee under a bankruptcy act, which provides that all "property" shall pass which the bankrupt "could by any means have transferred."

<sup>7</sup> It is true, as has been often said, that a contingent remainder is not technically an estate, but a mere possibility of an estate in the future, but that is very far from saying that it is not property. The term "property," used in the bankruptcy act, is of the broadest possible signification, embracing everything that has exchangeable value, or goes to make up a man's wealth—every interest or estate which the law regards of sufficient value for judicial recognition: *Charleston etc. Ry. Co. v. Reynolds*, 69 S. C. 481, 48 S. E. 476; *South Bound Ry. Co. v. Burton*, 67 S. C. 515, 46 S. E. 340; *Delassus v. United States*, 34 U. S. (9 Pet.) 117, 9 L. ed. 71; *Knight v. United Land Assn.*, 142 U. S. 161, 12 Sup. Ct. Rep. 258, 35 L. ed. 974.

It follows that under our decisions the interest of the bankrupt under the will was property which he could have transferred, and that, therefore, it passed to his trustee in bankruptcy to be sold by him.

While some authorities hold otherwise, we think there can be no doubt that a complaint to remove a cloud on the title to personal property may be maintained: *Pomeroy's Remedies*, sec. 369. Any distinction between real estate and personal property in this respect must be purely artificial, and tend to hinder the practical administration of justice. It is true that the trustee is not in possession, and the general rule is that one out of possession, and claiming the title and right of possession, cannot maintain an action to remove a cloud on his legal title against another person in possession, for the reason that there is an adequate legal remedy by the action to recover possession when the title to land is involved, and by action of claim and delivery when the title and right of possession of personal property is involved: *Pollitzer v. Beinkempfen*, 76 S. C. 517, 57 S. E. 475. But in this case the plaintiff is not entitled to possession, his property interest being a contingent remainder.



The question which he presents to the court is whether he has, as trustee, a right to assign this interest. If he has<sup>s</sup> the right to sell the contingent interest of the bankrupt, then it is manifestly important to the trust estate that the cloud cast upon that right by the claim of the bankrupt that the purchaser will take nothing should be cleared away before the sale. The only remedy which the plaintiff has to prevent a sacrifice sale of the trust property by reason of this claim is to ask the court to determine his right to sell before he offers the property. The right and duty of the plaintiff to have a fair sale of the property being evident, the court should not withhold the relief asked.

It might have been more appropriate to have the right determined by application to the federal court having control of the bankrupt proceedings. But that point was not made by the demurrer, and it is not before us.

The judgment of this court is that the judgment of the circuit court be affirmed.

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*In This Country Contingent Remainders are Assignable, at least in equity, though at common law they were not assignable: Note to McCall v. Hampton, 56 Am. St. Rep. 360.*

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## SOUTHERN RAILWAY v. CARROLL.

[86 S. C. 56, 67 S. E. 4.]

**VENDOR AND VENDEE—Purchaser Without Notice.**—If a person who has been in the apparent adverse possession of land for twenty years conveys, without general warranty, a right of way to a railway company which has no actual notice that he is holding under an unrecorded deed conveying only a life estate, the company is a purchaser for value without notice of such deed. (p. 1019.)

**PURCHASER WITHOUT NOTICE.**—The Holder of a Quitclaim Deed is entitled to the protection of the plea of purchaser for value without notice. (p. 1020.)

**A PURCHASER WITH NOTICE** from a Prior Purchaser for Value Without Notice is entitled to the same protection as his grantor. (p. 1020.)

**PURCHASER WITHOUT NOTICE—Notice to Agent.**—A railway company which buys a right of way is deprived of the claim that it is a purchaser for value without notice of a prior unrecorded deed to its grantor, if its agent was informed by the grantor that he had only a life estate in the land. (p. 1021.)

Action by the plaintiff railway company against Julia R. Carroll. There was a judgment for the defendant and the plaintiff appealed.

Harley & Best and B. T. Rice, for the appellant.

Bates & Simms, for the appellee.

<sup>57</sup> WOODS, J. On the twenty-seventh day of August, 1887, William S. Reynolds, in consideration of four hundred and fifty dollars, conveyed a right of way to the Blackville, Alston and Newberry Railroad Company. On the eleventh day of May, 1891, the Blackville, Alston and Newberry Railroad Company was consolidated with the Barnwell Railway Company under the name of the Carolina Midland Railway Company, and on the twenty-third day of June, 1902, the Carolina Midland Railway Company was consolidated with other railroads under the name of the Southern Railway, Carolina Division. On the thirtieth day of June, 1902, all the franchises and property of the Southern Railway Company, Carolina Division, was leased to the Southern Railway Company for the term of nine hundred and ninety-nine years. Thus the Southern Railway, Carolina Division, and the Southern Railway Company succeeded to whatever rights the Blackville, Alston and Newberry Railroad Company acquired under the deed made by William S. Reynolds.

Reynolds had been in possession of the tract of land which embraced the right of way for more than twenty years <sup>58</sup> before the date of the deed made by him; and he remained in possession until his death in November, 1888. Thereafter, on the twenty-fifth day of February, 1889, a deed was recorded in Barnwell county from Darling Peebles, dated the fifth day of March, 1848, purporting to convey the lands of which Reynolds had been in possession, including that covered by the right of way which he had undertaken to convey to the railroad company, to Julia Reynolds, the daughter of Darling Peebles, and her husband, William S. Reynolds, "for and during the term of their natural lives, and to the survivor of them, and from and after their deaths, to their three children, Julia Reynolds, Laura V. Reynolds, and Anna Reynolds, and their heirs forever."

In 1889, after the death of Julia Reynolds and Wm. S. Reynolds, the land was divided among their three daughters mentioned in the deed; and Julia Reynolds, who afterward became by marriage Mrs. Julia Carroll, acquired by deed all the interest of her two sisters in the portion of the tract over which the railroad company is operating its trains under the claim of a right of way acquired from William S. Reynolds.

On the fifteenth day of September, 1904, Mrs. Carroll presented her petition to Judge James Aldrich, alleging that William S. Reynolds held under the deed from Peebles, and therefore could grant a right of way only to the extent of

his life interest, and asking that the clerk of the court of common pleas of Barnwell county be directed to impanel a jury to ascertain the compensation to be paid to her for the use of the right of way. On the 6th of September, 1904, the order asked for was made. The proceedings were against the Southern Railway alone, but on the 19th of October, 1904, the petition and order were amended by making the Southern Railway, Carolina Division, and the Carolina Midland Railway Company parties defendant.

The Southern Railway and Southern Railway, Carolina Division, then brought their action to enjoin the proceeding <sup>59</sup> to assess compensation to Mrs. Carroll. Mrs. Carroll died after the action for injunction was commenced, and William Gilmore Simms, clerk of the court of common pleas, who in his official capacity administered on her derelict estate, was made a party defendant.

The main questions made by the complaint for injunction and the answer were: First, if the Blackville, Alston and Newberry Railway Company were still in possession of the right of way, would it be protected as a purchaser for value without notice against the claim of Mrs. Carroll, by reason of the fact that it received a conveyance from Reynolds in 1887, and the deed of 1848, under which Mrs. Carroll claims, was not recorded until 1889?

Second, if the first question be answered in the affirmative, would the Southern Railway, Carolina Division, and its lessee, the Southern Railway Company, be protected as the grantees or successors of the rights of the Blackville, Alston and Newberry Railroad Company, although the right and title of that railroad company was not acquired until 1902, after the deed under which Mrs. Carroll claims was recorded?

After the introduction of the various records, and of evidence as to the location and value of the land, the circuit judge dismissed the complaint for injunction and submitted to the jury only the question of the amount of damages. Thereupon the jury returned a verdict of fifteen hundred and ten dollars in favor of the plaintiff.

The two questions above stated are made by the exceptions; and as there is no conflict in the evidence, they are really issues of law.

At the time that William S. Reynolds conveyed to the Blackville, Alston and Newberry Railway Company, he had been in the apparent adverse possession of the land for more than twenty years, and there was no proof that the railroad company had any notice by record or otherwise of his holding under a deed which conveyed only a life estate to himself and wife, with remainder <sup>60</sup> to their three daughters. The deed to the railroad company, it is true, did

not contain a covenant of general warranty, but this fact does not impair its right to claim the protection of the recording statute. The respondent relies on the case of *Aultman v. Utsey*, 34 S. C. 559, 13 S. E. 848, as sustaining the position that the absence from a deed of a covenant of general warranty is sufficient in itself to put a purchaser on inquiry as to defects in the title. Chief Justice McIver in the opinion did indicate that as the view of the court; but the point decided in the case was that there were a number of other facts, which, in connection with the absence of a general warranty in several of the deeds, were sufficient to put the purchaser on inquiry. In accepting the view that the grantee who takes a quitclaim deed is not entitled to the protection of the recording acts, the court seems to have been influenced mainly by the opinion of the supreme court of the United States, expressed in *Oliver v. Platt*, 3 How. (U. S.) 333, 11 L. ed. 622, and *May v. LeClaire*, 11 Wall. (U. S.) 217, 20 L. ed. 50. Hence the authority of *Aultman v. Utsey* on the point is much weakened by the fact that the supreme court of the United States, in *Moelle v. Sherwood*, 148 U. S. 21, 13 Sup. Ct. Rep. 26, 37 L. ed. 350, and *United States v. California etc. Land Co.*, 148 U. S. 31, 13 Sup. Ct. Rep. 458, 37 L. ed. 354, has repudiated the doctrine in the two older cases and laid down the rule that the holder of a quitclaim deed is entitled to the protection of the plea of purchaser for value without notice. In the elaborate note of *Babcock v. Wells* (R. I.), 105 Am. St. Rep. 848, Mr. Freeman collates the authorities on both sides, and shows that this later view is gaining in judicial recognition.

In *Martin v. Ragsdale*, 71 S. C. 67, 50 S. E. 671, this court laid down and applied the later and better rule. As pointed out in that case, the statute law of this state prescribes a form of conveyance as "valid and effectual to convey from one person to another or others the fee simple of any land or real estate," and the form so prescribed does not contain a warranty clause. The statute law further provides<sup>61</sup> that deeds conveying real estate shall be valid so as to affect subsequent purchasers for value only when recorded as required by the act. Certainly, the courts cannot say that one who pays value and takes a deed without warranty in the form prescribed by the statute is not a purchaser of real estate within the meaning of the recording act. We conclude, therefore, that the Blackville, Alston and Newberry Railroad Company, under the evidence before the court, was a purchaser for value without notice, and entitled to protection against Mrs. Carroll's claim.

As to the second question, there can be no doubt. A purchaser with notice, who buys from a prior purchaser for value without notice, is entitled to the same protection as

his grantor. The law is established by numerous decisions as stated by Chancellor Johnson in *Brown v. Wood*, 6 Rich. Eq. 176: "Whenever, in tracing a title in defendants, you first come upon an innocent purchaser having no notice, from that moment the title is sacred in equity, under which principle a purchaser with notice, from one without notice, is protected in this court": *McKnight v. Gordon*, 13 Rich. Eq. 223, 94 Am. Dec. 164; *Herring v. Cannon*, 21 S. C. 217, 53 Am. Rep. 661; *Jones v. Hudson*, 23 S. C. 501.

We think the circuit judge was therefore in error in dismissing the complaint for injunction under the evidence offered. Examination of the evidence, however, leads to the conclusion that this court in reversing the judgment should not grant a perpetual injunction, but remand the case for a new trial under the principles herein announced. The evidence of the witness, W. T. Walker, seemed to show that he was one of the incorporators of the Blackville, Alston and Newberry Railroad Company, and that as the agent of the railroad company he made the purchase of the right of way from William S. Reynolds. On the objection of plaintiff's counsel the testimony of this witness as to all statements by William S. Reynolds concerning his title, made to the witness while he was acting as <sup>62</sup> agent for the railroad company procuring the right of way, was excluded. The defendant could not appeal from this ruling as to the exclusion of evidence, because the judgment was in his favor. If William S. Reynolds gave to the duly authorized representative of the railroad company notice that he held only a life estate in the land, with remainder to his daughters, and the railroad company took the title and paid for the land with this notice, then it could not claim to be a purchaser without notice. On another trial this testimony may be incompetent, because it may turn out that the witness was not such a representative of the railroad company as that notice to him would bind the company, but as the matter appears on the record before us, the defendant was entitled to the evidence.

The judgment of this court is that the judgment of the circuit court be reversed and the cause remanded to the circuit court for a new trial.

PER CURIAM. We are unable to discover any material issue that has not been carefully considered.

It is therefore ordered that the petition for rehearing be dismissed and the order heretofore granted, staying the remittitur, be revoked.

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*Who is a Bona Fide Purchaser Without Notice* is the subject of a note to *Blanchard v. Tyler*, 86 Am. Dec. 62. That one holding under a quit-claim deed is not a bona fide purchaser without notice, see *Wood v. Holly Mfg. Co.*, 100 Ala. 326, 46 Am. St. Rep. 56; *Thorn v. Newsom*,

64 Tex. 161, 53 Am. Rep. 747, but for other views compare the note to the case last cited; *Livingstone v. Murphy*, 187 Mass. 315, 105 Am. St. Rep. 400; *Ennis v. Tucker*, 78 Kan. 55, 130 Am. St. Rep. 352. The law protects purchasers of real estate as the title appears of record, unless there is notice of something to the contrary: *Booker v. Booker*, 208 Ill. 529, 100 Am. St. Rep. 250; *Friend v. Yahr*, 126 Wis. 291, 110 Am. St. Rep. 924.

*A Purchaser With Notice from a Purchaser Without Notice* takes a good title: *Doyle v. Wade*, 23 Fla. 90, 11 Am. St. Rep. 334; *Livingstone v. Murphy*, 187 Mass. 315, 105 Am. St. Rep. 400.

*Notice to an Agent as Notice to His Principal* is the subject of a note to *Trentor v. Pothen*, 24 Am. St. Rep. 228.

*Quitclaim Deeds* are discussed in the note to *Babcock v. Wells*, 105 Am. St. Rep. 854.

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## STATE v. COYLE.

[86 S. C. 81, 67 S. E. 24.]

**SELF-DEFENSE.**—To Instruct the Jury as to the Law of Self-defense is not error where the defendant's plea was simply not guilty, and where he did not make the plea of self-defense, if there was an issue in the testimony as to who made the first assault, and the court was not informed that the defendant relied solely on the defense of insanity. (p. 1026.)

**CRIMINAL LAW.**—An Instruction is not on the Facts where it does not assume as true any fact in issue, does not undertake to state the testimony, nor in any way convey to the jury the court's opinion of the testimony. (p. 1026.)

**SELF-DEFENSE.**—In Applying the Law of Self-defense, what a man of ordinary firmness and courage would have done and should have done, under the circumstances, is a question of fact for the jury. (p. 1026.)

**CRIMINAL LAW.**—Insanity Arising During the Progress of a Difficulty voluntarily brought on by the defendant, and as the result of a blow rightfully inflicted by his adversary, does not excuse him for his subsequent conduct in the affray. (p. 1027.)

Indictment for assault and battery. The defendant was convicted and sentenced, and appealed.

D. H. Magill, for the appellant.

R. A. Cooper, for the appellee.

82 JONES, C. J. Defendant, tried for assault with intent to kill Julian Still, was convicted of assault and battery of high and aggravated nature, and sentenced to eight years at hard labor in the state penitentiary.

The exceptions relate solely to the charge, but a statement of the testimony will help to make clear the points involved.



The testimony for the state was as follows:

Julian Still: "I live at the Greenwood Cotton Mill. I am twenty-two years old, and am married. I had a difficulty with Jeff Coyle on the night of August 15th, somewhere about 11 o'clock. I don't know what his condition was; he seemed to be drinking. When I came up to where Coyle was I asked Mr. Christian if there was any trouble, and Coyle spoke up and said, 'I have had some trouble'—said, 'Come here; I will tell you about it.' He had out his knife. <sup>83</sup> I told him to put up the knife and I would come over there. He said he wouldn't do it. Coyle caught hold of my arm and followed me about ten steps and told me to stop, he wanted to tell me about the trouble. I said, 'All right, I will stop.' He asked me if I didn't remember about six years ago when him and my father had a fuss. I said 'Yes,' and he began talking about it. He started at me with his knife open, and I knocked him down and walked over him, and started to hit him again, but I didn't, and walked off six or eight steps, and he got up and started toward me. He kept coming on me, and I backed ten steps and turned, and he ran up and stabbed me in the left side, and I ran toward the railroad and he cut me in the back. I ran up the street, and he knocked me down and began beating me. I hollered and he kept on beating me. I got up and ran in Will Joe Dean's yard, and he ran behind me and knocked me down again, and went on out through the back way. I think he cut me about ten times. The stick was an iron rod covered with leather. It was my stick. That is what I knocked him down with."

Cross-examination: "I was going in the opposite direction from my home when I went where Coyle was. I went there because I heard one of the Still boys and Coyle was in a fuss. I went there because I heard Coyle was down there. I bought this stick that night before I went to where Coyle was. The stick had a metal head, and is a tolerable heavy stick. You could brain a man with it if you hit him hard enough. I struck Coyle with that stick before he cut me, but he was coming toward me with a knife."

Dr. R. B. Epting, testifying as to the wounds received by the prosecutor, found that he was pretty badly injured with the twelve or fifteen cuts on him, some cuts entering the cavity of the lungs.

Dr. J. B. Owens testified that he next day dressed a wound on side of the defendant's head across the ear, and that it looked like a pretty severe lick.

<sup>84</sup> The testimony for the defense was as follows:

Jeff Coyle: "I am the defendant in this case. I was on my way home that night. I had a quart and a pint of whisky in a basket, and Julian Still overtook me and asked

me to give him some of the whisky, and I told him I could not give it to him because it wasn't mine, and he says, 'No, you are too damned stingy'—those are the words he used. I says, 'If it was my liquor I would give it to you; you would be welcome to it.' He says, 'I haven't forgot about how you treated my father three or four years ago, by whipping him over at the old mill.' I says, 'Me and your father has done settled that long ago.' And he stepped back from me with his stick and says, 'I have never settled it with you,' and knocked me down with the stick. He didn't give me a moment's warning. After he knocked me down I couldn't tell what happened. He knocked me crazy. I couldn't give account of anything after he hit me with the stick. I will be honest, before God in Heaven, he knocked me so crazy I didn't know anything. I don't know what I did. He struck me on the left side of my head. I never had a cross word with Julian Still in my life, and had nothing at all against him. I do not know whether I cut him or not. My physical condition is very weak. I have kidney trouble and lung trouble. Doctors have treated me for three years. I suffered with the wound I received from this stick for two weeks, and I felt as if I would die from it. After I came to my senses I went and surrendered to the sheriff, when I was told what had happened."

Cross-examination: "When I came to myself I was at home. I have no idea how I got home. I might have run this boy around and cut him up, for all I know. My wife took me over to her sister's after I came to myself, at her suggestion. I was not drunk. I can prove by the officers of this town I don't get drunk. My wife's brother came over and told me the next morning about Julian Still being cut, <sup>85</sup> and said they accused me of doing it, and I came and gave up, and that is the first I knew of it."

Redirect examination: "I was not drinking that night. I drank a bottle of beer that afternoon about 4 o'clock. That is all I drank. I did not cut at Still before he struck me with the stick. I carried the stick off with me, I suppose, I had it at home the next morning, but I didn't know anything about having the stick until my wife asked me where I got it."

In charging the law as to self-defense, the court said: "Now, there is involved in here the law as to self-defense, and the law upon that point is, that where anyone undertakes to escape responsibility for cutting or shooting a man or otherwise injuring him, on the ground of self-defense, the law requires him to satisfy the jury by the greater weight of the testimony: first, that he was free from fault in bringing on the difficulty; second, that he could not have retreated from the difficulty without probably endangering



his safety; and third, that it was necessary for him to use such force as he did use in order to protect himself from the loss of life or from serious bodily harm, and that from the standpoint of a man of ordinary firmness and courage—you place the defendant, the man seeking to escape on the ground of self-defense, when you are considering that plea in this case, you place in his position a man of ordinary firmness and courage, the standard which the law gives you to measure a man by, and you say what he would have done and should have done, under the circumstances, from the dangers by which he was surrounded, either real dangers or appearances of danger—whether he would have been justified in believing that he was in danger of the loss of his life or serious bodily harm, and therefore, was justified in doing as he did do.”

The specifications of error are:

“(a) In instructing the jury that the law of self-defense was involved in this case when the defendant made no such ~~so~~ plea, nor did the testimony involve such plea; on the contrary, the plea being not guilty by reason of irresponsibility on account of such a dethronement of his reason as to render him incapable of distinguishing between right and wrong or knowing what he was doing at the time of the alleged assault and battery.

“(b) By charging on the facts in telling the jury that the defendant was seeking to escape on the plea of self-defense, which was tantamount to telling them that he admitted the assault and battery, and that in order to escape, he must prove what is required to establish such plea, by the greater weight of the evidence, in order that he might be justified in doing what he did do.

“(c) In submitting to the jury to decide what a man of ordinary firmness and courage, situated as the defendant was situated, ‘should have done under the circumstances.’ to submit such question to the jury being to submit to them the decision of a question of law.

“(d) In charging on the facts by placing the defendant in the attitude of seeking to escape on the ground of self-defense, and speaking of him as having done as he did do.”

As to specification (a), the defendant’s plea was simply not guilty. The court was not advised that the defendant relied solely on the defense of insanity. It appears that each of the parties struck the other with a deadly or dangerous weapon, and there was an issue in the testimony as to who made the first assault, the prosecutor testifying that the defendant was attacking him with an open knife before he struck the defendant with the heavy stick, and defendant testifying that he was not cutting prosecutor with a knife when the prosecutor struck him, and that if he cut

the prosecutor it was after prosecutor had knocked him down with the stick. There is no contention that defendant was insane previous to the blow which he received in the difficulty. It is manifest, therefore, that <sup>87</sup> there was no impropriety in charging the law as to self-defense.

As to specifications (b) and (d): We fail to see how the charge could be construed as a charge on the facts. The charge did not assume as true any fact in issue, did not undertake to state the testimony, and in no way conveyed to the jury the court's opinion as to the testimony.

As to specification (c), it is sufficient to say that in applying the law of self-defense, what a man of ordinary firmness and courage would have done and should have done, under the circumstances, is a question of fact for the jury.

The second exception is as follows:

2. "Because it was error to charge the jury as follows: 'Now, if by a blow inflicted upon him, a man's reason became utterly dethroned, if he so absolutely lost his intelligence as not to know what he was doing at all, not to know right from wrong—the standard under our law in this state—so that he did not know what he was doing, or that it was wrong to do it, and he went and cut the other man as a man who was insane, suffering from such degree of insanity as not to know right from wrong, why he would not be responsible for what he did then, unless he was at fault in bringing on the difficulty in which he got the blow which deprived him of his reason. Of course, if he was at fault and brought on a difficulty, forced the man to protect himself from the loss of his life or serious bodily harm, to strike him, and as a result of that blow rightfully inflicted by the other man, and wrongfully brought upon himself by his own conduct, he became deprived of his reason and went on and cut or killed the man, of course, the law would hold him responsible for what he did, even although he did not then know what he was doing, because he would have been in the wrong in bringing himself into that condition'; the error being:

<sup>88</sup> "(a) In holding and charging that a person in such condition and under such circumstances would be responsible, under the law for what he did, when, it is submitted, it is the law of this state that it matters not whether the mind be destroyed by the acts and doings of the accused, or by the touch of the finger of God, if the fact of insanity existed at the time of the commission of the alleged offense, the defendant cannot be legally convicted.

"(b) In taking from the jury the only defense of the defendant, except that of not guilty, and in submitting to them the plea of self-defense, which we did not interpose, if, indeed, the defendant had satisfied the jury beyond rea-

Reasonable doubt even of his insanity at the moment the alleged offense was committed.

“(c) In saying to the jury that a man in the condition he describes mentally would be responsible if he was at fault himself in bringing on the difficulty in which he got the blow which deprived him of his reason, such being calculated to impress the jury with the fact that his honor believed that the defendant brought on the difficulty in which he got the blow when there is no proof to warrant such belief or to justify such charge.”

As to specification (c), it appears by reference to the testimony of the prosecutor that defendant was attacking prosecutor with a knife when he received the blow alleged to have made him temporarily insane. Specification (b) has been disposed of in considering the first exception.

We do not think specification (a) shows error. The charge is based upon the hypothesis that the jury might accept the prosecutor's version that defendant assaulted him with the deadly weapon before he struck defendant. According to this view, defendant was admittedly sane and responsible at the inception of the difficulty. “Insanity” arising during the progress of a difficulty voluntarily brought on by defendant, and as the result of a blow rightfully inflicted by his adversary, should not constitute <sup>an</sup> excuse for his after conduct in such difficulty. The reason which sustains the settled law in this state—that voluntary intoxication is no excuse for crime—applies with as great force in a case of this kind.

Moreover, the charge was very favorable to defendant in submitting the question of insanity to the jury. The defense rested solely on the unsupported statement of defendant as to the condition of his mind, and this testimony practically amounted to nothing but a statement that he did not remember what he did that night after the prosecutor struck him, by the defendant's showing his memory was completely restored next morning, except as to his acts to the prosecutor after the blow. There was no evidence by the physician who attended him that the blow was such as might have caused temporary insanity. There was no evidence of any delusion and no evidence that defendant did not at the time of his acts have mental capacity sufficient to know that his conduct was wrong. The barbarity of his conduct afforded no evidence of irresponsible insanity. All the evidence tended to show that defendant acted in a frenzy of passion or revenge, not engendered by a mind so diseased as to destroy capacity to know that his acts were wrong.

The judgment of the circuit court is affirmed.

**PER CURIAM.** After due consideration the court is unable to discover that any material question of law or fact has been overlooked or disregarded.

It is, therefore, ordered that the petition herein be dismissed and the order heretofore granted, staying remittitur, be revoked.

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*The Law of Self-defense* is discussed in the notes to *State v. Sumner*, 74 Am. St. Rep. 717; *State v. Gordon*, 109 Am. St. Rep. 804.

*Insanity as an Excuse or Defense for Crime* is the subject of a note to *Knight v. State*, 76 Am. St. Rep. 83. In this note, at page 85, it is stated that it is only necessary that the insanity exist at the moment when the act occurred with which the accused stands charged.

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## SEABOARD AIR LINE RAILWAY v. RAILROAD COMMISSIONERS.

[86 S. C. 91, 67 S. E. 1069.]

### **EVIDENCE—Books of Account—Enforcement of Freight Rates.**

In a proceeding by a railroad company to enjoin railroad commissioners from enforcing a freight rate, the books of original entry are the best evidence of the transactions of the company, but it would be a practical denial of justice to require it to produce all the waybills, tickets, reports and other innumerable memoranda made by its multitude of employees. The entries made of the aggregations of these on the company's books of original entry kept in good faith for the purpose of showing the course of its business and its profits and losses are admissible as evidence of such transactions, but the commissioners may call for any particular document which tends to elucidate the accounts or books or bears on any of the questions at issue. (pp. 1029, 1030.)

**EVIDENCE—Books of Account**, kept in the regular course of business and containing the original entry of transactions, may be introduced in evidence, but the court, or referee, must decide in the first instance what are the books of original entry, what is sufficient proof of the verity of the books, and what evidence is reasonably available to the one offering the books to prove the entries made therein. These questions must be left almost entirely to the discretion of the trial court. (pp. 1029, 1030.)

Proceeding in the supreme court by the railway company to enjoin the defendants from enforcing a freight rate on fertilizers.

Lyles & Lyles, for the petitioner.

Attorney General Lyon, for the respondent.

<sup>92</sup> **WOODS, J.** The referee to whom it was referred to take testimony and report on all the issues of law and fact has made a preliminary report to this court on a question of evidence, on the decision of which depends the further

conduct of the trial. The referee thus states the question and his decision thereon:

"During the taking of the testimony so far offered as to the receipts and disbursements of the plaintiff company, which has a material bearing on the reasonableness of the rates on fertilizers prescribed by the railroad commission of South Carolina, the question at issue, testimony was offered of tables made in the office of the company from the records of the company by clerks employed for that purpose, and also of books of the company, which showed in tabulated form its receipts and expenditures. The attorney general, as counsel for the railroad commission, contended that only the parties who received the moneys and made the disbursements were competent witnesses to prove them, or at least the original reports themselves.

"Counsel for plaintiff contended that any statement made up in the office of the company from its books and records could be proved by an officer of the company under whose direction and supervision such statements were made. The referee ruled that by reason of the multitudinous agents who collected and disbursed the freight, passenger and other moneys of so large a system as the Seaboard Air Line Railroad Company, a requirement that they, or even the original reports made to them, should be held to be the best, and, therefore, the only admissible evidence would be practically a denial of justice, and, therefore, not demanded; but that the books of the company, kept in their offices in which these several items were aggregated and tabulated could be produced, and when produced, would be received in evidence, but that such entries could not be produced by a copy or by the person who made a copy."

<sup>93</sup> The rule that a party cannot introduce his own statements in his favor is subject to the exception that he may introduce books of account, kept in the regular course of business, upon identification of the account by the persons who made and entered the transactions there recorded. But where the person who made the sale or other transaction and entered it is dead, or is for any other cause unavailable as a witness, on the principle of necessity, the books may be introduced upon the introduction of the best available proof of their verity: *Thomson v. Porter*, 4 Strob. Eq. 58, 53 Am. Dec. 653; *Wigmore on Evidence*, sec. 1521. Obviously there can be no fixed rule as to what circumstances establish such necessity, and what is sufficient proof of the verity of the books. These questions must be left almost entirely to the discretion of the trial court.

In this case, we think, as held by the referee, that the books of original entry are the best evidence of the transaction of the plaintiff company, but the referee must decide

in the first instance what are the books of original entry and what evidence is reasonably available to the plaintiff to prove the entries made therein.

We agree fully with the referee that it would be a practical denial of justice to require the plaintiff to produce all the waybills, tickets, reports and other innumerable memoranda made by its multitude of employees. The entries made of the aggregations of these on the plaintiff's books of original entry kept in good faith for the purpose of showing the course of its business and its profits and losses are admissible as evidence of such transactions: 2 Wigmore on Evidence, sec. 1230; *Boston & W. R. Co. v. Dana*, 1 Gray. 83; *Louisville Bridge Co. v. Louisville & N. R. Co.*, 116 Ky. 258, 75 S. W. 285.

The defendant is, of course, not to be precluded from calling for any particular documents in the possession of the plaintiff which, in the opinion of the referee, tend to elucidate the accounts or books of the plaintiff or bear on any of the questions at issue.

It follows that the report of the referee should be confirmed, and it is so ordered.

Mr. Chief Justice Jones did not sit in this hearing.

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*Books of Account as Evidence* are discussed in the note to *Sheridan Coal Co. v. C. W. Hull Co.*, ante, p. 435.

*The Admissibility in Evidence Against Third Persons of Books, reports, and the like, other than books of account, is the subject of a note to Eureka etc. Min. Co. v. Bullion etc. Min. Co.*, 125 Am. St. Rep. 841.

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## LAMB v. SOUTHERN RAILWAY.

[86 S. C. 106, 67 S. E. 958.]

**RAILROADS — Trespasser Crossing Bridge.**—A person who undertakes to walk upon a long railroad bridge over a river, in spite of a conspicuous posted notice not to do so, is a trespasser, although many persons actually use the bridge to cross without objection by the railroad authorities, and one or two planks are laid on the cross-ties and used as a walkway, particularly where a safe public bridge over the river is within easy access. (pp. 1033, 1034.)

**RAILROADS.—The Contributory Negligence of a Trespasser or licensee** in walking upon a long railroad bridge over a river will defeat a recovery for his death or injury caused by the negligence of the railroad company. (p. 1034.)

**RAILROADS—Trespasser—Wanton Injury.**—If a trespasser is killed, while walking upon a long railroad bridge over a river, through the recklessness or wantonness of persons in charge of a railroad engine, his contributory negligence will not defeat a recovery for his death. (pp. 1034, 1035.)



**RAILROADS—Trespasser—An Inference of Indifference and Wanton Disregard** of the safety of trespassers may be drawn from evidence that a railroad engine, without cars and without a headlight or signals, was run, between sundown and dark, at high speed across a long bridge; that the engineer saw a man on the bridge some distance ahead of him and "slowed up"; that the engineer saw the man step from the track into a platform, where there was a water barrel; that the engine was then pulled ahead; and that the engineer had said, after coming off the witness-stand, that he did knock the man off, especially where the railroad company had notice that many persons were trespassing on the bridge notwithstanding a conspicuous posted notice not to do so. (pp. 1035, 1036.)

**RAILROADS.—A Nonsuit is Properly Refused** in an action for damages against a railroad company for killing a trespasser who was walking upon a long railroad bridge over a river, where there is sufficient evidence from which an inference of indifference and wanton disregard of his safety might be drawn. (p. 1036.)

**EVIDENCE—Daylight or Dark.—A Witness** may say whether, at the time of an occurrence, it was daylight or dark. (p. 1036.)

**RAILROADS.—Hearsay Testimony** That a Person had crossed a railroad bridge is of no consequence after the introduction of undisputed evidence that a great number of persons had crossed. (p. 1036.)

**RAILROADS.—Negative Evidence, if Relevant,** is admissible, as that the witness had never heard of the railroad company making any objections to persons crossing its bridge. (p. 1036.)

**RAILROADS—Instructions—Harmless Omission.—In** an action against a railroad company, an omission to give an instruction substantially included in another instruction is not material. (p. 1037.)

Action by the plaintiff, as administrator, against the railway company and G. T. Brewer. There was a judgment for the plaintiff and the defendants appealed.

N. G. Evans, for the appellants.

J. W. Thurmond and Sheppard Bros., for the appellee.

<sup>107</sup> **WOODS, J.** The steel bridge of the Southern Railway Company, crossing the Savannah river from Hamburg, South Carolina, to Augusta, Georgia, was built and is maintained solely for railroad purposes. About two hundred yards from this bridge there is a bridge maintained for the use of the public. James J. Chapman, on the 31st of March, 1908, undertook to walk across the railroad bridge and was killed, either by being knocked off the bridge <sup>108</sup> by one of the defendant's engines, or by falling into the river in the effort to get out of the way of the engine. The plaintiff, as administrator of Chapman's estate, recovered judgment for three thousand dollars against the defendant railroad company, under a complaint alleging that Chapman's death was caused by the joint and concurrent negligence, recklessness and wantonness of the defendant railroad company and its agent in charge of the engine, the defendant, Brewer, in these particulars: "(a) In running the said locomotive engine across the said bridge without a headlight

while it was dark; (b) In running the said locomotive engine at a high rate of speed across said bridge when the said engineman knew, or by the exercise of due care could and would have known that he would meet or run over some person walking across said bridge, as it was dark thereon; (c) In failing to stop or lessen the speed of said engine after the said James J. Chapman was seen, to give him an opportunity to escape from his danger; (d) In failing to have a safe place from one end of the bridge to the other, for persons walking across the same, to stop and protect themselves from the passing engine or train; (e) In having the safety aprons too far apart; (f) In that the said G. T. Brewer, the engineman in control of said engine, saw, or by the exercise of ordinary care, could and would have seen the said James J. Chapman, or his bulk in time to stop the said engine before reaching him, but he did not even reduce the speed thereof, which if done, might have given the said James J. Chapman a chance to escape from his place of danger; (g) In that the said engineman in control of said engine, failed to keep a reasonable lookout for persons passing to and fro on said bridge; (h) In striking the said James J. Chapman and hurling him into said river, or in putting him into such imminent danger of life or limb as to cause him to leap or back into said river, as a safer way to escape from his dangerous position."

<sup>100</sup> The main question made by the appeal is whether a nonsuit should have been granted on the grounds: 1. That there was an entire absence of evidence tending to show that the death of Chapman was due to the actionable negligence, or the recklessness or wantonness of the defendants or either of them; and 2. That the evidence admitted of no other inference than that the plaintiff was guilty of contributory negligence.

The case is one of difficulty, because the evidence shows beyond a doubt that a main proximate cause of Chapman's death was his taking the great and perfectly obvious peril of walking over a railroad bridge when the safe public bridge over the river was within easy access. There are differences in favor of the defendant on this point between this case and *Jones v. C. & W. C. Ry.*, 61 S. C. 556, 39 S. E. 758; *Matthews v. Seaboard Air Line Ry.*, 67 S. C. 501, 46 S. E. 336, 65 L. R. A. 286; *McKeown v. S. C. & G. R. R.*, 68 S. C. 483, 47 S. E. 713; *Goodwin v. Atlantic C. L. R. R.*, 82 S. C. 321, 64 S. E. 242; *Bamberg v. Atlantic C. L. Ry. Co.*, 72 S. C. 389, 51 S. E. 988. These cases decided that it could not be laid down as an inevitable inference that a person walking on the railroad right of way was always a trespasser, but that it might be inferred that he was a licensee when the railroad company had acquiesced in the



general use by the public of the roadbed as a path or street. But in these cases, when the danger from trains was involved, the public use was of the ordinary roadbed or a very short trestle from which escape was easy without stopping the train or in any way interfering with the railroad business. In the cases cited it was entirely consistent with reason to say that it was not negligence per se for a person to walk on the right of way expecting to step off on the approach of a train; and to hold further that it may be inferred from the general and constant travel on the right of way of large numbers of persons in a populous community that the railroad company had acquiesced in the public<sup>110</sup> use of its right of way, and that it cannot treat those whom it has reason to expect to find there as trespassers.

But in this case Chapman was killed while walking on a railroad bridge at least a quarter of a mile in length across the Savannah river, which was a part of a long trestle with some fills. The facts relied on to indicate an implied acquiescence by the railroad company in its use by the public were, that many persons actually used the trestle to cross without objection by the railroad authorities, and that one or two planks were laid on the cross-ties and used as a walk way. But witnesses for the plaintiff testified that at Schultz's Hill, near the beginning of the trestle, there was a sign board posted, plainly forbidding persons to use the trestle, that the passage of trains over the bridge was very frequent, and that the attempt to cross the bridge was dangerous.

Hardly anything could be more stupid than a railroad company's acquiescence in the use of its river bridges by pedestrians. Such stupidity should not be lightly inferred. We do not see how acquiescence so senseless can be inferred from the fact that many persons chose to take the risk of using the trestle when the railroad company had posted a conspicuous notice forbidding them to do so. It cannot be inferred from the fact that planks were placed on the bridge by the company to be used by its own employees, that the railroad company intended others to cross. When a railroad company or other owner of dangerous property warns persons against its use, those who insist in incurring the peril of using it, however numerous they may be, have no right to charge the owner with acquiescence in the use. It is true that Chapman did not enter the trestle where the notice was posted, but climbed up one of the supports to which cross-pieces were nailed. But surely it cannot be contended that the railroad company was bound to put signs all along the trestle in anticipation that persons might climb on it. As was well remarked by the court in *Burns v.*<sup>111</sup> *Southern Ry. Co.*, 63 S. C. 46, 40 S. E. 1018, the care

required of owners of such property does not extend to the guardianship of those who insist on becoming trespassers and using the property of others unlawfully.

But if it be assumed that Chapman was a licensee and not a trespasser, we think the facts show beyond all doubt that he was guilty of contributory negligence in attempting to walk across the bridge. Everybody knows that walking a long railroad trestle over which trains frequently pass is a very dangerous undertaking, and several witnesses for the plaintiff so testified. The pedestrian who makes the attempt must know that even where there are stands for water barrels on the trestle, they are not intended for his use, and that he runs a risk of reaching them and finding safe refuge. In *Smalley v. Southern Ry. Co.*, 57 S. C. 243, 35 S. E. 489, it was held that an engineer who sees a man on a river bridge in the apparent possession of his senses is not required to stop his train, but may assume that such person has a way of escape. It is true that the way of escape from collision with the train is attended with danger, but when the pedestrian has deliberately taken the chances of being able to use it, he has only himself to blame if he miscalculates and does not find safety at the side of the trestle or under it. Chapman deliberately climbed on the trestle and negligently chose to take this peril, and that, too, without the excuse of emergency or necessity, for the public bridge only two hundred yards away afforded a convenient and safe crossing. As will be seen by reference to the citations in *Matthews v. Seaboard Air Line Ry. Co.*, 67 S. C. 501, 46 S. E. 336, our cases have gone beyond many other courts of high authority in allowing the general use of the right of way by the public in a populous community to be taken as evidence of acquiescence by the railroad company in that use. But we can find no case in this state or elsewhere which holds that a man who undertakes to walk a long trestle over <sup>112</sup> a river, in spite of a posted notice not to do so, is a licensee or that such an attempt is not negligence per se.

We think the evidence shows conclusively that Chapman was a trespasser who took the risk of being injured by meeting a train on the bridge; and that if he had been a licensee, injured by the negligence of the defendants, his contributory negligence would have defeated a recovery.

On the issue as to whether a nonsuit should have been granted, it remains to consider whether there was any evidence that Chapman, as a trespasser, met his death on account of the recklessness or wantonness of the defendant, Brewer, who was in charge of the engine which he was taking across the river; for if the accident was due to the wantonness or recklessness of the defendants, then the

contributory negligence of the plaintiff would not prevent his recovery. The witnesses who knew anything of the accident itself were Hall, on behalf of the plaintiff, and Brewer, on behalf of the defendants. Hall, after testifying that Chapman came to his house, which was about forty or fifty yards from the point where he climbed on the trestle, between sunset and dark, gave this account of the accident: "He came to my house coming from Schultz's Hill. I was standing in my back porch; when he came by the house I could see him from the back porch, as my house sits this way with the street [indicating]. The house that I lived in there was the only house on the block. He went under the bridge and went up the ladder, and as far as I could see him, he went in the first span of the bridge, when I heard the train coming from the Augusta side of the river. I could tell that it was running fast by the exhaust of the train; when he had got in far enough I could not see him, and the train came very fast until it got within a little piece of the Carolina side of the river. I heard this engine coming, and all at once it reduced its speed, and went on across that way until it came to about even with my house, <sup>113</sup> right at my house, and then the engineer pulled out the throttle and the train went on. The fuss of the engine did not drown the man hollering, 'Oh, Lord, help!' and I could hear the slush, slush, of the water as he struggled there, and I ran to his assistance, and when I got within a few steps of the water I heard him holler the last time, and I could not see anyone, as it was dark."

Hall further testified that there was no headlight on the engine and that the bell was not rung nor the whistle blown. If this were all, any conclusion as to whether Chapman was knocked off by the engine or fell off in his effort to escape would be mainly conjectural.

But the defendant, Brewer, gave this account: "Just as I got about middle ways of the first span from the Augusta side, I saw a man on the bridge; I could see him as plain as any one of you; when I saw this man quicken his pace, as if to make one of these water barrels, which was the first or second barrel on the Carolina side of the river, the Hamburg side; I slowed down the engine there for a few spaces, and I saw this man step from the track into the platform where this water barrel was. I saw him standing there right by the water barrel, on the upper end of it next to the river; I saw him standing there holding on to the barrel this way, with his back up the river. I pulled the engine ahead and passed on over to Hamburg, and the front end of the boiler obstructed my view, because I was on the opposite side of the engine from where this man was standing."

These statements of Hall and Brewer are reconcilable and if both be taken as true the inference could hardly be avoided that the engineer exercised such care that he was in no wise chargeable with the death of Chapman. But taking Hall's statement alone, it might be inferred either that the engine was "slowed up" in time to allow Chapman to get off the track at the water barrel, and then its speed increased, or that it was "slowed up" after knocking Chapman <sup>114</sup> off. On this point the plaintiff offered a witness who testified that he had heard Brewer say after coming off the witness-stand that he did knock Chapman off. In addition to this the fact appeared that Brewer was running an engine very easily controlled, because it had no cars attached. This evidence furnished some foundation for the jury to find that the engineman saw Chapman in abundant time to stop his engine or so reduce its speed as to allow Chapman to get to a water barrel stand, and that he nevertheless went on and knocked Chapman off; that there was no necessity for the engineer to run on in the face of Chapman's peril since he was running a mere shifting engine and not a train of cars; that the engine was run over the bridge at high speed without lights and without signals. Such facts if found by the jury would support an inference of indifference and wanton disregard of the safety of trespassers, especially when the defendant had notice that many persons were trespassing on the bridge notwithstanding the notice not to do so. We think it was possible to infer wantonness from the evidence, and, therefore, the nonsuit was properly refused.

The objections to the testimony cannot be sustained. A witness certainly may testify as to whether it is daylight or dark, and the witness did nothing more in the testimony which is objected to. It may be that the witness, Brigham, was testifying from hearsay when he said his son had crossed the bridge, but his testimony was of no consequence after the introduction of undisputed evidence that a great number of persons had crossed. Objection was made to the witness, Blackstone, testifying that he had never heard of the railroad making any objection to persons crossing the bridge. This testimony was negative, but it was relevant. No objection was interposed to the further statement of the witness that he supposed he would have known of it, if there had been objection.

<sup>115</sup> In the twelfth exception error is assigned in charging: "And if you further find that the said James J. Chapman was guilty of negligence, and his negligence was not a proximate cause of death, but the defendant's negligence was the cause of his death, then the plaintiff would be entitled to recover in this action." The omission to say

that in order for the plaintiff to recover it was necessary for the jury to conclude that the defendant's negligence was the proximate cause of Chapman's death was not material, because instruction to that effect had been already given.

The other exceptions to the charge were not relied on in the argument and require no detailed discussion.

The judgment of this court is that the judgment of the circuit court be affirmed.

**PER CURIAM.** Careful examination of the petition for rehearing does not convince us that there was any material issue arising on the record overlooked or disregarded in the judgment of the court. It is, therefore, ordered that the petition be dismissed, and that the order staying the remittitur be revoked.

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*The Duty to Trespassers on a Railroad Track* is discussed in the note to *Central R. R. etc. Co. v. Vaughan*, 30 Am. St. Rep. 53; *Louisville etc. R. R. Co. v. McNary*, 128 Ky. 408, 129 Am. St. Rep. 308. The owner of premises is not under any duty to make them safe for trespassers: *Alabama etc. Ry. Co. v. Godfrey*, 156 Ala. 202, 130 Am. St. Rep. 76. A railroad company ordinarily owes no duty to a trespasser until his peril is discovered, and is not liable to him unless, after discovering his peril, it could with proper care avoid injury: *Louisville etc. R. R. Co. v. McNary*, 128 Ky. 408, 129 Am. St. Rep. 308. As to the duty of railways toward licensees on their tracks, see *Williamson v. Southern Ry. Co.*, 104 Va. 146, 113 Am. St. Rep. 1032; and compare the note to *Lorence v. Ellensburg*, 52 Am. St. Rep. 46. As to when an injury is wantonly or willfully inflicted, see *Mobile etc. R. R. Co. v. Smith*, 153 Ala. 127, 127 Am. St. Rep. 22, and cases cited in the cross-reference note thereto.

*If the Engineer of an Approaching Train Sees a Person on a Railroad Bridge*, whose only means of escape is to reach the end of the bridge, he must give such person ample time to cross in safety: *Becker v. Louisville etc. R. R. Co.*, 110 Ky. 474, 96 Am. St. Rep. 459.

*An Instruction Given Need not be Repeated*: *Perin v. Parker*, 126 Ill. 201, 9 Am. St. Rep. 571; *Spencer v. McLean*, 20 Ind. App. 271; *Konold v. Rio Grande etc. Ry. Co.*, 21 Utah, 379, 81 Am. St. Rep. 693; *Jirachek v. Milwaukee etc. Light Co.*, 139 Wis. 505, 131 Am. St. Rep. 1070.

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## McCALLUM v. GRIER.

[86 S. C. 162, 68 S. E. 466.]

**APPEAL.**—An Exception is not in Proper Form where it does not contain within itself the proposition of law to be reviewed. (p. 1040.)

**EQUITY**—**Striking Out Allegations of Answer.**—Greater latitude is allowed in stating the issues in equity than in actions at law. Hence an exception that the court erred in refusing to strike out allegations of the answer in a suit for specific performance cannot be sustained where the appellant fails to satisfy the court that such ruling was prejudicial. (p. 1040.)

**AGENCY—Revocation of Agent's Authority.**—The authority of an agent may be revoked by the principal at will at any time, and with or without good reason therefor, except where the authority is coupled with an interest. (p. 1040.)

**SPECIFIC PERFORMANCE—Sale by Broker After Authority Revoked.**—Where a broker makes a sale of land after his authority has been revoked, the purchaser, though not then aware of the revocation, cannot enforce specific performance against the principal (p. 1041.)

**BROKERS—Purchase by President of Brokerage Company.**—A trustee cannot buy at his own sale, nor can a broker employed to sell property buy it for himself. Hence where the authority of a brokerage company to sell land has been revoked, and the president of the company attempts to purchase the land through the company for himself, he violates the duties of his position; and where he and the company deal with the land as if no such revocation had been made, and he, through the manager of the company, obtains from the company, acting as agent for the seller, a contract for the sale of such land, the name of the purchaser never having been disclosed to the seller, the president cannot demand specific performance of his contract, which is voidable at the option of the seller. (p. 1043.)

Action by J. L. McCallum against Kate B. Grier. There was a judgment for the defendant and the plaintiff appealed.

L. D. Jennings, for the appellant.

Lee & Moise, for the appellee.

<sup>163</sup> GARY, J. The facts are thus stated in the decree of his honor, the circuit judge: "This action was brought for specific performance of an alleged contract of sale by McCallum Realty and Insurance Company, as agent of the defendant, through its secretary and manager, D. R. McCallum, Jr., to J. L. McCallum, the president of the company, the same bearing date September 12, 1907. And the court is asked to require the defendant to specifically perform the alleged contract.

"The case was referred to the master upon all of the issues, and the master found that the contract was binding and should be enforced.

"This brings up the case upon all the evidence in the cause.

"The evidence shows that D. R. McCallum, Jr., acting for his company, requested the defendant to list her property for sale with his agency. She was about to leave the city of Sumter for the benefit of her health, was exceedingly feeble and in a nervous condition, and sent for the said D. R. McCallum, Jr., for the purpose of having her property insured in his company. After the insurance was arranged, the agent requested the defendant to allow him to list her property with the company for sale, which she did, claiming, however, to have signed a blank authority with nothing written thereon. The paper obtained at the time author-



ing the sale of the property is a printed form filled out<sup>64</sup> and witnessed by D. R. McCallum, Jr. He left no copy with the defendant.

“No sale was made in fact until after the return of the defendant from Charleston. She left her home for Charleston on the nineteenth day of August, 1908, and returned about September 2d, at which time Mr. D. R. McCallum, Jr., called upon her in the interest of the plaintiff, and with instructions from the plaintiff ‘to try and get her to take less than twelve hundred and fifty dollars,’ and with instructions to offer less. His first offer was eleven hundred dollars, which the defendant declined. He then stated, ‘I think I have about found a man who will give you twelve hundred.’ The defendant declined the offer. Further negotiations were carried on by the agent of the company with the defendant, all resulting in a refusal of the defendant to make the sale.

“Without repeating all of the testimony, it is sufficient to say that it appears therein that when the defendant returned to her home in September that no sale of her property had been effected, and she declined to allow the McCallum Realty and Insurance Company to make the sale of the land referred to in the contract, except upon certain terms, which the company did not agree to; in consequence of which disagreement there was a clear abrogation of the authority to make the sale of the land, in accordance with the contract.

“It further appears from the testimony that the McCallum Realty and Insurance Company, acting through its secretary and manager, acted in a dual capacity, in undertaking to negotiate a sale with the president of the company, at a price less than that fixed by the defendant.

“It further appears from the testimony that the agent of the defendant undertook to bind the defendant to a sale of property referred to, to its own president, and this without disclosing the name of the purchaser to the seller.”

<sup>165</sup> The first of the appellant's exceptions raises a question of practice, and is as follows: “It is respectfully submitted that his honor erred in overruling plaintiff's exceptions to the master's report, and in not holding that the master should have sustained the plaintiff's motion to strike from the answer all of the allegations referred to in the plaintiff's motion to strike out, all of which are referred to in this exception and made a part hereof, and it is respectfully submitted that his honor erred in not sustaining the motion on each and every ground therein stated.”

In the first place, the cases of Jumper v. Bank, 39 S. C. 296, 17 S. E. 980, Holtzclaw v. Green, 45 S. C. 494, 23 S. E. 515, and Tucker v. Charleston etc. Ry. Co., 51 S. C. 306,

28 S. E. 943, show that the exception is not in proper form, as it does not contain within itself the proposition of law to be reviewed. But, waiving such objection, it cannot be sustained, for the reason that the appellant has failed to satisfy this court that the ruling of the presiding judge was prejudicial to his rights. It must be remembered that greater latitude is allowed in stating the issues in equitable, than in legal, actions: *Smith v. Smith*, 50 S. C. 54, 27 S. E. 545.

The appellant filed exceptions to the findings of fact hereinbefore set out, but these exceptions must be overruled, as the findings of fact are fully sustained, not only by the testimony introduced in behalf of the defendant, but by the testimony of D. R. McCallum, Jr., a witness for the plaintiff.

The next question that will be considered is, whether the defendant had the power to revoke the authority of her agent during the time fixed for the continuance of her contract with the agent.

“As between principal and agent, authority is revocable at any time, if not coupled with an interest. The authority of an agent to represent the principal depends upon the will<sup>166</sup> and license of the latter. It is the act of the principal which creates the authority; it is for his benefit and to subserve his purposes that it is called into being; and unless the agent has acquired with the authority an interest in the subject matter, it is in the principal's interest alone that the authority is to be exercised. The agent, obviously, except in the instance mentioned, can have no right to insist upon a further execution of the authority, if the principal himself desires it to terminate. It is the general rule of law, therefore, that as between the agent and his principal, the authority of the agent may be revoked by the principal at his will at any time, and with or without good reason therefor, except in those cases where the authority is coupled with sufficient interest in the agent. And this is true, even though the authority be in express terms declared to be ‘exclusive’ or ‘irrevocable.’ But although the principal has the power thus to revoke the authority, he may subject himself to a claim for damages if he exercises it contrary to his express or implied agreement in the matter. An agency is sometimes said to be irrevocable when it is conferred for a valuable consideration. It is believed, however, that this is only another form of stating the general rule that it must be coupled with an interest”: *Mechem on Agency*, sec. 204.

“A power of attorney constituting a mere agency is always revocable. It is only when coupled with an interest in the thing itself, or the estate which is the subject of the power, it is deemed to be irrevocable, as where it is a secur-



ity for money advanced, or is to be used as a means of effectuating a purpose necessary to protect the rights of the agent or others. A mere power, like a will, is in its very nature revocable when it concerns the interest of the principal alone, and in such case, even an express declaration of irrevocability will not prevent revocation. An interest in the proceeds, to arise as mere compensation, for the service of executing the power, will not make the power irrevocable. Therefore, it has been held that a mere employment <sup>167</sup> to transact the business of the principal is not irrevocable without an express covenant founded on sufficient consideration, notwithstanding the compensation of the agent is to result from the business to be performed, and to be measured by its extent. In order to make an agreement for irrevocability contained in a power to transact business for the benefit of the principal binding on him, there must be a consideration for it, independent of the compensation to be rendered for the services to be performed": *Blackstone v. Buttermore*, 53 Pa. 266.

"It is not denied by the plaintiff that, in this case, it was within the power of the defendant to put an end to his agency by revoking his authority. Indeed, this is a doctrine so consonant with justice and common sense that it requires no reasoning to prove it. But he contends that it is a maximum of common law that every instrumentality must be revoked by one of equal dignity. It is true an instrument under seal cannot be released or discharged by an instrument not under seal or by parol, but we do not consider the rule as applicable to the revocation of powers of attorney. The authority of an agent is conferred at the mere will of the principal, and is to be executed for his benefit; the principal, therefore, has the right to put an end to the agency when the confidence at first reposed in him is withdrawn": *Brookshire v. Brookshire*, 8 Ired. (30 N. C.) 74, 47 Am. Dec. 341.

As a broker is a special agent, a third party deals with him at his peril. Therefore, after the defendant revoked the authority of her agent, D. W. McCallum, Jr., could not enter into a contract binding on her for the sale of the land, even though the plaintiff was not then aware that the agent's authority had been revoked.

The foregoing authorities dispose of all the exceptions relative to the power of revocation.

The next question is whether the relations existing between the defendant, the plaintiff, McCallum Realty and <sup>168</sup> Insurance Company, and D. R. McCallum, Jr., were such as to prevent the latter from entering into a contract with J. L. McCallum for the sale of land that would be binding upon the defendant against her wishes.

The McCallum Realty and Insurance Company was the agent of Mrs. Grier, and, of course, J. L. McCallum, its president, and D. R. McCallum, Jr., its manager, also sustained toward her a fiduciary relation, yet we find that one fiduciary (J. L. McCallum) not only seeks to purchase the property from the other fiduciary (D. R. McCallum, Jr.), but that the plaintiff constituted the D. R. McCallum, Jr., his agent, to negotiate the purchase of the property from the defendant, although her interests were antagonistic to those of the plaintiff.

“A broker cannot act as the agent of both parties where their interests are conflicting. Thus a broker employed to sell cannot act at the same time as the agent of the purchaser, for in that case the duty he owes to one principal to sell for the best price obtainable is essentially inconsistent with, and repugnant to, the duty he owes to the other, to buy at the lowest price possible, and there would necessarily be danger that the right of one principal would be sacrificed to promote the interests of the other.

“A broker employed to sell goods for his principal cannot buy them for himself, nor can a broker employed to buy, buy his own goods, unless the principal, with full knowledge of the facts, assents to the transaction. This rule is inflexible, and it is immaterial that the broker acts in good faith, and works no injury to his principal, or even that the transaction is more advantageous to the principal than if had with a stranger.

“The reason of the rule is that if the broker were permitted to buy from or sell to himself, there would be combined in him the incompatible relation of purchaser and seller, and an interest adverse to that of his principal<sup>169</sup> would be created, such as would ordinarily lead to a violation of his duty as agent”: 4 Ency. of Law, 966; 19 Cyc. 207.

“It is a well-established principle that a trustee cannot buy at his own sale. He cannot be the vendor and vendee at the same time of trust property; that is, he cannot make a binding contract with himself in the purchase of the trust property under his control. On the contrary, all such purchases are subject to be vacated and set aside by the cestui que trust at his option, and this, too, without regard to the fact whether said purchase was made in good faith, at full price, or was fraudulent and delusive. This doctrine has been long settled, both in England and in this country, and it is a wise and wholesome principle. It strikes at once at the root of danger, and destroys it. It removes from the trustee the temptation to do wrong, and guarantees the faithful execution of his trust in the sale of the property of his cestui que trust.”

This language is quoted with approval in *Scottish etc. Mtg. Co. v. Clowney*, 70 S. C. 229, 49 S. E. 569, 3 Ann. Cas. 437. See, also, *Verner v. Simpson*, 68 S. C. 459, 47 S. E. 729, and *Duncan v. City Council*, 60 S. C. 558, 39 S. E. 265.

These authorities conclusively show that it was a violation of the plaintiff's duty to attempt to purchase from an agency of which he was a member, and that he is not in a position to demand specific performance of his contract, which was voidable at the option of the defendant.

Judgment affirmed.

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*The Authority of an Agent to Sell Land may be Revoked* by his principal at any time before sale without the owner incurring any obligation to the agent. But an agent's authority coupled with an interest cannot be revoked: *Cronin v. American Securities Co.*, 163 Ala. 533, 136 Am. St. Rep. 88.

*Between Principal and Broker the Utmost Good Faith* must be exercised: *Jennings v. Trummer*, 52 Or. 149, 132 Am. St. Rep. 680. A trustee should not purchase at his own sale: Note to *Credle v. Baugham*, 136 Am. St. Rep. 805, 806; and specific performance of a contract will not be decreed even where there is a suspicion of its bona fides: Note to *Banaghan v. Malaney*, 128 Am. St. Rep. 393.

*Purchases by Persons Standing in a Fiduciary Relation* to the owner of the property, where the sale is of a judicial or compulsory character, are discussed in the note to *Credle v. Baugham*, 136 Am. St. Rep. 789.

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## FIRST NATIONAL BANK OF RICHMOND v. BADHAM.

[86 S. C. 170, 68 S. E. 536.]

**BILLS AND NOTES—Provisions Affecting Negotiability.**—If a note or written instrument, otherwise negotiable, contains a provision or provisions which do not and cannot in any way have any effect on it until after it becomes non-negotiable by operation of law, to wit, after maturity, such provision or provisions do not render the instrument non-negotiable. (p. 1047.)

**BILLS AND NOTES—Provisions Affecting Negotiability.**—A note is not rendered non-negotiable by provisions therein for the payment of an attorney's fee, in case it becomes necessary to employ an attorney to collect the note, and for the payment of the expense of collection, as such provisions can have no active legal operation until after maturity, when the note by operation of law becomes non-negotiable. (p. 1047.)

**BILLS AND NOTES—Provision Destroying Negotiability.**—A provision in a note that "for value received in one machinery as per contract November 23, 1899," renders it non-negotiable. (p. 1047.)

**APPEAL.**—A Correct Ruling will not be Reversed on appeal, though the reason for it is erroneous or unsound. (p. 1048.)

**SALES.**—There can be No Rescission of an Executed Sale for breach of warranty, except: 1. Where this right is given in the contract of purchase; 2. Where the seller is guilty of fraud; 3. Where there has been an entire failure of consideration. (p. 1048.)

Lyles & McMahan, for the appellant.

D. W. Robinson, for the appellee.

<sup>195</sup> DE VORE. J. For the purpose of this opinion it will be necessary only to state that this was a suit commenced August 8, 1905, based upon two promissory notes set out in the complaint; each being the basis for a separate cause of action, as will appear from the complaint herein.

The main question involved in the court below, as well as in this court, is whether said notes are negotiable; it will, therefore, be important to have a copy inserted here.

“\$785.00.

Columbia, S. C., July 12, 1902.

“On or before the first day of January, 1903, for value received in one machinery as per contract November 23, 1899, I, the undersigned, of Richland county, State of South Carolina, promise to pay to the order of V. C. Badham, of Columbia, S. C., seven hundred and eighty-five dollars, negotiable and payable at the Carolina National Bank, Columbia. Without offset, with interest at the rate of 8 per cent. per annum after maturity until paid, waiving all relief whatever from valuation, appraisement or exemption laws, with all expenses if suit be instituted for collection of this note. And it is expressly understood and agreed that the said V. C. Badham neither parts with the title, nor do the undersigned acquire any title in the property enumerated herein until this note and all other notes given in payment for same, and all extensions and renewals thereof are fully paid. And in case it becomes necessary to employ an attorney to collect this note, a further sum, not exceeding <sup>196</sup> 10 per cent. for fees. Presentment for payment and protest waived.

“SAM J. HUFFMAN.

“P. O. Congaree, Richland Co., State of S. C.”

The following indorsements are on the back of the said note: “Pay to the order of Richland City Mill Works. V. C. Badham. Richmond City Mill Works. By H. A. Moore, Treasurer. Pay to the order of any Bank, Banker or Trust Co. All previous indorsements guaranteed. First National Bank, Richmond, Indiana. G. R. DuHadway, Cashier.”

The other note is identical with the above, except the last indorsement, the amount and date of maturity; and these differences do not affect the question of negotiability; in other words, both notes must bear the same fate so far as that question is concerned.

According to the case, another action previous to this was brought on the notes against the maker, Sam J. Huffman, and V. C. Badham, the defendant herein, jointly, but was discontinued and this one commenced thereafter against V. C. Badham, because S. J. Huffman, in the former, as-

swered and pleaded as a defense breach of warranty, alleging that the machinery was sold to him by Badham as agent for the Richmond City Mill Works, and that he and the Richmond City Mill Works, as an inducement to him, the said Huffman, to buy, had represented and warranted that said machinery would have a certain capacity of production per day, and said notes were given and accepted upon condition that he would not be liable unless the machinery upon trial proved to have such capacity, and same had failed to develop such capacity. The defendant, Badham, answered in that suit and virtually set up same defense. The plaintiff, in order not to become involved in litigation with said Huffman upon that defense, as above stated, discontinued that suit and instituted this one against V. C. Badham alone.

<sup>197</sup> Badham, in substance, sets up same defense here as in the other suit. In this suit he alleges that he, as agent of Richmond City Mill Works, had full power and authority to make, and as such did make, the representations, and that he accepted and took the notes subject thereto, and that his indorsement on said notes was conditional, that after a fair trial said machinery did not have the producing capacity of fifty barrels of flour per day, as represented by him to said Huffman.

On the trial in the court below his honor, Judge R. W. Memminger, presiding, held the notes to be non-negotiable. Said trial resulted in judgment for defendant.

The case was heard in this court, at November term, 1909, involving twenty-six exceptions, almost all of which will depend upon negotiability or non-negotiability of the notes.

Exceptions 9, 10, 15 and 16 in different forms raise the question of negotiability, and will be considered first and together.

In so far as our own decisions are concerned, beginning with Carroll Co. Sav. Bank v. Strother, 28 S. C. 504, 6 S. E. 313, and coming on down to Smith Sons etc. Machine Co. v. Badham, 81 S. C. 63, 61 S. E. 103, the last utterance of this court upon the subject, for one reason or another, there is a difference of opinion among the supreme court justices on the question under consideration. The court does not seem to have ever been a unit in any of the cases except the Strother case. In that case the note contained three provisions: 1. "All counsel fees and expenses in collecting this note, if it is sued or placed in hands of counsel for collection. 2. Gives payee 'power to declare this note due at any time they may deem it insecure, even before maturity.' 3. With exchange on New York."

Mr. Chief Justice McIver, in delivering the opinion of the court, held the note to be non-negotiable, mainly on the ground that it contained the provision "with exchange on

198 New York," for, with reference to the other two provisions, he uses this language: "If, however, there was any doubt as to the effect of either of these stipulations, there can be none as to the effect of the exchange provision as above." Thus clearly showing that he was not fully satisfied that the other two provisions affected negotiability.

The next case, *Sylvester Beckley Co. v. Alewine*, 48 S. C. 308, 26 S. E. 609, 37 L. R. A. 86, the note provided for "ten per cent attorney's fees for collection." Mr. Justice Gary, delivering the opinion of the court, said that *Bank v. Strother* held "that uncertainty in a note prior or subsequent to maturity destroyed its negotiability." Mr. Chief Justice McIver concurred in the opinion. Mr. Justice Pope concurred in the result on another ground. Mr. Justice Jones dissented as to question of negotiability.

The next case, *White v. Harris*, 69 S. C. 65, 104 Am. St. Rep. 791, 48 S. E. 41, the note contained the provision, "we agree in default of payment after maturity to pay ten per cent for attorney's fees for collection." Mr. Chief Justice Pope, delivering the opinion, held the note to be negotiable for the reason that the attorney's fees were definite and certain. Mr. Justice Gary dissented for the reason stated in the *Sylvester* case.

The next case, *Green v. Spires*, 71 S. C. 107, 50 S. E. 554, 4 Ann. Cas. 261, the note contained a provision "to pay all costs and expenses, including ten per cent attorney's fees," if "collected through an attorney or by legal proceeding of any kind." Mr. Justice Gary, delivering the opinion, held the note to be non-negotiable upon the authority of *Bank v. Strother*. Mr. Chief Justice Pope concurred. Mr. Justice Jones dissented as to question of negotiability. Mr. Justice Woods concurred in the opinion of Justice Jones, saying *Bank v. Strother* should be overruled in so far as it held non-negotiable a note providing for payment of attorney's fees and costs of collection, which cannot accrue until after maturity.

199 The next case, *Smith Sons etc. Machine Co. v. Badham*, 81 S. C. 63, 61 S. E. 1031, the note contained the provision, "negotiable and payable at the bank . . . with all expenses if suit be instituted for collection of this note." Mr. Justice Gary, delivering the opinion, held the note non-negotiable. Mr. Chief Justice Pope concurred in the result. Mr. Justice Jones concurred in the result, but dissented on the question of negotiability. Mr. Justice Woods concurred in the dissenting opinion.

The citation of the foregoing cases will show the views of the justices of this court, from which it will be seen this court has been divided on the question under consideration since the case of *Bank v. Strother* down to the present time.



It is very important that the law on the question involved should be settled by this court, and rightly settled, not so much in accordance with the needs and purposes of the times with regard to commercial interest, but in accordance with sound reason as regards the question itself. Our court being divided in this regard, and there being no decision upon which we can rely for precedent, except the case of *Bank v. Strother*, supra, it will therefore be necessary to look elsewhere for authority.

Mr. Daniel, on *Negotiable Instruments*, fifth edition, section 62a, speaking of instruments like those involved here, says: "Such instruments should, we think, be upheld as negotiable," and continues with his reasons therefor, in the text, and besides cites numerous cases to support same, and also cites the cases contra.

I find the text-writers on the subject are about equally divided pro and con. The courts of the several states are about equally divided.

I find that those writers and jurisdictions opposed to holding paper like this under consideration negotiable do so mainly on the ground of uncertainty as to amount that will be due under the terms of the instrument. In other <sup>200</sup> words, the commercial world cannot estimate the value of paper if put on the market for sale or negotiation; hence would not know what to pay for it.

Those writers and jurisdictions who favor negotiability do so on the ground that no uncertainty as to amount due by terms of such instrument can arise until after maturity.

After a careful consideration of the authorities, I am forced to the conclusion that the better reasoning leads to the following as a sound proposition of law. If a note or written instrument, otherwise negotiable, contain a provision or provisions which do not and cannot in any way have any effect on said note or written instrument until after it becomes non-negotiable by operation of law, to wit, after maturity, such provision or provisions do not render the same non-negotiable.

The provisions in the notes involved here, that is, as to attorney's fees, and as to expense of collection, do not and cannot affect the negotiable character of the notes, because those provisions cannot have any active legal operation until after maturity, when the notes by operation of law become non-negotiable.

The notes involved here are, however, non-negotiable, on account of the following provision contained therein, "for value received in one machinery as per contract November 23, 1899, I promise to pay," etc. This provision is notice to the commercial world of a contract made November 23, 1899, in connection with the purchase of the machinery for

which these notes were given; the terms of the contract do not appear on the face of the notes, but it is sufficiently referred to and stated to inform those who deal with these notes they must take the contract into consideration in so doing.

The circuit judge, in the court below, held the notes to be non-negotiable, which was correct, and this court will not reverse a correct ruling, though the reason for it be erroneous or unsound.

<sup>201</sup> The notes being non-negotiable, exceptions 1, 2, 3, 4, 5, 6, 7, 8, 11, 12, 13 and 14, which relate to the admissibility of evidence cannot be sustained, and are therefore overruled.

Exceptions 15, 16, 17 and 18 cannot be sustained, the notes being non-negotiable.

Exception 19 imputes error to the circuit judge in charging the following: "And if the jury also believe from the evidence that before the commencement of this action Sam J. Huffman, or the defendant, offered to return the machinery to the plaintiff and the plaintiff declined or failed to accept a return thereof, then the jury should find for the defendant on this ground." Under the law of this state there can be no rescission of an executed sale for breach of warranty, except: 1. Where this right is given in the contract of purchase; 2. Where the seller is guilty of fraud; 3. Where there has been an entire failure of consideration. The charge, therefore, should have limited the right of rescission to the instances above, and it should have been left to the jury to say whether or not, if the right ever existed to rescind, it had been waived by the defendant or by Huffman, in not undertaking to do so within a reasonable time.

Under the contention of the parties, and in view of the testimony submitted in the case, it was error to charge as above.

Exceptions 20, 21, 22, 24 and 25 are disposed of by what has been said as to 19.

Exception 23 is overruled, as the request submitted by plaintiff is not applicable to non-negotiable paper such as is involved here.

Exception 26 is overruled, the question raised there being matter in discretion of the trial judge.

Exception 10 is sustained in so far as the question raised therein concerns the charge in regard to section 255B <sup>202</sup> of the code; the same is not applicable here as construed and charged by the circuit judge, for the reason that it would have the effect of destroying altogether negotiable paper in so far as this state is concerned.

Let all the exceptions be reported with the case.



It is the judgment of this court that the judgment of the court below be, and the same is hereby, reversed, and the case remanded for a new trial.

Mr. Chief Justice Jones concurs in the result and in the separate opinion of Mr. Justice Woods.

GARY, J. I dissent from the conclusion announced herein that the notes were not rendered non-negotiable by the provision as to attorney's fees, but concur in the separate opinion of Mr. Justice Woods to the extent that the words expressing the consideration of the note "for value received in one machinery as per contract November 23, 1899," did not render the note non-negotiable.

WOODS, J. I concur in the conclusion reached in the opinion of Judge De Vore that the notes in suit were not rendered non-negotiable by reason of the provision therein for attorney's fees. The learned judge has reached the conclusion, however, that the words in the notes expressing the consideration "for value received in one machinery as per contract November 23, 1899," prevented the notes from being negotiable instruments. I dissent from this conclusion, because it seems to me not only an unsound and unfortunate limitation on the negotiability of promissory notes, but clearly opposed to authority. The notes are identical in form and need not be separately referred to. The first note is in these words:

208 "\$785.00.

Columbia, S. C., July 12, 1902.

"On or before the first day of January, 1903, for value received in one machinery as per contract November 23, 1899, I, the undersigned, of Richland County, State of South Carolina, promise to pay to the order of V. C. Badham, of Columbia, S. C., seven hundred and eighty-five dollars, negotiable and payable at the Carolina National Bank, Columbia, without offset, with interest at the rate of eight per cent. per annum after maturity until paid, waiving all relief whatever from valuation, appraisement or exemption laws, with all expenses if suits be instituted for collection of this note. And it is expressly understood and agreed that the said V. C. Badham neither parts with the title, nor do the undersigned acquire any title in the property enumerated herein until this note and all other notes given in payment for same, and all extensions and renewals thereof are fully paid. And in case it becomes necessary to employ an attorney to collect this note, a further sum, not exceeding ten per cent. for fees. Presentment for payment and protest waived.

"Congaree, Richland Co., S. C.

"SAM J. HUFFMAN."

The following indorsements were on the back: "Pay to order of Richmond City Mill Works. V. C. Badham. Richmond City Mill Works. By H. A. Moore, Treasurer."

There is not a word importing that the payment of the amount promised was to be subject to or dependent on any contract of sale or any contingency whatever. Had there been such an expression, without doubt the instrument would not have been negotiable. These cases will serve to illustrate the principle. In *Dilley v. Van Wie*, 6 Wis. 209, the note was held not negotiable. There, however, the reference to a collateral contract was not, as in the note under discussion, explanatory of the consideration, but the words, "subject to the provisions contained in an agreement this day made between said Carter and myself," were <sup>204</sup> inserted in the body of the instrument, qualifying and rendering conditional the promise to pay. In *Cushing v. Field*, 70 Me. 50, 35 Am. Rep. 293, the note was held not negotiable because of the indorsement: "This note is subject of a contract made November 13, 1874." This was manifestly a limitation upon the promise itself, and of course destroyed its certainty. In *Costelo v. Crowell*, 127 Mass. 293, 34 Am. Rep. 367, the note was not an original promise in writing, but was itself collateral given to secure a contemporary agreement. The words, "given as collateral security with agreement," were written on the margin, and it is obvious, as stated by the court, that the note was conditioned "upon the performance of the undertaking to which this is collateral."

This case is entirely different. The promise to pay is not subject to a separate contract, nor according to a separate contract, nor subject to any contingency, but absolute and unconditional. The words relied on by the learned judge as making the note not negotiable merely express the consideration, the reference to the contract being manifestly for the purpose of indicating a sale by which the title to the machinery had been reserved as a security for the debt. Such a reference to the consideration and the security does not take away from the paper a single element of a promissory note; it is none the less an unconditional written promise to pay a specified sum of money at a certain time to the order of the payee.

The generally recognized rule that the expression of the consideration does not affect the negotiability is thus stated in *Daniel on Negotiable Instruments*, volume 1, section 51a: "The negotiability of the instrument is not impaired by recitals or statements upon its face, which merely state the consideration upon which it was made, and impose no other liability upon any parties thereto than that for the payment of the sum of money therein expressed. Where there is a

memorandum upon the instrument that it is 'secured <sup>205</sup> according to the condition of a certain mortgage'; or that it was 'given in consideration of a certain patent right'; or 'as part pay for a pianoforte,' or for any other consideration, or 'and the same will be credited on your joint note to me.' The statement that collateral security has been deposited for the performance of a promise contained in the bill or note is a recital only, which does not affect its negotiability; and though the recital contain the terms of the deposit, that does not alter the case, for it renders neither the amount, the time of payment, the payee, nor the engagement to pay, uncertain."

Two cases in this state make it clear beyond all doubt that neither statement of the consideration nor provision for securing the promise affect the negotiability of the instrument. And these cases seem conclusive of the question here; for as above indicated, reference to the contract of sale was made in the note merely to indicate that the note was given for the purchase money of machinery, and that by the contract of sale the title to the machinery was reserved as a security for payment of the note. In *First Nat. Bank v. Gary*, 18 S. C. 282, a note held to be negotiable was in these words, fully setting out the security:

"\$886.00. Charleston, S. C., July 31, 1877.

"On the first of November, 1877, I promise to pay to M. W. Gary or order, without offset, eight hundred and eighty-six dollars, for value received, with interest from date, interest after maturity at the rate of one per cent. per month, having deposited with M. W. Gary, as collateral security, seven hundred and thirty-five dollars Greenville and Columbia Railroad second mortgage coupons, past due. And in case this note shall not be paid when due, I hereby give the said M. W. Gary authority to sell the said security, or any part thereof, for my account, on the maturity of this note, or at any time thereafter, at public or private sale, at his discretion, without advertising the same, and to apply so much of the proceeds of said security to the payment of said <sup>206</sup> note, as may be necessary to pay the same, with all interest due thereon, and also the payment of all expenses attending the sale of said security. If the net proceeds of such security shall not cover the amount due on this note, I hold myself bound to pay the balance forthwith, after such sale, with interest, at the rate of one per cent per month."

In *Dowie v. Joyner*, 25 S. C. 123, the note was in these words, expressing the consideration, the security for the debt and a distinct undertaking on the part of the payee:

**"Collateral Note for Fertilizers.****"\$826.50.**

Eastover, S. C., April 23, 1884.

"On November 1, next, I promise to pay to the order of Dowie & Moise, eight hundred and twenty-six and 50-100 dollars at First National Bank of Charleston, for value received in fertilizers. And to secure the payment of this note, I hereby agree on or before May 15, next, to pay to the said Dowie & Moise all moneys collected from the sale of said fertilizers, and to deliver to them all notes given for purchase of same, inclusive of freight on said fertilizers, as said collateral security for the payment of this note. That on or about September 15, next, Dowie & Moise agree to return said planter's notes for collection for their account, and that I agree in their behalf to collect the same, and remit to them the proceeds of such notes as may be collected, or transfer the original notes which, as trustees for them, we may be unable to collect in part or in full, and this agreement to remain in force until this obligation is satisfied."

This was held to be a negotiable note, notwithstanding the agreement as to the collateral and the agreement of the payees to return the collateral notes to the maker for collection.

It is a well-settled doctrine in other jurisdictions also that the reservation to the payee of title in the property for which the note is given or the statement of the consideration do not affect negotiability: *Chicago Ry. etc. Co. v. Merchants' Bank*, 136 U. S. 268, 10 Sup. Ct. Rep. 999, 34 L. ed. 349; *Choate v. Stevens*, 116 Mich. 28, 74 N. W. 289, 43 L. R. A. 277; *Siegel v. Chicago Trust & Savings Bank*, 131 Ill. 569, 19 Am. St. Rep. 51, 23 N. E. 417, 7 L. R. A. 537; *Windmill Co. v. Honeywell*, 7 Kan. App. 645, 53 Pac. 488; *Campbell v. Equitable Securities Co.*, 17 Colo. App. 417, 68 Pac. 788; *Collins v. Bradbury*, 64 Me. 37; *Gilpin v. People's Bank (Ind. App.)*, 90 N. E. 91.

In *Markey v. Corey*, 108 Mich. 184, 62 Am. St. Rep. 698, 66 N. W. 493, 36 L. R. A. 117, suit was brought on a promissory note, on the face of which was written: "This note is given in accordance with the terms of a certain contract under the same date, between the same parties," and the court held that the negotiability of the note was not affected by these words. In *Biegler v. Merchants' Loan & Trust Co.*, 164 Ill. 197, 45 N. E. 512, an indorsement on the note was as follows: "This note is secured by a lien upon my interest in certain horses named in the agreement this day made between S. W. Liehy & Son and myself." It was held that the notes were negotiable and were not affected by the recital of the security and agreement.

In *Bank of Sherman v. Apperson*, 4 Fed. 25, the note recited that it was "for value received, being for a part of the payment on the Goree plantation purchased of said Gregg, as per agreement of the fourteenth of February, 1874." The court held that the note in question was negotiable and "the recital of the consideration in the face of the note did not at all affect its negotiable character." In *Taylor v. Curry*, 109 Mass. 36, 12 Am. Rep. 661, a promissory note given to an insurance company and otherwise negotiable bore on its face the words: "On policy No. 33,386." The policy referred to contained a provision for a setoff in case of loss. Yet the court held that this did not make the note contingent upon the happening of no loss and added, "a mere reference to the policy, without more, does not affect the negotiability of the note."

If a written contract had been introduced and had contained a limitation on the liability of the maker of the note, <sup>208</sup> that fact would not affect the liability of the defendant as indorser, for, as we have shown, it would not affect the negotiability of the note. But it may seem important to observe that the record shows that defendant failed to offer in evidence any written contract limiting the liability of the maker, and himself testified that there was no written contract containing any limitation of the liability of the maker of the note.

On the trial counsel for defendant did not contend that the reference to the contract of sale in the note affected its negotiability, and the circuit judge did not so hold. It seems to me clear that the notes are negotiable, and that the judgment should be reversed and a new trial ordered for error of the circuit judge in holding otherwise.

As this was the main issue in the cause, and the course of the trial and the other rulings of the court depended very largely on the holding that the notes were not negotiable, the labor of considering the exceptions in detail would be fruitless.

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*For Cases Illustrating Conditions Which Do not Destroy the Negotiability of written instruments, see* *Farmer v. First Nat. Bank*, 89 Ark. 132, 131 Am. St. Rep. 79; *First Nat. Bank v. Miller*, 139 Wis. 126, 131 Am. St. Rep. 1040; *Bank of Sampson v. Hatcher*, 151 N. C. 359, 134 Am. St. Rep. 989. For cases illustrating conditions destroying the negotiability of written instruments, see *Union Stockyards Nat. Bank v. Bolan*, 14 Idaho, 87, 125 Am. St. Rep. 146; note to *Kimpton v. Studebaker Bros. Co.*, 125 Am. St. Rep. 192.

*Provision for Attorney's Fee Impairs Negotiability of Writing, When, and When not:* Note to *Kimpton v. Studebaker Bros. Co.*, 125 Am. St. Rep. 192; *First Nat. Bank v. Miller*, 139 Wis. 126, 131 Am. St. Rep. 1040.

*A Correct Judgment will not be Reversed* though wrong reasons were given therefor: *Avery v. Popper*, 92 Tex. 337, 71 Am. St. Rep. 849; *Oppenheimer v. Bank*, 97 Tenn. 19, 56 Am. St. Rep. 778; *City of Galveston v. Hemmis*, 72 Tex. 558, 13 Am. St. Rep. 828.

## WALLACE v. DOWLING.

[86 S. C. 307, 68 S. E. 571.]

**SECONDARY EVIDENCE of Alleged Lost Letter.**—An Exception that secondary evidence of the contents of an alleged lost letter, written subsequent to an alleged contract of sale, was not admissible to prove a memorandum of such contract sued upon, cannot be sustained where oral evidence as to the contents of the letter was admitted without objection; where defendant merely interposed a general objection to plaintiff's offer to introduce a copy of the letter in evidence, without specifying any grounds; where other testimony was introduced, without objection, sustaining the allegations of the complaint; and where the defendant not only failed to deny, but admitted the contract. (p. 1056.)

**STATUTE OF FRAUDS—Sale of Goods in Solido.**—When goods contracted for exist in solido, and are capable of delivery at the time, the contract is within the statute of frauds, where the value of the goods is above that specified in the statute. (pp. 1057, 1058.)

**STATUTE OF FRAUDS—Sale of Goods in Futuro.**—When goods contracted for are to be made, or something is to be done to put them in a condition to be delivered according to the terms of the contract, such contract is not within the statute of frauds. (pp. 1057, 1058.)

**STATUTE OF FRAUDS.**—A Contract for the Sale of a Camera-graph, to be delivered in futuro, is not within the statute of frauds where there is work and labor to be performed on the machine to such an extent as to cause them to enter considerably into its cost and price. (pp. 1057, 1058.)

Geo. F. von Kolnitz, for the appellant.

Logan & Grace, for the appellee.

**308 GARY, J.** This is an action on contract for the sale of a cameragraph. The complaint contains the following allegations:

1. "That heretofore, to wit, on the twenty-eighth day of May, 1907, the plaintiff herein made with the defendant herein a contract whereby the plaintiff was to deliver to the defendant one power cameragraph No. 5 with a 240-volt circular rheostat, and one shutter, for which defendant was to pay this plaintiff the sum of two hundred and thirteen dollars."

2. "That in due course and according to said agreement, this plaintiff tendered to this defendant said cameragraph."

Answering paragraph 1 of the complaint, the defendant says: "The defendant admits that a contract was entered into, but alleges that the same was made orally, and was, therefore, null and void, since any contract of this nature, under the laws of the state of South Carolina, must be in writing."

W. P. Dowling, the plaintiff, testified as follows:

"Q. Do you know J. V. Wallace? A. I do.



“Q. Did he ever get you to sell him a cameragraph?

“(Objected to on the grounds that where the complaint alleges contract of sale of goods, over fifty dollars in value, under the statute, same must be in writing.)

“Q. Mr. Dowling, this machine, this cameragraph No. 5, when Mr. Wallace saw you about this machine, was that machine in existence at that time? A. It was not; it had to be built specially.

“Q. Mr. Dowling, what was this machine that Mr. Wallace bought from you? A. It was a power cameragraph, fitted with a special fireproof shutter; it had to have lenses of a peculiar focus, made for a long, narrow, low-ceilinged store, to make a small picture at a long distance, to be used under the masonic temple, and it <sup>300</sup> had to be peculiarly constructed, because the lenses made for the average work in theaters would not suit it at all. This order was given me by Mr. Wallace. . . . .

“Q. Now, Mr. Dowling, was this cameragraph made specially by you? A. Yes, sir; the lenses were constructed for this long distance work.

“Q. For this special order? A. Yes, sir.

“Q. Why did it have to be made specially? A. Because the lenses sent out with machines are focussed so big that they could not be used except in theaters or other large places, and at this time they did not use many fireproof shutters, and they had to put one on it. . . . .

“Q. What was Mr. Wallace to pay you for that cameragraph? A. He was to pay me one hundred and seventy-five dollars for the machine, eight dollars for the shutter, and thirty dollars for the circular rheostat.

“Q. Two hundred and thirteen dollars altogether? A. Yes, sir.

“Q. He was to pay how much for the rheostat? A. Thirty dollars. That is a special rheostat made to carry high voltage, and they did not ship them with the machine, they shipped a clean rheostat.

“Q. This rheostat that you speak of was a special rheostat to go with this machine? A. It was ordered specially; we do not usually sell them that way at all.”

Cross-examination: “. . . . Q. So that it does not appear that they made this machine to order? A. He makes parts, and some parts he buys.

“Q. He made the cameragraph and equipped it with parts he got elsewhere, to suit this order? A. Yes, sir.

“Q. And that is the usual course of his business? A. No; they have a block and they take them on that block. and ship them out; it is the standard thing.

“Q. But the only difference was the equipment of the lenses and shutters and the rheostat? A. Yes, sir.”

The jury rendered a verdict in favor of the plaintiff for seventy-three dollars, and the defendant appealed.

The first exception is as follows: "That his honor erred in allowing W. P. Dowling, the plaintiff, to testify over the objection of the defendant, as to the contents of an alleged lost letter, written subsequent to <sup>310</sup> alleged contract, to establish the existence of the contract sued upon. Whereas, it is respectfully submitted that under the provisions of the statute of frauds, his honor should have held that the letter should have been produced, and that secondary evidence of its contents was not admissible to establish the existence and the production of a written memorandum of the sale, made at the time."

This exception cannot be sustained for the following reasons: 1. Oral evidence as to the contents of the letter was admitted without objection. 2. When plaintiff offered to introduce a copy of the letter in evidence, the defendant did not specify the grounds, but merely interposed a general objection. This was not sufficient: *Allen v. Cooley*, 53 S. C. 77, 30 S. E. 721. 3. There was other testimony introduced without objection, sustaining the allegations of the complaint. 4. The answer of the defendant not only failed to deny, but admitted, the contract. "Having acknowledged the agreement, the court considers it such an assent in writing as overrules his plea of the statute of frauds": *Smith v. Brailsford*, 1 Desaus. Eq. 350.

The second exception was withdrawn.

The remaining exceptions will be considered together, and are as follows:

3. "That his honor erred in refusing to charge the jury the fourth request of the defendant, to wit: 'The jury is instructed that in order to recover any damages for an alleged breach of contract, the plaintiff must establish by the preponderance of the evidence, if the contract be for the sale and delivery of goods, wares and merchandise for the price of fifty dollars and upward, that the said contract was in writing, or that the buyer received part of the goods so sold, or paid something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain was <sup>311</sup> made and signed by the parties to be charged by such contract, or their agents hereunto lawfully authorized.'

4. "His honor erred in refusing to charge the seventh request of the defendant, to wit: 'The jury is instructed that the mere fact that goods are not at the time of making the contract in the condition in which they are to be delivered does not take the case out of the statute, and that if the bargain be to deliver certain goods, of a certain description, at a future time, and they are not existing at the time



of the contract, but the seller does not stipulate to manufacture them himself, or a particular person to do so, contract is within the statute.' "

In regard to the request mentioned in the third of these exceptions, his honor, the presiding judge, said: "I refuse to charge you that, gentlemen, in this particular case, because I have virtually covered, in my own language, the law in regard to the statute of frauds here, which I conceive to be applicable to this case." He refused the other request without comment. In his general charge the presiding judge instructed the jury as follows:

"Now, for the purposes of this case, I charge you, that in order to enter into a valid contract for the purchase of goods, over or above the value of fifty dollars (\$50), that the contract is required by law to be in writing. . . .

"Now, I charge you further, that where the goods to be delivered are to be manufactured, and that is a part of the contract, that the goods are to be manufactured and then delivered, that would take it out of the statute of frauds, and the party would be entitled to recover under a contract of that sort. . . .

"So, I charge you that if the machine described in this complaint here was to be manufactured, or any extensive part of it was to be manufactured, out of the ordinary run of machines of that class, if the amount of work to be done on it was an important item in the case, I charge you that such a contract as that would not have to be in writing; but <sup>312</sup> if there was just a slight change to be made in it, it didn't have to be manufactured, such a slight change to be in the way of work and labor, that it would not make an item in the cost of the machine, why, under those circumstances, a contract of that sort would have to be in writing.

"Now, you understand, Mr. Foreman, that where the goods are to be manufactured, where there is to be work and labor performed on them to such an extent as to cause that labor and work to enter considerably into the cost and price of the goods or the machine, if that was the contract, it would not have to be in writing, if the goods or the articles didn't have to be manufactured, and yet there might be still a little work or labor to be performed, or a little change to be made, which would not enter into the cost of the articles, then a contract of that sort would have to be in writing."

The ruling of the circuit judge is sustained by the case of *Bird v. Mulinbrink*, 1 Rich. 199, 44 Am. Dec. 247, in which it was held that the fourteenth section of the statute of frauds extends to contracts executory, as well as to contracts executed, for the sale of goods above the value of fifty dollars, which exists in solido, at the time of the contract. But

if the contract is for the sale of goods in futuro, which are not in existence at the time, and for work and labor to be bestowed upon them by the vendor, or procured at his expense, so as to make the work and labor the essential consideration of the contract, it is not within the statute of frauds. Also, by the case of *Gadsden v. Lance*, 1 McMul. Eq. 87, 37 Am. Dec. 548, in which it is said, that "it is now the settled rule that when the goods contracted for exist in solido, and are capable of delivery at the time, it is within the statute; but where they are to be made, or something is to be done, to put them in a condition to be delivered, according to the terms of the contract, it is not within the statute."

It is the judgment of this court that the judgment of the circuit court be affirmed.

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*A Contract for the Sale of Goods to be Subsequently Manufactured and delivered is not within the statute of frauds: Note to Crookshank v. Burrell, 9 Am. Dec. 189; Warren Chemical etc. Co. v. Holbrook, 118 N. Y. 586, 16 Am. St. Rep. 788; Hientz v. Burkhard, 29 Or. 55, 54 Am. St. Rep. 777.*

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### CITY OF GREENVILLE v. PRIDMORE.

[86 S. C. 442, 68 S. E. 636.]

**CONSTITUTIONAL LAW—Departments of Government.**—The constitutional requirement that the three departments of government shall be separate and distinct refers to the government of the state and to state officers, not to the government and officers of municipal corporations. Hence the mayor of a city, though he participated as a legislator in making ordinances, is not prohibited by the constitution from acting in a judicial capacity in the trial of persons accused of violating them. (p. 1059.)

**MUNICIPALITY.—An Ordinance Purporting to be an Amendment** of a former ordinance is not void because of the alleged invalidity of the former ordinance, where such amendment is a complete law in itself, requiring no reference to any other ordinance, either for its interpretation or enforcement. (p. 1059.)

**MUNICIPALITY—Ordinance Void in Part.**—If the law requires the sentence in a mayor's court to be in the alternative, an ordinance purporting to confer on the mayor power to impose a sentence of both fine and imprisonment is void to that extent, but this does not make void the entire ordinance if it remains complete in every respect, after striking out that provision, both as to the evil to be prevented and the penalties to be inflicted. (p. 1059.)

Adam C. Welborn, for the appellant.

Hodges & Daniel, for the appellee.

<sup>443</sup> WOODS, J. The defendant was convicted in the mayor's court of the city of Greenville on the charge of

violating a city ordinance of October 5, 1909, relating to the traffic in intoxicating liquors. The sentence was that he pay a fine of twenty-five dollars or be imprisoned for thirty days. An appeal to the circuit court resulted in affirmance, and the defendant now appeals to this court.

By his first exception the defendant relies on the same position taken in *City of Spartanburg v. Parris*, 85 S. C. 227, 67 S. E. 246, namely, that the mayor, having participated as a legislator in the making of the ordinances, was prohibited by the constitution from acting in a judicial capacity in the trial of persons accused of violating them. In that case it was held that the constitutional requirement, with respect to the separateness of the three departments of government, refers clearly to the government of the state and to state officers, and not to the government of municipal corporations and the officers of such corporations.

The other position taken in support of the appeal is that the ordinance itself is void, because it is a mere amendment of an ordinance which, under the statute law of the state, the city council had no power to make. The ordinance begins in these words: "Be it ordained by the mayor and city council of the city of Greenville, in council assembled and by authority of the same, that section No. 3, of an ordinance ratified on the second day of May, 1905, be amended by striking out the words, 'or both fined and imprisoned, at the discretion of the mayor'; so that, when <sup>444</sup> amended, said ordinance shall read as follows." Then follows an ordinance complete in every particular, requiring no reference to any other ordinance, either for its interpretation or enforcement. Even if it be assumed that the ordinance of May, 1905, was void, the vice in it would not extend to the ordinance of October, 1909, for while it is true the latter ordinance purports to be an amendment of the former, it was not a mere amendment, but a complete law in itself.

But the ordinance of May 5, 1905, was not so contrary to the statute law of the state as to be void. It provided for punishment in these words: "Any person violating any of the provisions of this ordinance shall be fined not less than twenty, nor more than fifty, dollars, or imprisoned thirty days, or both fined and imprisoned at the discretion of the mayor." Section 2004 of the Civil Code, construed in *Town of Union v. Hampton*, 83 S. C. 46, 64 S. E. 1017, requires the sentence in the mayor's court to be in the alternative. Therefore, so much of the ordinance as purported to confer on the mayor power to impose a sentence of both fine and imprisonment was void. This, however, did not make void the entire ordinance, for after striking out that provision the ordinance remains complete in every respect, expressing the main purpose of the city council in respect

to both the evil to be prevented and the penalties to be inflicted: *Utsey v. Hiott*, 30 S. C. 360, 14 Am. St. Rep. 910, 9 S. E. 338; *State v. Johnson*, 76 S. C. 39, 56 S. E. 544; *Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. ed. 377; *Shevlin-Carpenter Co. v. Minnesota*, 218 U. S. 57, 30 Sup. Ct. Rep. 663, 54 L. ed. 930.

The judgment of this court is that the judgment of the circuit court be affirmed.

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*If a Valid Portion of an Ordinance is Severable from, and not Dependent upon, Invalid Parts thereof, the whole enactment will not be declared void because of such invalid portions, but the valid portion may be enforced independently of the invalid portions: St. Louis v. Liessing*, 190 Mo. 464, 109 Am. St. Rep. 774.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**VERMONT.**

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**LEE v. FOLLENSBY & PECK.**

[83 Vt. 35, 74 Atl. 327.]

**PLEADING—Misjoinder.**—A Demurrer does not raise the question of misjoinder unless it goes to the whole declaration. Hence counts added to a declaration are not demurrable for misjoinder because, when filed, they become an integral part of the original declaration. (p. 1062.)

**COTENANCY—Effect of Deed by One Tenant.**—A deed, by a tenant in common, to all the timber on a described portion of the common property, with a right of way to and from the timber and a right to enter to cut and remove it, is inoperative as to his cotenants. (p. 1062.)

**PLEADING.—A Bad Pleading is Sufficient** if that which it undertakes to answer is bad. (p. 1063.)

**PLEADING.—The Sufficiency of the Declaration as a Whole** cannot be brought into question by a demurrer to a plea which undertakes to answer only a single count in the declaration. (p. 1063.)

**PLEADING.—A Demurrer, in Opening a Record,** opens only that branch which it terminates. (p. 1064.)

**PLEADING.—A Plea is not Double,** in a legal sense, though it sets up several distinct matters, where all the matter contained in it is necessary to make it a full answer to the count which it purports to answer. (p. 1064.)

**PLEADING.—The Statute of 4 Anne, Chapter 16, Introduced a New System of Pleading,** in a great measure, and the pleader was not at liberty to combine the new and the old. He had to take or decline the benefit of the statute. If the defendant took the benefit of the statute, his plea stated that it was by leave of the court first had and obtained, according to the statute in such case made and provided. (pp. 1064, 1066.)

**PLEADING.—Under the Statute of 4 Anne, Chapter 16, There was No Implied Leave of Court** to file, in connection with a plea of the general issue, and special pleas under the statute, a plea which was in one part the general issue and in another part a justification with a verification and prayer for judgment, and require the plaintiff to file a replication to that. (pp. 1064, 1065.)

**PLEADING—Improper Plea Under the Statute of 4 Anne, Chapter 16.**—If a defendant pleads the general issue to all the counts in a declaration in trespass, he cannot afterward replead it to a part

of the trespasses mentioned in connection with a license justifying the other trespasses therein alleged. Such a plea must be filed as at common law, without the aid of the statute of Anne. (pp. 1064, 1066.)

Action of trespass quare clausum by Lee against Follensby and another. An order was made overruling the demurrer of defendants to the last five counts of plaintiff's declaration. Each party excepted.

Elisha May and George L. Hunt, for the plaintiff.

Howe & Hovey, for the defendant.

<sup>88</sup> HASELTON, J. This case was once before here on questions of pleading: 80 Vt. 182, 67 Atl. 197. After it was remanded the plaintiff filed five counts in addition to the two original counts of his declaration. To these additional counts the defendants demurred. The defendants filed an amended second plea to the first original count. The defendants also filed pleas 8 and 9 to the first and second counts respectively. To the defendants' second, third, eighth and ninth pleas the plaintiff demurred. The defendants' demurrer to the five additional counts was overruled. The plaintiff's demurrers to the pleas enumerated were severally sustained. The defendants excepted and the case is here again on questions of pleading.

The defendants claim that their demurrer to the five additional counts should have been sustained on the ground of misjoinder. But those counts when filed became an integral part of the original declaration, and a demurrer does not raise the question of misjoinder unless it goes to the whole declaration.

The defendants' second plea is by way of justification of the entry of the close mentioned in the first count, under a deed from one Albert Lee, a tenant in common with the plaintiff. Profert is made of the deed, and the plaintiff having craved and had oyer of the deed, sets it out in full in his demurrer to the plea. From this deed it appears that the cotenant of the plaintiff undertook <sup>89</sup> to convey to the defendants "all the hard and soft wood saw timber" standing on the southeast corner of the farm in question, bounding said corner by a description. But this deed was inoperative as to the cotenants, for Albert could not, by his sole deed, convey an interest in a part which he might choose to set out and describe: McElroy v. McLeay, 71 Vt. 396, 45 Atl. 898; Smith v. Benson, 9 Vt. 138, 31 Am. Dec. 614; Broughton v. Howe, 6 Vt. 266.

Such a deed is inoperative as to cotenants, if for no other reason, because, if it were not, it would affect the rights of the cotenants in respect to partition. By the deed set out the cotenant sought to make a grant of something which

could not be referred to his right: *McElroy v. McLeay*, 71 Vt. 396, 45 Atl. 898; *Broughton v. Howe*, 6 Vt. 266.

The deed from Albert also undertook to convey a right of way to and from said timber, a right to enter upon the land for the purpose of cutting, logging and removing the timber. But since the deed of the timber was inoperative as to the cotenants, the grant of this merely incidental right of way was in like manner inoperative. The third plea was directed to the second count, but in other respects was the same as the second plea, and both were bad for the reasons pointed out in considering the second.

The defendants contend that the demurrers to the second and third pleas should have been overruled, whether such pleas be good or bad, on the ground that the plaintiff's declaration is bad for misjoinder of counts, and that a demurrer reaches back through the pleadings and fastens upon the first substantial defect.

Since the second and third pleas are held bad, this claim is for consideration; but the rule invoked only requires that the court should follow the pleadings back through their course, and since neither the second plea nor the third undertakes to answer the declaration as a whole, but since each such plea is directed to a specific count, the question of misjoinder of counts is not reached by going back through the record.

The principle is that a bad pleading is sufficient if that which it undertakes to answer is bad, and so if a plea undertakes to answer only a single count in a declaration, a demurrer to such plea cannot bring in question the sufficiency of the declaration as <sup>40</sup> a whole. If, for instance, a defendant filed a demurrer to one count of a declaration and a plea to another count, and such plea is demurred to by the plaintiff, neither the defendant's demurrer nor the plaintiff's raises the question of misjoinder of counts.

In *Hooker v. Smith*, 19 Vt. 151, 47 Am. Dec. 679, the declaration was in three counts. To the defendant's second and third counts the plaintiff filed a replication which was demurred to. In argument on the demurrer reference was made to a defect in the first count of the declaration, but the supreme court held that the sufficiency of that count was not brought in question by a demurrer to a plea which went to the second and third counts.

In *Black v. Howard*, 50 Vt. 27, the declaration was in several counts, and the plea, which went to the whole declaration, was demurred to. Since the plea went to the whole declaration, the court considered the question of misjoinder of counts, and as to a claimed defect in the third count, held, that if it existed, it was not reached. Judge Barrett, who delivered the opinion, and the reporter, now



the chief judge, carefully pointed out that the plea demurred to went simply to the declaration as a whole. In Gould's Pleading, Hamilton's edition, 454, it is tersely said: "A demurrer, however, in opening a record, opens only that branch which it terminates."

The plaintiff in each count of his original declaration alleged trespasses on divers days and times between a certain date and the bringing of the suit. The defendants by their eighth plea set up the general issue as to a part of the alleged trespasses, and as to the rest plead license from the cotenant Albert Lee. To this plea the plaintiff sets down as a special ground of demurrer that it is double. But the plea is not, in legal sense, double, since all the matter contained in it is necessary to make it a full answer to the count which it purports to answer: 2 Lilly's Practical Register, ed. 1745, 374.

The defendants' ninth plea is constructed like the eighth, and is specially demurred to on the same ground.

Although nothing is pointed out to make either of these pleas bad in itself, we find occasion, as will be disclosed, for commenting on questions not raised by the demurrers.

Before the Statute of 4 Anne, chapter 16, the pleader in a case like this could make his client's full defense available in no other <sup>41</sup> way than by pleading, as the defendant has done in his eighth plea and in his ninth. But such pleas ought not in reason to be joined with a plea of the general issue as these were; for the benefit of the statute is something which a defendant must either take or decline.

A defendant cannot be allowed to plead the general issue to all the trespasses alleged and then to plead it again to a part of the trespasses. Each of the pleas now under consideration begins in the familiar way thus: "And for a further plea the defendants, by leave of the court here for this purpose first had and obtained, according to the statute in such case made and provided say." But there is no implied leave of court to file such a plea in connection with the general issue, and such a plea when filed must be filed without the aid of the Statute of Anne. Chitty recognizes the plea as a proper one, when leave of court to file a variety of pleas cannot be obtained, but, in the form which he gives, the plea is not designated as a further one, nor as pleaded by leave of court nor according to the statute, although he recognizes and lays down the rule that when several pleas are pleaded under the statute, the second and each subsequent plea should state that it is "by leave of court, etc.": 2 Chitty's Pleadings, 3d London ed., p. 520, vol. 1, p. 543.

If anything more is needed to make clear the understanding of Chitty, it is found on page 514 of volume 1, where



**he** says: "At common law the defendant may plead to a **part** of the declaration one ground of defense and to another **part** a different ground of defense."

In speaking of pleadings at common law, Chitty always refers to the rules of pleading unmodified by the Statute of Anne and certain other statutes, and his whole work in elucidating and systematizing the science of pleading is inconsistent with the idea that one could plead as at common law and then further plead by virtue of the statute.

The Statute of Anne was in its effect quite like our statute providing for pleading the general issue and giving in connection therewith written notice of matter in defense. If a defendant, after filing the general issue with notice of his special matter in defense, should afterward file special pleas setting up the same matters of defense with a view to getting the benefit of the statute himself and not giving it to the plaintiff, but with the <sup>42</sup> idea of requiring the latter to reply to his special pleas, the proceeding would not be countenanced by the court, and the special pleas, as such, would be treated as nullities. The statute authorizing the general issue with notice was intended to make it possible to dispense with the technicality and prolixity of special pleading: Prentiss, J., in Fullerton v. Mack, 2 Aik. 415; Royce, J., in Randall v. Preston, 52 Vt. 198.

In treating pleas so improperly filed and anything done with reference thereto as nullities, the court would be moved to act from its own sense of duty in respect to the due administration of the law.

And so in respect to the Statute of Anne. Before the enactment of that statute the pleader was often sorely perplexed to state his whole defense in a single plea, without violating any rule of pleading, and the plaintiff was sometimes equally perplexed in shaping his replication. See the pleadings in the time of Charles II, found in Saunder's Reports. See, also, 1 Eunomus, ed. 1774, 142.

The fourth section of the Statute of Anne, which we are considering, simplified the matter, and permitted the defendant, with leave of court, to plead his several matters of defense in separate pleas. If the defendant took the benefit of this statute and set out his matters of defense in various pleas, he had to accord to the plaintiff the benefit of the statute which the simplicity of the pleas to be replied to afforded, and the defendant could not, after pleading the general issue and special pleas under the statute, construct a plea like each of these under consideration, which was in one part the general issue, and in another part a justification with a verification and prayer for judgment, and require the plaintiff to file a replication to that. He could have no express or implied leave of court to file such a plea

after filing the general issue and other pleas. He could plead as at common law without the benefit of the statute and obviate difficulties which without that confronted him, but if he emancipated himself he emancipated the plaintiff. Less than this fairness will in no wise permit, for the plaintiff in replying has not the latitude which the statute gives the defendant in pleading, since the plaintiff can make but one replication to the same plea so far as the plea sets up a single matter in defense, and may have to elect between several true and sufficient answers. The possibility <sup>43</sup> of this situation is clearly pointed out by Stephen, and the disadvantage at which the plaintiff sometimes is in this respect is commented on by that writer as a somewhat remarkable feature of the law: Stephen's Pleading, 275, 276.

A plea like the pleas in question, and like the one given in Chitty as above noted, was used in *Parker v. Parker*. 17 Pick. 236, and was held good, as it doubtless was. There the pleader kept within his rights irrespective of the Statute of Anne; he did not plead the general issue nor any further plea; he did not claim to file the plea by leave of court, nor in accordance with the statute. Enough is said at the very close of the opinion in that case to indicate that the pleader would have found himself involved in trouble if he had filed the plea as a second or further plea invoking the Statute of Anne and leave of court.

The Statute of 4 Anne, chapter 16, introduced what was in great measure a new system of pleading, and the pleader was not at liberty to combine the new and the old. He had to choose between this and that. The statute was enacted, to quote the first clause thereof, "for the amendment of the law in several particulars, and for the easier, speedier and better advancement of justice." The various provisions of its twenty-seven sections were beneficent. They were instrumental in rooting up many thrifty abuses which no panegyrist of things as they were has sought to defend. It was one of the instruments by which through a slow, languid and halting process it has become measurably possible for every person "to find a certain remedy by having recourse to the law for all injuries or wrongs which he may receive in person, property or character." It contributed to bring the vindication of legal rights within the horizon of all. That it should be wrested from its purpose, and made to double the difficulties of suitors in getting their causes to trial, was never tolerated.

The defendants' eighth and ninth pleas stand as they would if they had been filed after the defendant had pleaded the general issue with notice setting up the matters of defense contained in them. These pleas and everything done under them go for nothing.

The court, in the exercise of a power which is inherent and in the discharge of a duty which is plain, strikes from the record the defendants' eighth and ninth pleas and whatever relates <sup>44</sup> thereto. This action is not to be construed as preventing the defendants from perfecting their pleadings below conformably to the method of pleading upon which they set out.

The judgment overruling the defendants' demurrer to the plaintiff's five additional counts is affirmed. The judgment sustaining the plaintiff's demurrers to the second and third pleas and adjudging those pleas insufficient is affirmed. The cause is remanded. Let neither party take costs in this court.

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*The Conveyance by One Cotenant of a Specific Part of the Common Property* is the subject of a note to *Kenoye v. Brown*, 100 Am. St. Rep. 649.

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## JOSLYN v. MOOSE RIVER LUMBER COMPANY.

[88 Vt. 49, 74 Atl. 385.]

**CHATTEL MORTGAGE.**—In Aid of the Description in a chattel mortgage it should be taken that the mortgagor is the owner of the property he assumes to mortgage. (p. 1069.)

**CHATTEL MORTGAGE—Description—Location of Property.** One of the most important elements in the description of mortgaged chattels is a statement of their location. It should never be omitted. (p. 1069.)

**CHATTEL MORTGAGE—Want of Proper Description.**—A chattel mortgage which fails to locate the property mortgaged otherwise than by giving the residence of the mortgagor at a place in another state where he formerly resided, suggests an erroneous location of the property, and is void, as against a subsequent mortgagee, for want of a sufficient description. (pp. 1069, 1070.)

Trover by Joslyn against the defendant company for the conversion of a horse.

Howe & Hovey, for the plaintiff.

Elisha May and Guy W. Hill, for the defendant.

<sup>50</sup> **HASELTON, J.** This was an action of trover for a horse. The general issue was pleaded. Trial by jury was had and verdict and judgment were for the defendant.

February 17, 1905, one Sullivan, then a resident of Concord, in Essex county, in this state, but recently of Woodstock, New Hampshire, executed and delivered to one Garland a chattel mortgage of certain property. Garland was a resident of New Hampshire. Among other things, the

mortgage described eight horses as follows: "One black horse, seven years old, one black horse, eight years old, one bay horse, six years old, one bay horse, six years old, one bay horse, nine years old, one gray horse, seven years old, one gray horse, nine years old, one bay mare, six years old." Within thirty days from the execution of this mortgage it was recorded in the office of the town clerk of the town of Concord.

March 22, 1905, twelve days after the Garland mortgage was recorded in Concord, Sullivan made, executed and delivered to the plaintiff, Joslyn, a resident of said Concord, a mortgage of <sup>51</sup> personal property including "one bay horse, between eight and nine years old, with black points and one white foot." The horse above described was the one for the claimed conversion of which this action was brought. The plaintiff's mortgage contained no reference to a prior mortgage. In the fall of 1905, Sullivan, the mortgagor, went to work for the defendant, the Moose River Lumber Company, with eight horses in the employment of hauling logs and so worked for twenty-one days, at the end of which time Garland, the first mortgagee, with the consent of Sullivan, the mortgagor, sold and delivered the eight horses at private sale to the defendant company, claiming that they were the eight horses named in his mortgage. One of them was the bay horse, covered by the plaintiff's second mortgage. At the time of the sale, the condition of both the mortgages referred to had been broken for more than thirty days. Until after this sale the plaintiff had no actual knowledge of Garland's mortgage, and neither Garland nor the defendant had actual knowledge of the plaintiff's mortgage. As soon as the plaintiff learned that the defendant company had purchased the horse covered by his mortgage he fully informed the defendant about his mortgage and demanded of the defendant the horse in question. The defendant refused to deliver the horse and claimed to own it in consequence of its purchase of Garland, and continued to keep and use the horse as its own; whereupon the plaintiff brought this action of trover against the defendant. On trial the plaintiff claimed that the Garland mortgage was invalid, and requested the court to charge that it was invalid, as to innocent third persons, and particularly that it was invalid as to the plaintiff in respect to the bay horse covered by his mortgage. The court held that the Garland mortgage was good against the plaintiff unless it had been extinguished by the giving of a certain note for the amount of the indebtedness of Sullivan to Garland. To the treatment of this latter question no exceptions were taken.

In the Garland mortgage Sullivan set himself up as of Woodstock, Grafton county, New Hampshire, although as has been said he was residing in Concord, Vermont, when he gave it. The description in that mortgage included besides the horses hereinbefore referred to, "five sets of heavy work harnesses, one open Concord wagon, one single driving harness, all robes, stable blankets, halters, neckyokes, whiffletrees, spread chains, chains, <sup>52</sup> axes, cant-dogs, all camping tools and logging outfit, three sets wagon sleds, two yarding sleds, two sleighs, one stone wagon, one two year old heifer, one two-horse lumber wagon, all subject to previous mortgages as follows: October 26, '04, vol. A, page 286; October 28, '04, vol. A, p. 287; September 21, '04, vol. A, 283."

It appeared on trial that the previous mortgages referred to were given to the same Garland and were on record in the town clerk's office in Woodstock, New Hampshire. These mortgages were produced on trial but they do not appear to aid the description in which they are referred to. The mortgage from Sullivan to Garland, which is now in question, though made after the mortgagor had come to reside in Concord, Vermont, was executed and sworn to at Woodstock, New Hampshire, where the mortgagor set himself up as residing. Three days thereafter it was recorded, strange to say, in the office of the town clerk at Woodstock, Vermont. Eight days after its execution it was recorded at Woodstock, New Hampshire, and twenty-one days after its execution it was recorded in Concord, Vermont, as before stated.

The description in the later mortgage to the plaintiff, Joslyn, was of the horse in question, and of other property, a part of which was described as being on the place in Concord where Sullivan was then living, a part in a certain barn in East St. Johnsbury, Vermont, and a part in a certain other barn in North Woodstock, New Hampshire. The validity of this mortgage as to the horse to which this suit relates was, on trial, conceded.

Nothing is said in the Garland mortgage about the ownership or location of the horses referred to. However, it is held in this state that in aid of the description in a chattel mortgage it should be taken that the mortgagor is the owner of the property he assumes to mortgage: *Shum v. Claghorn*, 69 Vt. 45, 37 Atl. 236. In the mortgage in question nothing is said about the location of the property. One of the most important elements in the description of mortgaged chattels is a statement of their location: *Huse v. Estabrooks*, 67 Vt. 223, 48 Am. St. Rep. 810, 31 Atl. 293. Other details, without this element of description, often amount to little or nothing, and with this element other slight details usually

make the property meant to be designated easy of ascertainment. A statement of the location of the property is the one thing which the draftsman of a chattel mortgage should never omit. It has sometimes been held <sup>53</sup> that the place of the execution of the mortgage and the residences of the parties as set up in the mortgage may be taken to convey a suggestion as to its location and so to aid the description: *Baldwin v. Boyce*, 152 Ind. 46, 51 N. E. 334; *Barrett v. Fisch*, 76 Iowa, 553, 14 Am. St. Rep. 238, 41 N. W. 310; *Brock v. Barr*, 70 Iowa, 399, 30 N. W. 652.

*Thompson v. Fairbanks*, 75 Vt. 361, 104 Am. St. Rep. 899, 56 Atl. 11, was a chattel mortgage case in which the claim was made that the mortgage under consideration was void for want of a sufficient description. As there the mortgagor had seasonably taken actual possession, the court did not find occasion for much discussion of this claim, but, in reference to it, it is suggested that some inference as to the location of the mortgaged property might be drawn from the fact that both parties were set up in the mortgage as of St. Johnsbury.

In *Shum v. Claghorn*, 69 Vt. 45, 37 Atl. 236, it is held that the location of livestock is generally so easily ascertainable from the fact of ownership that a statement of the farm, or even of the town, where an animal is kept ought not to be required in addition to a statement of sex, age and color in order to make a description *prima facie* sufficient. But as appears from the whole opinion, every inference that could be drawn from the whole instrument was calculated to aid the description. Certainly there was nothing there to detract from the full force of the description in respect to sex, age and color. But here the residence of the plaintiff was incorrectly set up, and that circumstance, the reference to New Hampshire mortgages, and the place of execution of the instrument, took away the *prima facie* effect of the description referred to. The instrument was calculated to puzzle and mislead, and the reasonable inquiries suggested by it, in view of circumstances already detailed, would naturally result in further mystification and cannot be considered to afford the requisite basis of identification. It is contrary to the policy of our law that chattel mortgages should constitute pitfalls embarrassing the dealings in personal property of those whose conduct is governed by reasonable prudence. As this mortgage stands, an erroneous location of the property is suggested, and as has been well said: "Giving an erroneous location of the mortgaged property is more apt to mislead inquirers than failure to give any location at all, and hence renders the description ineffectual": *Jones on Chattel Mortgages*, ed. 1908, sec. 54d. The statement just quoted immediately follows a review of



**Shum v. Claghorn**, 69 Vt. 45, 37 Atl. 236, <sup>54</sup> and a recognition of the doctrine of that case, and the limitation pointed out is one which the case itself obviously suggests.

The Garland mortgage was insufficient as to the horse in question and the defendant by its purchase acquired no title which it could assert against the plaintiff.

Judgment reversed and cause remanded.

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*The Sufficiency of Description of Property in Chattel Mortgages* is the subject of a note to **Barrett v. Fisch**, 14 Am. St. Rep. 239. For cases showing that the description of property in a chattel mortgage is sufficient, as a general rule, when it will enable a third party, aided by inquiries which the instrument itself suggests, to identify the property, see **Buck v. Davenport Sav. Bank**, 29 Neb. 407, 26 Am. St. Rep. 392; **Reynolds v. Strong**, 10 N. D. 81, 88 Am. St. Rep. 680, and cases cited in the cross-reference note thereto.

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## HUBBARD v. TAYLOR.

[83 Vt. 120, 74 Atl. 641.]

**A TAX SALE is Void as Against Public Policy**, where the tax collector struck off the property to the plaintiff on the strength of the latter's promise, made prior to the sale, and received as a bid, that he would pay the taxes and costs for the land, especially where the plaintiff was not present at the sale, and there was no other bidder. Under these circumstances, the collector was acting for the plaintiff, which relation was inconsistent with his official duty and forbidden by the law. (p. 1072.)

Ejectment by Hubbard against Taylor and another. There was a judgment for the defendants and the plaintiff excepted.

William W. Stickney, J. G. Sargent, Homer L. Skeels and F. C. Southgate, for the plaintiff.

Davis & Davis, for the defendants.

<sup>120</sup> **ROWELL, C. J.** This is ejectment for land in Plymouth. The plaintiff claims title under a tax deed executed to him in default of redemption. The sale was advertised for December 26, 1892, but was adjourned to December 29, 1892. Between those dates the plaintiff said to the collector, "I will pay the taxes and costs for the land." The collector received that as a bid, and sold the land at public auction to satisfy the tax and costs, and struck it off to the plaintiff, who was the highest and only bidder therefor, but who was not present at the sale. If the collector had struck the land off to himself for the plaintiff instead of to the plaintiff, the case would have

been like *Crahan v. Chittenden*, 82 Vt. 410, 74 Atl. 86. There the collector bid off the land in his own name for, and at the request of, another who was not present at the sale. It was held that the sale was void as against public policy, for <sup>121</sup> that the collector's official duty and that of his private agency were in conflict, and made the faithful performance of one inconsistent with the faithful performance of the other. But the fact that here the collector struck off the land to the plaintiff and not to himself makes no difference, for he was, nevertheless, acting for and in behalf of the plaintiff; and as that relation was inconsistent with his official duty, the law forbade him to enter into it, for no man can properly serve two masters concerning a matter in which their interests are in conflict. We hold, therefore, that for this reason the sale was void. This being decisive of the case, there is no occasion for considering any of the other questions presented.

Judgment affirmed.

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*A Tax Sale is not Valid Unless All Substantial Requirements of the statute are shown to have been strictly complied with: Charland v. Home for Aged Women*, 204 Mass. 563, 134 Am. St. Rep. 696, and cases cited in the cross-reference note thereto.

*As to Who may Purchase at a Tax Sale*, see the note to *Cone v. Wood*, 75 Am. St. Rep. 229.

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### OLIN v. MARTELL.

[83 Vt. 130, 74 Atl. 1006.]

**CROPS—Evidence of Ownership.**—The fact that a person is the owner of a farm is no evidence that he is the owner of the crops grown thereon during the occupancy of a tenant. (p. 1073.)

**CROPS.—The Lessee is the Owner of Crops**, where the lease is for a cash rental without lien reserved. (p. 1073.)

**CROPS.—If a Lease is on Shares** without modifying provisions, the lessor and lessee are tenants in common of the crops. (p. 1073.)

**COTENANCY—Sale of Personalty by One Tenant.**—As a general rule, one tenant in common of personal property is not liable in trover at the suit of his cotenant for selling the common property. (p. 1073.)

**TROVER—Conversion of Hay by Tenant.**—If a farm is leased with a requirement that the lessee shall leave as much hay on the premises at the end of the term as he found there when he took possession, and a settlement is had at the end of the term, but the landlord finds, on taking possession, that several tons of hay which had been left in one of the barns are gone, and that straw had been substituted in the place thereof, an action of trover for the conversion of the hay cannot be maintained, in the absence of anything to show that the tenant had not left as much hay on the premises as was on them when he went there. (p. 1073.)



**Trover** for the conversion of hay. There was a judgment for the defendant and the plaintiff excepted.

Nathan N. Post, for the plaintiff.

H. N. Deavitt, for the defendant.

<sup>131</sup> **MUNSON, J.** The plaintiff leased her farm to the defendant for one year by a writing which required the defendant to leave as much hay on the premises at the end of the term as he found there when he took possession. This is all we know regarding the lease. The defendant surrendered the premises at the expiration of the term, and a settlement of matters arising under the lease was had the same day. Nothing further appears regarding the settlement. When the defendant took possession there were five tons of hay in a certain bay in one of the barns; and after the settlement the plaintiff discovered that the defendant had taken five tons of hay from this bay and appropriated it to his own use, putting straw in its place. This was done before the expiration of the term. The action is trover for the conversion of this hay.

The question argued by counsel is whether the plaintiff can maintain trover, but the case as presented fails to show the existence of any claim. The plaintiff's right was not to have any particular hay, but to have as much hay left on the premises as was there when the defendant took possession. For aught that appears, the defendant may have left as much hay on the premises as was on them when he went there. But if the case is to be passed upon as treated by counsel, the suit cannot be maintained. The fact that the plaintiff was the owner of the farm does not determine that she was the owner of the crops grown during the defendant's occupancy. If the lease was for a cash rental without lien reserved, the lessee would be the owner of the crops. If the lease was on shares without modifying provisions, the lessor and lessee would be tenants in common of the crops; and, as a general rule, one tenant in common of personal property is not liable in an action of trover at the suit of his cotenant for selling the common property: *Kellogg v. Fox*, 45 Vt. 348. Nothing appears here to subject the defendant to this liability. The question whether the defendant was leaving hay enough on the premises to meet his obligation in that behalf was a matter for consideration in the settlement had, and we know nothing of the nature or terms of the settlement. <sup>132</sup> If the plaintiff's understanding that this space was filled with hay instead of straw led her to make a settlement different from what

she otherwise would, that affords no basis for a suit in trover.

Judgment affirmed.

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*If One Tenant in Common of a Chattel Converts It to His Own Use by a Sale* thereof, he becomes liable in trover for the conversion, but in Vermont such a sale does not authorize an action in trover by the other cotenant, his remedy being either to disaffirm the sale and become cotenant with the purchaser, or else affirm it, and call upon the seller for an accounting of the proceeds: Note to Tuttle v. Campbell, 16 Am. St. Rep. 660. As to when a cotenant is guilty of conversion, see the note to Bolling v. Kirby, 24 Am. St. Rep. 816; and as to trover by one tenant in common against the other, see, also, Weeks v. Hackett, 104 Me. 264, 129 Am. St. Rep. 390.

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### FAIRBANKS v. STOWE.

[83 Vt. 155, 74 Atl. 1006.]

**TIMBER.**—A Sale and Conveyance of Standing Trees, to be removed within a specified time, works a severance thereof from the freehold, converts them into personal property, and vests the title thereto in the grantees, as such property. (p. 1076.)

**TIMBER**—Oral Sale.—The Grantees of Growing Trees may sell and convey them orally or otherwise, the same as they can any other personal property, and the buyer will acquire title thereto, authorizing him to go upon the land and cut and remove them within the time limited. (p. 1076.)

**TIMBER**—Oral Sale.—If Standing Trees are Conveyed by an instrument in writing, called a "contract" or "lease," duly witnessed, acknowledged and recorded, with a time specified therein in which to remove them, and the grantees make a parol sale of the trees, they cannot afterward defeat the purchaser's title by assigning the "contract" or "lease" to a third person to whom the land has been conveyed. (p. 1076.)

**APPEAL**—Right Ruling on Wrong Ground.—The appellate court will not disturb a ruling based on a wrong ground if it can be sustained on any ground. (p. 1077.)

**TRESPASS**—Evidence Under the General Issue.—In trespass quare clausum for cutting trees, when the act complained of is prima facie a trespass, and the allegations of fact in the declaration cannot be denied, evidence that the defendant had acquired title to the trees by a parol purchase is inadmissible under the general issue. As a general rule, any matter of justification or excuse, in such a case, must be specially pleaded. (p. 1077.)

Trespass quare clausum for cutting trees. The plea was the general issue. The defendant, Stowe, was the owner in fee of a farm of which the locus was a part. By an instrument in writing, dated October 2, 1905, and called in the case a "contract" or "lease," he sold the growing timber on the land to Darling, Clark and Hubbard, excepting that on a certain portion thereof. The time limited was

five years. This instrument was recorded. A few days afterward, Stowe quitclaimed the farm to Boyd. On May 3, 1907, Boyd quitclaimed it to Marvin Fairbanks, "excepting the timber right of Darling, Clark and Hubbard." And on May 6, 1907, Marvin Fairbanks conveyed the same by warranty deed to the plaintiff, A. A. Fairbanks, "excepting the lumber right of Darling, Clark and Hubbard." The trespass complained of consisted of the defendant entering upon the land described in said deeds, and cutting thereon certain of the trees conveyed by him to Darling, Clark and Hubbard. At the time of the alleged trespass, August 1, 1908, the plaintiff owned the farm and was in exclusive possession thereof, save such rights as were acquired therein and being exercised by Darling, Clark and Hubbard and the defendant.

The defendant claimed to have orally bought the lumber rights of Darling, Clark and Hubbard, and was acting thereunder in cutting what he did. He also claimed that this oral agreement had been reduced to writing before the cutting. This paper was dated June 11, 1908, and was signed by Darling and Clark. The plaintiff offered in evidence a writing, dated in June, 1908, purporting to be an assignment by Darling, Clark and Hubbard to him of all their right, title and interest under and by virtue of said contract or lease from the defendant to them. The defendant objected to the admission thereof for divers reasons, but the instrument was admitted. According to the plaintiff's testimony, he bought the rights of Darling, Clark and Hubbard about June 20, 1908, and soon after received the aforesaid contract or lease from them with the assignment pinned thereto, and a written request thereon directing the town clerk to discharge the "lease." This writing was signed by Darling, Clark and Hubbard. The plaintiff also testified that at that time he had no knowledge of the defendant's claim.

The defendant offered to show that the title to the trees was in Darling, Clark and Hubbard at the time of the alleged trespass; that he acquired title thereto from them, or license and permission to cut the trees and remove them; that the plaintiff never had title to the trees; that after the plaintiff knew that the defendant had bought them, he went to Darling, Clark and Hubbard and acquired his claim and title for the purpose of defrauding the defendant, and procured said assignment by false and fraudulent representations; that Darling, Clark and Hubbard informed him that they had already sold the trees to the defendant; and that whatever title the plaintiff took under said assignment he took subject to the defendant's right. The defendant also offered in evidence the aforesaid writing, showing his

purchase of Darling and Clark. The offers of defendant were excluded. The court then directed a verdict for the plaintiff, holding that the defendant's license had been revoked by the assignment attached to the lease as aforesaid and the discharge on the back of the lease. Defendant excepted to the rulings against him.

Herbert G. Barber and Frank E. Barber, for the defendant.

Chase & Daley, for the plaintiff.

<sup>158</sup> ROWELL, C. J. The sale and conveyance of the trees to Darling, Clark and Hubbard by the defendant, evidenced by his deed to them of October 2, 1905, worked in law a severance thereof from the freehold, converted them into personal property, and vested the title thereto in the grantees as such property, for that was manifestly the intention of the parties. Therefore, the grantees could sell and convey them orally or otherwise, the same as they could any other personal property, and the defendant could acquire title thereto as he offered to show he did, and that title would authorize him to go upon the land and cut and remove them within the time limited, for the plaintiff took his title subject thereto, as the lumber right of Darling, Clark and Hubbard was excepted in his deed, and their lease was on record. Nor could they defeat the defendant's right <sup>159</sup> and title in this behalf by assigning the lease to the plaintiff, nor by discharging it, as they directed the town clerk to do. This being so, it is unnecessary to consider any of the objections to the admission of the assignment.

Sterling v. Baldwin, 42 Vt. 306, is full authority for this holding. That was trespass for cutting trees. One Adams sold and conveyed the land to the plaintiff by deed duly executed and recorded, reserving therein to himself all the hemlock timber standing on a certain part thereof, with the right to cut and remove the same at any time within two years. Afterward Adams sold the trees to Quimby, and evidenced it by a writing neither sealed, witnessed, nor acknowledged. After that Adams quitclaimed to the plaintiff, by a deed duly signed, sealed, witnessed and acknowledged, all the rights and timber reserved to him in his first deed to the plaintiff. The court said that by that reservation the parties virtually treated the trees as personal property, in no way so partaking of the nature of realty as to require a deed as between them to transfer the title thereto from Adams to the plaintiff nor from Adams to anyone else; that therefore the deed subsequently made by Adams to the plaintiff, purporting to cover and convey only the same property, could be of no greater efficacy than such a writ-

ing as Adams gave to Quimby would have been if it had been given to the plaintiff instead of said deed. The court held that Quimby got good title to the trees by his purchase of Adams, evidenced by said writing, and that his title was in no way defeated by the deed of Adams to the plaintiff subsequently obtained. The court expressly says that the case does not at all bring into consideration the rights of bona fide purchasers who take title by deeds duly executed, acknowledged and recorded, and who are not affected by the record or in some other equivalent way with the knowledge or effect of such a sale of growing trees standing upon the land covered by such deeds as was made by Adams to Quimby, because the plaintiff was party to the virtual severance of the trees by the operation of his first deed with its reservation, which made the trees susceptible of valid sale by Adams without deed; that therefore he could not be misled by the record, and if he would make himself certain whether he could get a good title to them by a subsequent purchase from Adams, it behooved him to keep track of the ownership by other means than the land records <sup>160</sup> of the town. But this case is stronger than that, for the defendant offered to show that before and at the time the plaintiff got his assignment from Darling, Clark and Hubbard, he was told and knew that the defendant had already bought their right and interest.

It follows, therefore, that the court was wrong in excluding the defendant's offer on the ground it did. But the plaintiff says that though the ground was wrong, the exclusion was right, because the defendant should have specially pleaded the things he offered to show, and could not show them under the general issue. This claim was not made below, but is properly made here as a ground for sustaining the ruling, for if there is any ground on which it can be sustained, it will be; and there is, for the plaintiff is right in his claim, the rule being that when, as here, the act complained of is prima facie a trespass, and the allegations of fact in the declaration cannot be denied, any matter of justification or excuse must, in general, be specially pleaded: 1 Chitty's Pleadings, \*501; *Le Caux v. Eden*, Doug. 594, 611; *Milman v. Dolwell*, 2 Camp. 378; *Knapp v. Salisbury*, 2 Camp. 500; *Rawson v. Morse*, 4 Pick. 127. And see *Hill v. Morey*, 26 Vt. 178; *Sawyer v. Newland*, 9 Vt. 383.

Judgment affirmed.

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*A Parol Sale of Standing Trees*, though unenforceable as a sale of an interest in the land, by reason of being within the statute of frauds, operates as a license to enter, cut and carry away the trees, until revocation, but is revoked by a sale and conveyance of the land to a third person: *Note to Wilson etc. Co. v. Alderman & Sons Co.*, 128

Am. St. Rep. 875. A sale of growing trees, according to many authorities, is a conveyance of an interest in the land: *McKenzie v. Shows*, 70 Miss. 388, 35 Am. St. Rep. 654; *Mee v. Benedict*, 98 Mich. 260, 39 Am. St. Rep. 543; and is not valid, by reason of the statute of frauds, without a contract in writing: *Ives v. Atlantic etc. R. R. Co.*, 142 N. C. 131, 115 Am. St. Rep. 732; note to *Wilson etc. Co. v. Alderman & Sons Co.*, 128 Am. St. Rep. 875. But other cases hold that such a sale is one of chattels only, at least where there is a prospect of immediate separation of the trees from the land: Notes to *Kingsley v. Holbrook*, 86 Am. Dec. 182; *Turner v. Piercy*, 17 Am. Rep. 596; and that an oral agreement for the sale of growing timber, to be cut and removed by the purchaser, is not regarded as being within the statute of frauds: *Emerson v. Shores*, 95 Me. 237, 85 Am. St. Rep. 404.

*A Present Title to Standing Timber* cannot be transferred by an oral contract, according to *Polk v. Carney*, 21 S. D. 295, 130 Am. St. Rep. 719, but a license to enter and remove the timber may rest in parol.

*A Contract Requiring the Owner of Standing Timber* to cut it into logs and deliver them to the purchaser at a designated place is a contract for the sale of logs, personal property, and not a contract for the sale of standing timber, which must be in writing: *Turner v. Planters' Lumber Co.*, 92 Miss. 467, 131 Am. St. Rep. 552.

*No Evidence can be Offered, Under the General Issue, in an Action of Trespass Quare Clausum Fregit*, to show that an act prima facie a trespass was authorized by the plaintiff: *Finch's Exrs. v. Alston*, 2 Stew. & P. 83, 23 Am. Dec. 299.

## ROWLEY v. SHEPARDSON.

[83 Vt. 167, 74 Atl. 1002.]

**MARRIED WOMAN—Liability for Deceit.**—In an action against husband and wife for deceit in their sale of a farm, not her separate property, her liability is measured, not by the statute enlarging the powers of married women, but by the common law. (p. 1080.)

**MARRIED WOMAN—Liability for Deceit.**—If a man sells a farm which stands in his wife's name but is not her separate property, and the deed is executed by both, she is not liable at common law for accepting and appropriating the whole or a part of the consideration money and thereby ratifying the sale, though she does so with knowledge of misrepresentations made by him in negotiating the sale, as the tort is based upon her contract and is not a tort simpliciter. (p. 1080.)

**MARRIED WOMAN—Evidence of Deceit.**—In an action by the purchaser against a husband and wife for deceit in the sale of a farm, not her separate property, evidence of the husband's misrepresentations as to the number of maple trees on a designated part of the land is admissible as against him but not as against her. (pp. 1080, 1081.)

**MARRIED WOMAN—Liability for Misrepresentations.**—In an action by the purchaser against a husband and wife for deceit in the sale of a farm, not her separate property, evidence that the wife had authorized the husband to make the sale in her behalf, and of his misrepresentations as to the number of maple trees on a designated part of the land, is not admissible against her under counts for false



warranty, for at common law a married woman cannot personally, nor by her agent, make a contract which will bind her so that a judgment upon it can be rendered against her person. (pp. 1080, 1081.)

**PLEADING.—A Misjoinder of Counts may be Remedied by a trial court, before verdict, by striking out designated counts. (p. 1081.)**

**PLEADING — Misjoinder — Amending Verdict.**—If a general verdict is returned and a motion in arrest is filed on the ground of misjoinder of counts, and no evidence has been given on one of the inconsistent counts, or on one set of inconsistent counts, the verdict may be amended, confining it to the counts on which evidence was given, by leave of court before which the cause was tried, and the objection of misjoinder be thereby removed. (p. 1081.)

**PLEADING—Misjoinder—Amending Verdict.**—Where there is a misjoinder of counts in a declaration, and all but one of the inconsistent counts have been stricken out, a general verdict with entire damages cannot be amended by limiting it to a part only of the counts, for it is impossible for the court to say from the record alone, as it must, on which of the counts the damages were assessed, or whether they were apportioned upon the separate counts; and a motion in arrest should be granted unless the plaintiff is awarded and accepts a venire de novo on terms imposed. (pp. 1081, 1082.)

Case for deceit. The plea was the general issue. There was a verdict for the plaintiffs and the defendants excepted.

Cudworth & Pierce, H. G. Barber and F. E. Barber, for the defendants.

Chase & Daley, for the plaintiffs.

<sup>169</sup> **WATSON, J.** This action is to recover damages for deceit and false warranty in the sale of a farm. The declaration originally contained four counts: The first and second in case for deceit, and the third and fourth in assumpsit for false warranty. The title to the farm in question stood in the name of Eva C. Shepardson, the defendant wife. The deed of conveyance, executed by both defendants, warranty in form, contained a reservation as follows: "Ever reserving all the standing timber <sup>170</sup> on said premises both hard and soft wood suitable to cut into logs with conditions and provisions that the sugar maple trees west of the highway leading through the farm, only five hundred are to be included in this reservation with further reservation of the right to enter and remove the timber so reserved at any time within ten years from date hereof which timber may be taken down to the size of six inches on the stump at the time of cutting the same." The evidence on the part of the plaintiffs tended to show that they wanted to purchase a farm on which was a sugar orchard containing a thousand maple trees, and that in the negotiations for the purchase of this farm the defendant George W. Shepardson, in the absence of his wife, Eva C., represented to the plaintiffs that there were standing on the west side of the

road leading through the farm sixteen or seventeen hundred sugar maple trees, and that after the five hundred trees referred to in the deed had been cut and removed, there would be eleven or twelve hundred sugar maple trees remaining on the lot; that he would guarantee that there were sixteen or seventeen hundred there; that the plaintiffs relied upon these representations; and that in fact there would be only two hundred and twenty-seven to two hundred and thirty-five such trees left on the lot after the removal of those reserved in the deed. In admitting this evidence the court ruled in effect that as the property stood in the name of Mrs. Shepardson and was conveyed by the joint deed of herself and her husband, "and the consideration ran to her and to him so far as he had a marital interest, or marital right," she adopted the representations made by him culminating in the deed. The exception to this ruling was well taken. It fairly appears from the record that the farm in question was not the wife's separate property, and therefore her responsibility is to be measured, not by the statute enlarging the powers of married women (Pub. Stats. 3037), but by the common law. There was evidence tending to show that Mrs. Shepardson had given her husband full authority to transact this business in her behalf; and beyond this, assuming the evidence to be as strong as the plaintiffs' claim—that she, with knowledge of the misrepresentations made by her husband in negotiating the sale, accepted and appropriated the whole or a part of the consideration money and thereby ratified the sale as made—yet she is not liable at common law for the tort, it being based upon her contract, <sup>171</sup> and not a tort simpliciter: *Woodward v. Barnes*, 46 Vt. 332, 14 Am. Rep. 626; *Russell v. Phelps*, 73 Vt. 390, 50 Atl. 1101; *Brunnell v. Carr*, 76 Vt. 174, 56 Atl. 660. Nor as to Mrs. Shepardson, for the same reason, was the evidence describing the trees standing on the west side of the highway admissible. But as against her husband, this evidence had a bearing certainly on the question of damages and was properly received. Nor were these two pieces of evidence any more admissible against the wife, if considered with reference to the counts for false warranty. For at common law a married woman cannot personally nor by her agent make a contract which will bind her so that a judgment upon it can be rendered against her person: *Davis v. Estate of Burnham*, 27 Vt. 562; *Ingram v. Nedd*, 44 Vt. 462.

During the trial, and before the plaintiffs had rested in putting in their opening evidence, plaintiffs' counsel gave notice to counsel for defendants and to the court that they claimed to recover only on the ground of deceit and did



not claim to recover for breach of warranty, and asked permission to strike out the fourth count, which was granted.

Thereafter the trial proceeded on both sides, so far as was made known to the court, on the theory that there was no other count in the declaration for breach of warranty. The jury were not informed that the third count still remaining in the declaration could not be made the basis of recovery, except that the court submitted the case solely upon the ground of deceit, as alleged in the first two counts. A general verdict was rendered for the plaintiffs. After verdict and before judgment the defendants moved in arrest of judgment and for judgment for defendants notwithstanding the verdict, on the ground of misjoinder. Whereupon the plaintiffs, on motion, were permitted to strike out the third count, to which defendants excepted. The motion in arrest was then overruled pro forma, judgment rendered on the verdict, and a certified execution granted, to each of which an exception was saved. It is not contended here that judgment should have been rendered for the defendants non obstante veredicto, so the motion will be considered only with respect to arresting the judgment.

No question is made but that the third count is technically good in itself, and that so long as it remained a part of the declaration there was a misjoinder of counts. The position of <sup>172</sup> the plaintiffs is, however, that this defect was obviated by striking out the third count by leave of court pending the motion in arrest. There would seem to be no doubt regarding the right of the court to allow such a defect to be so remedied at any time before verdict; but can it be done after verdict and pending a motion in arrest of judgment based upon that ground? The record before us shows that the plaintiffs introduced evidence tending to support the third count as well as the counts for deceit. And the law is that when a general verdict is returned and a motion in arrest filed on the ground of misjoinder, if no evidence has been given on one of the inconsistent counts, or on one set of inconsistent counts, the verdict may be amended, confining it to the counts on which evidence was given, by leave of the court before which the cause was tried, and the objection of the misjoinder thereby removed. But when there was evidence which applied to the inconsistent count or counts, a general verdict with entire damages cannot be amended by limiting it to part only of the counts, for it is impossible for the court to say from the record alone, as it must, on which of the counts the damages were assessed, or whether they were apportioned upon the separate counts: *Eddowes v. Hopkins*, 1 Doug. 376; *Harris v. Davis*, 1 Chit. Rep. 625, 18 Eng. Com. L. 341; *Peabody v. Kinsley*, 40 N. H. 416. See, also, *Haskell v. Bowen*, 44 Vt. 579. In

Richmond v. Whittlesey, 2 Allen, 230, all the counts were properly joined, except the fourth, "and the jury were correctly and distinctly instructed by the court that the plaintiff was not entitled to recover on" that count. The court said it must be assumed that under this explicit instruction no damages were given for the alleged slander set out in the fourth count; and that therefore the verdict was a general verdict in damages on the three counts properly joined, "and in support of which there was evidence laid before the jury." Consequently the motion in arrest did not prevail. As before seen in the case before us, the jury were not instructed that no recovery could be had on the third count; and the fact that the case was submitted to them solely on the ground of deceit as alleged in the first two counts is not enough. The verdict being general, there is nothing in the record from which it can be said that the damages were not in part at least assessed on the third count. In Sellick v. Hall, 47 Conn. 260, the first count was for breach of contract, and the <sup>173</sup> second for tort. The verdict was for the plaintiff upon the second count only. A motion in arrest of judgment was made on the ground of misjoinder of counts. It was held that the verdict upon the second count only was virtually a verdict for the defendant on the first count. The court said it appeared that the first count was not relied upon by the plaintiff on the trial although not formally withdrawn; but that this, perhaps, would not be sufficient of itself, and clearly would not if the jury had rendered a general verdict. The motion was not granted, the court resting its opinion wholly on the fact that the first count did not in any manner subtend the judgment. In Joy v. Hill, 36 Vt. 333, the first, second and fourth counts were in case for false warranty in the sale of a horse. The third count was in assumpsit, counting upon an express warranty. A general verdict was rendered for the plaintiffs. The case was tried on the general issue, but the bill of exceptions did not say on what form of plea. The exceptions stated that "the whole case went upon the ground of an express warranty and the breach of it, and not upon the ground of a deceit," which was construed by this court to mean that the evidence offered went only to show that an express warranty, *proprio vigore*, was the sole ground of action and recovery. Yet the motion in arrest on the ground of misjoinder of counts was granted.

The verdict in the case at bar was rendered when the third count was part of the declaration, and it was allowed to stand without any amendment confining it to the first two counts. There being evidence which applied to all three counts, thus rendering it impossible to say on which count or counts the damages were assessed, the judgment sought to be arrested is based upon all counts, and it could not be made to stand upon

two of them by striking out the third. The motion in arrest should have been granted, unless under the practice which now generally obtains in this state the plaintiffs were awarded and accepted a venire de novo on terms imposed: *Posnett v. Marble*, 62 Vt. 481, 22 Am. St. Rep. 126, 20 Atl. 813, 11 L. R. A. 162; *Baker v. Sherman*, 73 Vt. 26, 50 Atl. 633; *Dean v. Cass*, 73 Vt. 314, 50 Atl. 1085.

Judgment reversed and new trial ordered on terms that plaintiffs pay defendants' costs up to the time of filing a new <sup>174</sup> declaration, and take none during that time if they finally recover, except for service of the writ and entry of the action. If a new trial is not accepted on these terms, let judgment on the verdict be arrested, with costs to the defendants in this court and in the court below.

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*A Wife is not Liable at Common Law for a Wrong* based upon a contract relation, though it is otherwise under statutes investing her with power to contract and to sue and be sued, and the torts or frauds of a wife for which the husband is liable at the common law are such as are torts simpliciter, or cases of pure, simple tort, and not where the substantive basis of the tort is the contract of the wife: Note to *Henley v. Wilson*, 92 Am. St. Rep. 165. The liability of married women for torts is the subject of a note to *Graham v. Tucker*, 131 Am. St. Rep. 130.

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### McDERMENT v. TAFT.

[83 Vt. 249, 75 Atl. 276.]

**DOGS—Law Providing for Summary Destruction.**—While dogs are recognized by the law as a species of property, they belong to that class of property which is within the domain of the police power, and the legislature may provide for their destruction in a summary way, without judicial proceedings. (pp. 1083, 1084.)

**DOGS—Nonliability for Killing.**—There is no liability for shooting foxhounds, found attacking a wild deer, if, though licensed, they have no collars on, where the statute provides that the owner of a dog shall cause it to be licensed and to wear a collar distinctly marked with the name of the owner or keeper, and authorizes any person to kill dogs not licensed and collared, whenever and wherever found. (p. 1084.)

**DOGS—Motive in Killing not Material.**—If a person is authorized by statute to kill an uncollared dog, his motive in killing it is immaterial as affecting his liability therefor. (p. 1085.)

Trespass and case for shooting the plaintiff's dogs. There was a judgment for the plaintiff and the defendant excepted.

Darling & Wilson, for the defendant.

Elwin L. Scott and R. M. Harvey, for the plaintiff.

<sup>250</sup> **POWERS, J.** While dogs are recognized by the law as a species of property, and are frequently of great useful-

ness and value, they belong to that class of property the keeping of which may be stringently regulated by the legislature in the exercise of its police power—even to the extent of providing for their destruction, in given circumstances without judicial proceedings and in a most summary way: *Blair v. Forehand*, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94; *Morewood v. Wakefield*, 133 Mass. 240; *Morey v. Brown*, 42 N. H. 373; *Julienne v. Mayor etc. of Jackson*, 69 Miss. 34. 30 Am. St. Rep. 526, 10 South. 43; *Sentell v. New Orleans etc. R. R. Co.*, 166 U. S. 698, 17 Sup. Ct. Rep. 693, 41 L. ed. 1169; *State v. Smith*, 72 Vt. 140, 47 Atl. 390.

Accordingly, our statute (Pub. Stats. 5623) provides that the owner or keeper of a dog shall cause it to be registered, numbered, described and licensed, and to wear a collar distinctly marked with the name of its owner or keeper, and (Pub. Stats. 5635) that “any person may, and every police officer and constable shall, kill or cause to be killed” dogs not so licensed and collared “whenever and wherever found.”

These provisions afford a complete defense to this action. The defendant shot the plaintiff's hounds—killing one and wounding the other—which he found attacking a wild deer. The dogs were duly licensed and usually wore lawful collars. but when shot they did not have collars on—a fact which the defendant observed. The plaintiff had started out with them <sup>251</sup> to hunt foxes and had removed their collars, as was his custom when they were on the chase. By so doing, the plaintiff exposed them to the penalty provided for uncollared and therefore unprotected dogs. The provisions of the statute are drastic, but they are plain and positive, and the consequences of a noncompliance therewith are distinctly specified, and nothing short of a strict, if not literal, compliance will suffice.

These views find sufficient support in the following cases, all of which were tort actions for killing dogs: *Morewood v. Wakefield*, 133 Mass. 240. The Massachusetts statute required dogs to be licensed and collared, and provided that “any person may, and every police officer or constable shall, kill or cause to be killed all” dogs not licensed and collared “whenever and wherever found.” The plaintiff's dog was duly licensed, but his neck was so large and his head so small that he could not wear a collar. While without a collar, he was shot and killed by the defendant. It was held that there could be no recovery.

*Moore v. Mills*, 191 Mass. 56, 77 N. E. 638, arose under the same statute. The plaintiff's dog was duly licensed and when killed by the defendant wore a collar with its owner's name distinctly marked thereon. But the number on the collar was not the dog's correct registered number—the requirement of the statute being that the owner should cause

the dog to wear a collar marked with the owner's name and the dog's registered number. It was held that there could be no recovery, and a judgment ordered for the defendant was affirmed.

*Morey v. Brown*, 42 N. H. 373: The statute of New Hampshire provided that no person should be liable for killing a dog found without a collar with its owner's name carved or engraved thereon. The plaintiff's dog, when killed by the defendant, wore a collar on which was engraved only the initials of the owner's name—"J. P. M." It was held that there was no liability.

It is argued that the defendant cannot justify under the statute, since the agreed statement shows that he shot the dogs to save the life of the deer. But the defendant's motive was immaterial: *Moore v. Mills*, 191 Mass. 56, 77 N. E. 638.

Judgment reversed and judgment for the defendant to recover his costs.

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*Property in Dogs and the Right to Kill an Uncollared Dog* are discussed in the note to *Hamby v. Samson*, 67 Am. St. Rep. 288, 299. Property in dogs is subject to the police power: See note to *Hamby v. Samson*, 67 Am. St. Rep. 298; although some of the regulations are exceedingly severe in authorizing the killing of the offending animal forthwith without notice to the owner or a hearing in the execution of the law: Note to *Armstrong v. Brown*, 90 Am. St. Rep. 214. The power of the legislature to provide for the destruction of animals is discussed in the note to *Blair v. Forehand*, 97 Am. Dec. 88.

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## PLOOF v. PUTNAM.

[83 Vt. 252, 75 Atl. 277.]

**MASTER'S LIABILITY for Servant's Malicious Act.**—A master is liable for the act of his servant, though willful and malicious, when it is done in furtherance of the master's business and within the scope of the servant's employment; but he is not liable for such act done to effect some purpose of the servant alone. (p. 1087.)

**MASTER'S LIABILITY for Servant's Malicious Act.**—The primary test, in determining whether a master is answerable for the willful and malicious act of his servant, is, not the character of the act itself, nor whether it was done during the period of employment, but whether it was done to carry out the directions of the master, express or implied, or to effect some purpose of the servant alone. (p. 1087.)

**MASTER'S LIABILITY for Excess or Mistaken Execution of Authority.**—To establish a right of action against the master for injuries resulting from an excess or mistaken execution of a lawful authority by his servant, it must be shown that the servant intended to do on behalf of his master something of a kind which he was in fact authorized to do; and that the act, if done in a proper manner, or under circumstances erroneously supposed by the servant to exist, would have been lawful. (p. 1088.)

**MASTER AND SERVANT—Implied Authority of Latter.**—In determining what acts are within a servant's authority, courts are not usually confined to his express instructions. Regard should be had to the character of the work, the situation of the parties, and the surrounding circumstances. Certain implied authority goes with the relation, usually if not always; and it will be inferred that a servant has implied authority to do all those things that are necessary for the protection of the property intrusted to him, or for fulfilling the duty which he has to perform. (p. 1088.)

**MASTER AND SERVANT—Implied Authority Against Trespassers.**—A servant who has been placed in sole charge of an island is clothed with implied authority to keep off trespassers and intruders, irrespective of written instructions by the master that he does not care to have people tie up to his wharf. Authority to use such force as may be necessary to accomplish this is implied from the character of the work. (p. 1088.)

**MASTER AND SERVANT—Authority to Protect Property.**—A caretaker who has sole charge of an island, with instructions from his master that he does not care to have people tie up to his wharf, acts within the scope of his employment in casting off the line of one who has moored his sloop to the master's wharf and refusing to permit him to tie thereto in a storm. (pp. 1088, 1091.)

**MASTER'S LIABILITY for Servant's Act in Caring for Property.**—Where a caretaker, in sole charge of an island, with instructions not to allow boats to tie up there, refuses to permit the occupants of a sloop to tie to the master's wharf in a storm, by reason whereof the sloop is wrecked and the occupants thereof injured, such act, under the peculiar circumstances, is improper and unlawful; and the master is liable if the caretaker intended to carry out instructions and perform his duty, but not if he intended only to serve some purpose of his own. (pp. 1088, 1089.)

**MASTER AND SERVANT—Scope of Employment.**—The questions whether a servant acts within the scope of his employment and whether he acts in behalf of the master or in his own behalf are usually for the jury; but if the facts, and the inferences to be drawn therefrom, are not in dispute, the court may dispose of these questions as matter of law. (p. 1090.)

**MASTER AND SERVANT—Scope of Employment.**—Where a servant testifies that he acted according to orders, though his act was improper and unlawful, and there is nothing to show that he acted merely to serve some purpose of his own, it is proper to instruct the jury that he was acting within the scope of his employment, so that the master stands as though he were present and had himself done the act. (pp. 1090, 1091.)

Trespass and case for damages resulting from the unmooring of the plaintiff's sloop from the defendant's dock on an island in Lake Champlain. This island and dock were in the charge of a caretaker employed by the defendant. The plaintiff, while sailing in a sloop on the lake with his wife and children, encountered a sudden storm, and, for safety, was compelled to, and did, moor his sloop to the defendant's dock. The caretaker thereupon unmoored the sloop, which was driven ashore without the plaintiff's fault, where its contents were destroyed and its occupants cast into the lake and injured. The caretaker testified that, prior



to the time of the wreck, the defendant had notified him in writing that he did not care to have boats tie up to his dock, This dock was conceded to be a strictly private one.

Batchelder & Bates and Charles H. Darling, for the defendant.

Martin S. Vilas and Cowles & Moulton, for the plaintiff.

<sup>255</sup> POWERS, J. It was formerly held, usually on the authority of *McManus v. Crickett*, 1 East, 106, that a master was not answerable for the willful or malicious act of his servant, though done in the line of the servant's duties, unless he directed or assented to it. Accordingly, it was said by Aldis, J., in *Andrus v. Howard*, 36 Vt. 248, 84 Am. Dec. 680, that "the master is not liable for the willful wrong or trespass of the servant, though the act be done while employed in the business of his master." But this doctrine is now pretty generally repudiated, and it has come to be well settled that a master is liable for the act of his servant, though it be willful and malicious, when it is done in furtherance of the master's business and within the scope of the servant's employment. The primary test, then, is, not the character of the act itself, nor whether it was done during the period of employment, but whether it was done to carry out the directions of the master, express or implied, or to effect some purpose of the servant alone. This rule was fully recognized and approved in *Palmer v. St. Albans*, 60 Vt. 427, 6 Am. St. Rep. 125, 13 Atl. 569, wherein it is said: "The rule of respondeat superior is of universal application, whether the act be one of omission or of commission, whether negligent or fraudulent. And it makes no difference that the master did not know of the act, or disapproved it, or even forbade it, provided the servant was acting at the time for the master and within the scope of the business intrusted to him. . . . But the foundation of the rule is the relation of master and servant. When that does not exist, the law does not impute to one man the negligence of another. . . . Hence, the modern cases all show that it is not enough, in order to charge one man with the negligence of another, to show that the latter was acting at the time under the employment of the former; but you must go further and show that the employment created the relation of master and servant between them"; that is to say, of course, the relation of master and servant as to the very act of which complaint is made. Acts are here spoken of as "negligent or fraudulent," but in <sup>256</sup> this connection fraud stands the same as other torts: *Barwick v. English Joint Stock Bank*, 2 L. R. Ex. Cas., at p. 265. So far we can proceed without much difficulty. Indeed, the defendant's brief does not seriously

controvert the rule as above stated. But an attempt to apply the rule to the varying circumstances of the numberless cases which have already arisen under it has led to much perplexity and confusion. In Pollock's Torts, seventh edition, at page 82, the injuries in respect of which a master becomes subject to this kind of "vicarious liability" are helpfully classified as follows:

(a) Such as are the natural consequence of something being done by a servant with ordinary care in execution of the master's specific orders.

(b) Such as are due to the servant's want of care in carrying on the work or business in which he is employed.

(c) Such as result from an excess or mistaken execution of a lawful authority.

(d) Such as result from a willful wrong, such as an assault, provided the act is done on the master's behalf and with the intention of serving his purposes.

The case in hand falls within class "c" or class "d." It is further said by the author referred to, at page 87, that to establish a right of action against the master in cases covered by class "c," it must be shown that (1) the servant intended to do on behalf of his master something of a kind which he was in fact authorized to do; (2) the act, if done in a proper manner, or under circumstances erroneously supposed by the servant to exist, would have been lawful.

In determining what acts are within a servant's authority, courts are not usually confined to his express instructions. Regard should be had to the character of the work, the situation of the parties, and the surrounding circumstances. Certain implied authority goes with the relation, usually if not always. In the much quoted language of Mr. Justice Blackburn in *Allen v. London etc. Ry. Co.*, L. R. 6 Q. B. 65, implied authority in a servant will be inferred to do all those things that were necessary for the protection of the property intrusted to him or for fulfilling the duty which he has to perform.

So this man Williams, who was the defendant's caretaker and had sole charge of his island in Lake Champlain, was clothed<sup>257</sup> with implied authority to keep off trespassers and intruders—and this without regard to his written instructions that the defendant did not care to have people tie up to his wharf. Authority to use such force as might be necessary to accomplish this is implied from the character of the work: 26 Cyc. 1541; *Alton Ry. etc. Co. v. Cox*, 84 Ill. App. 202; *Brennan v. Merchant & Co.*, 205 Pa. 258, 54 Atl. 891. The whole story is condensed into an admirable statement of Willis, J., in *Bagley v. M. S. & L. R. R. Co.*, L. R. 7 C. P., at p. 420: "A person who puts another in his place to do a class of acts in his absence necessarily leaves him to



determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so intrusted either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done; provided that what was done was done, not from any caprice of the servant, but in the course of the employment." When Williams cast off the plaintiff's rope, he was doing one of a class of acts well within the scope of his employment. One which under ordinary circumstances would be proper and lawful. But in the peculiar circumstances then existing, the act was improper and unlawful—it was done under circumstances in which it ought not to have been done—and the defendant is responsible, whether it was done carelessly or willfully, unless it was done from the caprice of Williams—that is, to serve some purpose of his own. In other words, if Williams cast off the rope intending thereby to carry out his instructions and perform his duty as caretaker of the property, the defendant is liable; if he cast it off, not for this purpose, but only to serve some purpose of his own, the defendant is not liable.

The books are crowded with cases supporting this doctrine, a few of which we take time to refer to by way of illustration.

In *Letts v. Hoboken etc. Co.*, 78 N. J. L. 358, 57 Atl. 392, the declaration charged that the defendant as owner of certain property employed a watchman to prevent persons from trespassing thereon, and that the watchman, within the scope of his employment and acting for the owner, in ejecting a person from the premises, made an assault upon him, from the effects of which he died. It was held that it stated a cause of action, the court <sup>258</sup> saying: "Authority given by the master to his servant to eject trespassers from the former's premises charges the master with the liability for the act of the servant in using excessive or inappropriate force in removing one who was a trespasser."

In *Brennan v. Merchant & Co.*, 205 Pa. 258, 54 Atl. 891, a boy eight years old climbed onto a moving truck of the defendant, then in charge of a driver, and held on to a standard. The driver, without warning, struck the boy's hand with his whip, and the boy fell off and was injured. The plaintiff was nonsuited below, and this was held error. "If his act," says the court, "in striking the boy was intended to remove him by force from the wagon, it would be the act of his employer, for which the latter would be responsible. If, on the other hand, the purpose of the driver was not to cause the boy to leave the wagon, but to inflict punishment upon him, to gratify the ill-will of the driver,

the defendant company is not responsible for the wrongful or tortious act."

In *Hammond v. Grand Trunk Ry. Co.*, 4 Ont. W. Rep. 530. a watchman was employed at a crossing to raise and lower the gate by means of a lever in a structure near by. He was to lower the gate while a train was passing, and raise it immediately afterward. The plaintiff, a boy of sixteen, reached the crossing when the gate was down and stood leaning upon it while a train passed. After the train had gone by he and his companions did not immediately remove their weight from it, as the watchman ascertained as he attempted to raise it. Whereupon he picked up a cinder and threw it toward the plaintiff, hitting him in the eye and destroying it. The court said that the act of throwing the cinder was one for which the master might or might not be answerable. "If the act were done out of mere malice and ill-temper and to punish the boy, the company would not be answerable; but if it were done for the purpose of warning him to get off the bars so that they might be raised, then it is clear that they would be answerable, although the act done was a tort."

In *Alton Ry. etc. Co. v. Cox*, 84 Ill. App. 202, the company had a small park near the city of Alton, which was used during the summer as a pleasure resort. At the time in question it was closed and in the charge of a superintendent, who had orders to keep all persons out of it. He testified that in the <sup>259</sup> acts complained of he was obeying his instructions. Cox and some others entered the park, and were ordered out by the superintendent. They got into an altercation and the superintendent threw a stone at Cox, which hit and injured him. It was held that it was apparent that the superintendent was acting for his master and in the performance of his duty as he understood it, and not on account of any matter personal to himself, and a recovery was sustained.

The instruction of which the defendant complains and to which he excepted was that it was established by uncontradicted evidence that Williams cast off the rope, and "that in so doing he was acting within the scope of his employment as a servant of the defendant. . . . So that . . . the defendant stands as though he had been present and had himself done the act." The questions whether a servant acts within the scope of his employment and whether he acts in behalf of the master or in his own behalf are usually questions of fact, and so are for the jury: Note to *Goodloe v. Memphis etc. R. R. Co.* (Ala.), 54 Am. St. Rep., at pp. 85, 89. But this is not always so, and the usual rule prevails in these as in other cases: If the facts and the inferences to be drawn therefrom are not in dispute, the court may dispose of these questions as matter of law: *Brennan v. Merchant & Co.*, 205 Pa. 258, 54 Atl. 891. So it remains to inquire whether there

was any conflict in the evidence on these important questions in the case in hand.

As we have already seen, the act of casting off the rope of one attempting to tie up to that wharf would, ordinarily, be within the scope of Williams' employment. He testified that he threw the plaintiff's line off in furtherance of his employer's orders, and that he so informed the plaintiff at the time. The only evidence disclosed by the record which could in any view be claimed to have a tendency to contradict this comes from Williams himself when he testifies that, after he told the plaintiff that the defendant did not allow boats to tie up there, the plaintiff swore at him, called him an opprobrious name, and threatened him. There is nothing in this fact alone which tends to show that Williams thereupon cast off the rope for any purpose of his own. It does not appear that he was angered, or even irritated by it. And we cannot infer that he was in order to find error. Nothing appears to indicate that he had any personal interests <sup>260</sup> to serve, or that in the slightest degree he turned aside from the line of duty as he then understood it or did anything that he would not have done. In these circumstances the court was right in the instruction given; the act being within the scope of the agency and done for the master's benefit, the defendant's liability was the same as if he had done it himself: *Rochester v. Bull*, 78 S. C. 249, 58 S. E. 766; *Columbus R. R. Co. v. Woolfolk*, 128 Ga. 631, 119 Am. St. Rep. 404, 58 S. E. 152, 10 L. R. A., N. S., 1136.

In the foregoing discussion we have excluded from consideration (1) cases in which a special duty is imposed upon the master toward the person injured, arising out of the relation existing between them—like carrier and passenger, innkeeper and guest, and such like; (2) cases in which an absolute duty is imposed upon the master—by statute, for instance; and (3) cases in which the injuries result from certain dangerous agencies intrusted to the servant by the master—like wild animals or high explosives; all of which are said to be exceptions to the rules herein applied. Nor have we referred to cases in which the servant acts outside of the scope of his employment though attempting in good faith to further his master's interests, which are said not to afford any ground of action against the master.

Judgment affirmed.

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*A Master is Liable for the Willful Torts of His Servant*, committed in the course of the servant's employment, just as though the master had himself committed them: *Columbus R. R. Co. v. Woolfolk*, 128 Ga. 631, 119 Am. St. Rep. 404. He is responsible for the torts of his servant, done in the course of his employment with a view to the furtherance of the master's business, and not for a purpose personal to himself, whether the same be done willfully, but within the scope

of his agency, or in excess of his authority, or contrary to express instructions: *Barrett v. Minneapolis etc. Ry. Co.*, 106 Minn. 51, 130 Am. St. Rep. 585, and cases cited in the cross-reference note thereto.

*A Master is Answerable not Only for the Negligence, but also for the torts, of his servants, when done within the scope of their employment:* Note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 85; *Deck v. Baltimore etc. R. R. Co.*, 100 Md. 168, 108 Am. St. Rep. 399; *Star Brewery Co. v. Hauck*, 222 Ill. 348, 113 Am. St. Rep. 420; *McGinnis v. Chicago etc. Ry. Co.*, 200 Mo. 347, 118 Am. St. Rep. 661. If the servant misconducts himself in the course of his employment, his acts are the acts of the master, who must answer for them. The quality of the act does not excuse the master. The simple inquiry and true test is not whether a given act was done during the existence of the servant's employment, but whether it was in the course of the servant's employment, or outside of it: Note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 72. Whether a particular act of a servant was or was not done in the line of his duty is, in most cases, a question of fact to be determined by the jury from the surrounding facts and circumstances: Note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 85; *Polatty v. Charleston etc. Ry. Co.*, 67 S. C. 391, 100 Am. St. Rep. 750; *Deck v. Baltimore etc. R. R. Co.*, 100 Md. 168, 108 Am. St. Rep. 399; *Moon v. Matthews*, 227 Pa. 488, 136 Am. St. Rep. 902. As to the presumption of a servant's implied authority from the general nature of the employment see *Deck v. Baltimore etc. R. R. Co.*, 100 Md. 168, 108 Am. St. Rep. 399.

*The Rule that a Master is Liable for the Acts of His Servant only when the servant acts within the scope of his employment is applied to cases where the servant assumes to protect the master's property in* *Bobards v. P. Bannon Sewer Pipe Co.*, 130 Ky. 380, 132 Am. St. Rep. 394.

## DEROSIA v. FERLAND.

[83 Vt. 372, 76 Atl. 153.]

**MASTER AND SERVANT—Wrongful Discharge.**—A master has the power to dismiss his servant without cause, but he subjects himself, in so doing, to the consequences of a violation of his contract. (p. 1097.)

**MASTER AND SERVANT—A Servant Wrongfully Discharged has the Election** of treating the contract as continuing and suing for damages for the breach by the discharge; or of treating it as, and acquiescing in its being, rescinded by the wrongful act of the master, and bringing an action on the quantum meruit for the work actually performed; but he cannot, though waiting until the termination of the period for which he was hired, maintain *indebitatus assumpsit* for the whole wages, relying on the doctrine of constructive service. (pp. 1096, 1100.)

**WORDS AND PHRASES—Judicial Dictum.**—If an expression of opinion by the supreme court upon a point argued by counsel and deliberately passed upon by the court is a dictum, it is a judicial dictum as distinguished from a mere obiter dictum—that is, an expression of the judge who writes the opinion, made as an argument or illustration. (p. 1097.)

**MASTER AND SERVANT—Discharge—Constructive Service.** A servant discharged without cause cannot, by waiting till the end

of the term for which he was employed, sue for and collect wages, as such, for the portion of the term after the dismissal. (p. 1100.)

**MASTER AND SERVANT—Wrongful Discharge—Pleading.—**

A declaration in indebitatus assumpsit by a servant to recover wages for the portion of the term after the time of his dismissal cannot be amended by filing a count seeking damages for breach of the contract of hiring, as the causes of action are not the same. (p. 1101.)

**APPEAL AND ERROR—Rendering of Final Judgment.—**

Where the declaration does not entitle the plaintiff to recover, and the suit cannot be maintained on any declaration which may be filed in amendment, final judgment will be rendered in the appellate court. (p. 1101.)

Assumpsit. There was a verdict and judgment for the plaintiff, and the defendant excepted.

D. W. Steele, for the defendant.

C. G. Austin & Sons, for the plaintiff.

376 WATSON, J. The declaration is common counts in assumpsit. Plea, the general issue.

The plaintiff claimed, and his evidence tended to show, that on August 12, 1907, he made a contract with the defendant whereby he was to work for the defendant as clerk and salesman in his store at Highgate Center for the term of one year from that date for the sum of four hundred and sixty-eight dollars, payable in installments of nine dollars per week, with the agreement that he should be given employment for the full term; that when the plaintiff had worked eight and one-half weeks the defendant sold his stock in the store to one Loukes, notified the plaintiff that he had no more work for him, and paid him in full for the services he had performed; that the plaintiff remained at Highgate Center during the entire year, ready and willing to work for the defendant, but was not furnished with more work, and was paid nothing by him, after the time of the dismissal; that during the remainder of the year the plaintiff did some work under other employment and, deducting what he received therefor, together with the sums received of the defendant for the services actually performed, seeks to recover here the "balance due on services" for the full term of the contract, this suit being brought after the termination of that period.

It was claimed in defense and the defendant's evidence tended to show that he did not hire the plaintiff for the term of one year, but did hire him by the week and paid him up to the time he was discharged.

The defendant seasonably objected, and excepted to the admission of any and all evidence in support of the plaintiff's claim, on the ground that the declaration is general assumpsit, and not special for breach of the contract; and at the

close of the evidence the defendant moved for a verdict, for that since the testimony on both sides shows that the plaintiff was paid his wages in full up to the time of his dismissal, no recovery can be had under the common counts in *assumpsit*. This motion was overruled and an exception saved.

The plaintiff contends for and relies upon the doctrine laid down in *Gandell v. Pontigny*, 4 Camp. 375, 1 Stark. 198, 2 Eng. Com. L. 82. There the action was *indebitatus assumpsit* for work and labor, with the common money counts. The plaintiff, employed by the defendant at a yearly salary payable quarterly, <sup>377</sup> was discharged from his service about the middle of a quarter and paid for the half quarter worked. Thereupon the plaintiff denied the defendant's power to discharge him in the middle of a quarter, and the next day made an offer to do the duties of the situation, which the defendant declined. Lord Ellenborough said, if the plaintiff was discharged without a sufficient cause, the action was maintainable. "Having served a part of the quarter and being willing to serve the residue, in contemplation of law he may be considered to have served the whole." The doctrine of constructive service there laid down was followed in *Collins v. Price*, 5 Bing. 132, 30 Rev. Rep. 542, 15 Eng. Com. L. 507, and in other English cases. It was repudiated, however, by Lord Tenterden in *Archard v. Hornor*, 3 Car. & P. 349, 14 Eng. Com. L. 604, as early as 1828. There the first count was special on a contract by which the plaintiff agreed that he and his wife would become the servants of the defendant at certain wages, and the defendant undertook, etc., to continue them in such service until the expiration of one year. Breach, that the defendant discharged them without warning before the year had expired. Pleas, *non assumpsit* to the special counts, also to the other counts as to all but the sum of eleven pounds, and a tender of that sum. The tender was for the time of actual service. The plaintiff and his wife entered upon the performance of the contract in the month of December and were discharged on the sixth day of February, following. The plaintiff claimed wages for the time he had served, and for a quarter more. The evidence did not support the contract declared upon, but instead thereof showed a contract terminable at a month's notice. Consequently, it was held that there could be no recovery on the special counts. And his lordship further held that wages could not be recovered under the common count for any more of the time than the plaintiff had actually served. In 1837 the case of *Smith v. Hayward*, 7 Ad. & El. 544, 34 Eng. Com. L. 292, was heard before the court of king's bench. The declaration contained a special count, which was not proved, and counts for work and labor, and on an account stated. Plea, *non assumpsit*, and payment into court of four pounds on the



account for work and labor. The defendant employed the plaintiff for a quarter of a year and paid him therefor. The jury found that the agreement was subject to three months' notice. The plaintiff completed <sup>378</sup> that quarter; but when he had worked some more than half a month on the second quarter he was dismissed by the defendant. The action was commenced three days later, the plaintiff having first offered to complete the second quarter's service. The money was paid into court as due for the time of actual service after the expiration of the first quarter. The plaintiff claimed pay for the whole quarter from that period. It was held that the action was brought too soon for any question to arise on this point. But in discussing the matter, Lord Chief Justice Denman said he thought the rule was granted for the purpose of bringing the case of *Gandell v. Pontigny* into question; that the view taken by Lord Ellenborough of the point there decided was different from that which Lord Tenterden took of the same point in *Archard v. Hornor*, and "if we were bound to decide between the two authorities, I should say that the later case is grounded on the better reason. There is obviously a great difference between suing for a breach of contract in dismissing the plaintiff, and for work and labor which, by reason of the dismissal, has not been performed. The defense in the last case would be the nonperformance of the work; in the other, some excuse for breaking off the contract." The other three justices expressed themselves to the same effect. In 1847 the case of *Fewings v. Tisdal*, 5 Dowl. & L. 196, 1 Ex. 295, came before the court of exchequer. The declaration was *indebitatus assumpsit* for work and labor as a hired servant, and on an account stated. Plea, *non assumpsit*. The plaintiff, when in the defendant's employ, was dismissed without previous warning and was paid her wages up to the time of dismissal. The action was brought to recover a month's wages, commencing from the day of her discharge. The under-sheriff nonsuited the plaintiff on the ground that the declaration should have been special, and that she could not recover under the common count for work and labor. The rule was discharged, Lord Chief Baron Pollock saying he regretted that the party was unable to recover her claim "in this form of count; it is not the proper form, but it should have been a special one. The case of *Archard v. Hornor* governs the present; it has been recognized by all the courts, and has been acted upon in this court, in the case of *Broxham v. Wagstaffe*, 5 Jur. 845." Barons Parke and Alderson concurred therein, the former saying: "The good sense of the <sup>379</sup> matter is to be found in *Archard v. Hornor*, which was afterward confirmed by the court of queen's bench in the case of *Smith v. Hayward*, and also by this court." In

*Emmens v. Elderton*, 13 Com. B. 495, 76 Eng. Com. L. 495, 4 H. L. Cas. 624, Mr. Justice Crampton, of the exchequer chamber, wrote as follows: "The result of the modern authorities, as to the remedies of a servant wrongfully discharged, is well discussed in the passage in 1 Smith's Leading Cases, 67. He is said to have the election of treating the contract as continuing, and suing for damages for the breach by the discharge; or of treating it as, and acquiescing in its being, rescinded by the wrongful act of the master, and bringing an action on the quantum meruit for the work actually performed; and it is added, that he may wait till the termination of the period for which he was hired, and may then, perhaps, sue in *indebitatus assumpsit* for the whole wages, relying on the doctrine of constructive service. It is clear, since the decision of *Fewings v. Tisdal*, that this last remedy cannot be maintained in the shape of *indebitatus assumpsit*; for the simple reason, that the allegation of his being indebted for work done is untrue." To the same effect are *Goodman v. Pocock*, 15 Ad. & El., N. S., 576, 69 Eng. Com. L. 576; *Wood v. Mayes*, 1 Week. Rep. 166.

The exact question now presented does not seem to have been directly passed upon by this court. Yet in several cases determined by it kindred questions have been involved, and the decisions rendered are consonant with the rule which finally obtained in England, and are quite controlling in the case before us. In *Derby v. Johnson*, 21 Vt. 17, the action was book account, and the plaintiffs presented an account for labor performed and for materials furnished by them in the prosecution of work under a special contract by which the plaintiffs agreed with the defendants to do all the stone work and blasting on a certain piece of railroad, at prices specified. After the plaintiffs had worked a month in performance, the defendants directed and requested them to cease labor and to abandon the further execution of the contract, in consequence of which the plaintiffs immediately ceased laboring under the contract and abandoned its further execution. The auditor, finding that the items of plaintiffs' account were reasonably and properly charged, upon the facts reported submitted to the court the question whether the plaintiffs were entitled to recover, and if so, what amount. It was insisted <sup>380</sup> by the defendants that their request and direction to the plaintiffs to cease work and abandon the execution of the contract should be considered in the light of a proposition which the plaintiffs were at liberty to accede to or disregard, and that having acquiesced therein by quitting the work, the contract was to be treated as having been relinquished by the mutual consent of the parties. Thus the power of the employers to stop the execution of the contract by the employees, and the right of the



latter to recover for services performed, were questions before the court. It was held that the direction of the defendants to the plaintiffs to quit the work was positive and unequivocal; that the employer in a contract for labor has the power to stop the completion of it, if he choose, subjecting himself thereby to the consequences of a violation of the contract; that the workman, after notice to quit, has no right to continue his labor and claim pay for it; that the plaintiffs, having been prevented from executing their part of the contract by the act of the defendants, were entitled to recover, as upon a quantum meruit, the value of the services they had performed under it, without reference to the rate of compensation specified in the contract; and that they might, in addition thereto, in another form of action have recovered their damages for being prevented from completing the whole work. In *Sherman v. Champlain Transp. Co.*, 31 Vt. 162, by the contract declared upon the defendants were allowed to use on two of their steamers two machines, known as "Sickles' patent cut-off," belonging to the plaintiff, and a patent right, known as "Stevens' patent cut-off," also owned by the plaintiff, on another of their steamers, for an agreed sum per annum, so long as defendants continued to use said machines and said patent right. The company used the machines and the patent right for some seasons, paying therefor according to the contract, and then notified the plaintiff that they would not pay him anything further for the use of the cut-offs, but continued to use them the same as before the giving of such notice. It was urged that the company had the right to repudiate the contract and refuse to suffer the other party to proceed under it, and thereby subject itself to damages for breach of the contract. The court said that in cases of hiring either party may always put an end to the contract by violating its terms, and only becomes liable for damages for the breach of <sup>381</sup> the contract—stating in support thereof the rule declared in the later English cases to which we have made reference. It seemed to the court at first blush that this principle of law was applicable to the case, but upon more reflection it was determined otherwise, because of the peculiar species of the contract, and the defendants should not be allowed to repudiate it in part and not in toto.

Perhaps it cannot be said that the court's statement of the law respecting the right of a party to terminate a contract of hiring, and the resulting liability, was essential to the disposition of that case; yet it was an expression of opinion upon a point argued by counsel and deliberately passed upon by the court; and if it is a dictum, it is "a judicial dictum as distinguished from a mere obiter dictum—i. e., an expression originating alone with the judge who

writes the opinion, as an argument or illustration": *Rhoads v. Chicago etc. R. R. Co.*, 227 Ill. 328, 81 N. E. 371, 11 L. R. A., N. S., 623, 10 Ann. Cas. 111; *Brown v. Chicago & N. W. R. Co.*, 102 Wis. 137, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 579.

In *Chamberlin v. Scott*, 33 Vt. 80, the declaration contained a general count for work and labor and a special count upon the contract. By the contract the plaintiffs agreed to draw for the defendant, from premises described, a lot of timber, and deliver such portion thereof as the defendants should direct on board of the cars at a certain depot, and deliver the rest at one of the sawmills named as the defendants should direct, the whole job to be finished by a day specified. The evidence showed that the plaintiffs completed the drawing of the timber before the expiration of the time limited, but as the defendant failed to furnish cars upon which to load the timber drawn to the depot until after that time had expired, they did not load it. The court reiterated the principles of law enunciated in *Derby v. Johnson*, 21 Vt. 17, as having been recognized in this state, and held accordingly. In *White v. Lumiere North American Co., Ltd.*, 79 Vt. 206, 64 Atl. 1121, 6 L. R. A., N. S., 807, the declaration was special to recover damages for breach of contract in dismissing the plaintiff without cause when in performance of his duties, and before the end of the period for which he was employed. The defendant excepted to the charge to the jury, that the consummation of the lease for a term which exceeded the plaintiff's employment, by the terms of which all the plant, property and business of the <sup>382</sup> defendant passed into the hands of the lessee, was a breach of the contract, entitling the plaintiff to maintain the action, unless his subsequent conduct precluded him from setting that up as a breach. This part of the charge was held to be without error, except that the last and modifying clause, relating to the plaintiff's subsequent conduct, was erroneous, consequent on the further holding that the defendant had the power to dismiss the plaintiff without cause, by subjecting itself to damages for a breach of the contract, and the plaintiff was not at liberty to disregard the dismissal by continuing his labor and claiming pay therefor after notice of his discharge. The propositions of law there stated by the court were necessarily involved in the determination of the case, and consequently they are of the doctrine of the case for which the decision is authority.

Four cases from this court are cited and relied upon by the plaintiff in support of his position; but an examination shows them severally to be in harmony with those to which we have made reference. Thus, *Boardman v. Keeler*, 21 Vt. 77, was debt on bond, and general counts for work and

labor. The plaintiff's intestate, Paro, executed a promissory note by which he promised to make for the defendant and deliver at his store four installments of a certain number of pairs of boots, each by a day named, Paro to find pegs and wax, and the defendant "to find the rest of the stock." The condition of the bond was, that if Paro should perform the services specified in the note, and the defendant should within ten days, after "full payment" thereof, execute and deliver to Paro, or his assigns, a good and valid deed of certain premises, then the bond should be void; but otherwise in force. Paro complied with the provisions of the note as to the first three installments, also as to a portion of the fourth. The assignee of the bond, within the time allowed by the contract, demanded of the defendant the leather of which to make the rest of the boots due on the note; whereupon the defendant furnished leather for part of the boots so due, and refused to furnish more, leaving thirty-four pairs still due at the expiration of the time limited. It was considered that the case showed in substance a tender of the service according to the contract, and a refusal of it by the defendant, in refusing to furnish the essential leather as demanded; and "that the tender, wrongfully refused, should have the effect of actual performance <sup>383</sup> so far as to give a right of action on the bond." The plaintiff before us relies upon the holding shown by the clause here quoted as a precedent in his favor. Yet not only is the force of the holding limited by the concluding modifying clause, but it clearly appears from the context that the court then understood, and made it plain, that the holding could have no application to the question of a right to recover for constructive service. The court below charged the jury that the measure of damages was the value of the land at the time it should have been conveyed, with interest thereon. The rule there laid down was held to be, in general, the proper one where the entire consideration for the conveyance has been received by the party who is to give the deed; yet in the circumstances there shown the measure of damages was the value of the land only in proportion as the land had been paid for, the court saying: "But a mere tender of service operates no actual benefit to the other party. And though, if he wrongfully refuse it, he may forfeit any consideration previously advanced in payment for the service, it is another question, whether he is bound to render the same prospective compensation as if the service had in fact been performed. No principle of equal and exact justice would appear to indicate such a rule. . . . The just distinction is between a consideration already advanced for the service and a payment to be made for it after performance. The first may probably be forfeited by a wrongful refusal of the service when

duly tendered. But in the latter case, though the party tendering the service will be entitled to sue upon the contract, yet the recovery should be restricted to the extent of his actual damages." *Paul v. School District*, 28 Vt. 575, was an action in assumpsit to recover for services rendered in teaching school, and damages for not being permitted to continue for the full term of the contract. The plaintiff being dismissed after part performance, it was held that, unless incompetency or unfaithfulness be shown, he could not be deprived of his right to complete the performance without a claim to damages resulting from such breach of the contract. *Cashen v. School District*, 50 Vt. 30, was in book account. When the plaintiff had taught school in defendant district twenty-three days, in part performance of her contract for the term of twelve weeks, the schoolhouse was burned. After the fire, but on the same day, the plaintiff was told by the prudential committee <sup>384</sup> that if he could get a place for the school she should go on with it; and she, not being discharged from the contract, nor it repudiated in any way, held herself in readiness to go on with the work through the entire term. She was given to understand that she was expected to be ready and able to resume her service of teaching, it being treated as contingent at most whether a place would be provided for a continuation of the school. It was held that she performed the service of her employment in just the way the employer enabled and required her to do it, and that she was entitled to be paid according to the terms of the contract. And *Davis v. Streeter*, 75 Vt. 214, 54 Atl. 185, the last of the four cases from this court on which the plaintiff relies, was an action of general assumpsit. There the evidence tended to show that the plaintiff rendered services by way of work and labor for the defendant under a special contract which he forced her to abandon before complete performance. It was held that this evidence tended to support a quantum meruit recovery under the general count for such services performed.

No case has been called to our attention, and we have found none, in which the doctrine of constructive service has been applied, or recognized as law, in this state. On the contrary, we think the decisions of this court to which reference has been made, some of them precedential in nature, show the law here to be that a servant who was dismissed during his performance of an entire contract, by the master, without cause, cannot by waiting until the end of the term for which he was employed sue for and collect wages, as such, for the portion of the term after the time of his dismissal. As before seen, the law does not permit a servant to continue to work and claim pay for it after his discharge. To allow him to do so would be inconsistent with the right

of the master to stop performance by the servant, by taking upon himself the liability for resulting damages. How much more inconsistent would it be to say that when no work is subsequently done by the servant, he may bring indebitatus assumpsit and recover for constructive service? The reason given by Mr. Justice Crampton why such a remedy cannot be maintained, that the allegation of the master's being indebted for work done is untrue, is substantiated by the holding of this court in *Curtis v. Smith*, 48 Vt. 116, that a plaintiff cannot recover on the common count for work and labor done and performed <sup>385</sup> without showing that he has performed work and labor for the defendant at his request, either expressed or implied.

It follows that the defendant's motion for a verdict should have been granted.

The plaintiff says, however, that the parties were heard on their evidence the same as they would have been had the declaration been special for damages, and hence, on the authority of *Chaffee v. Rutland R. R. Co.*, 71 Vt. 384, 45 Atl. 750, an amendment of the declaration should be permitted by filing a special count to conform to the proof in this respect, and that on filing the same the judgment should be affirmed. The defendant objects thereto, denying that the case was fully heard on questions which would arise in a trial for damages. Regardless of the range of the evidence, leave to file such new count cannot be granted. As seen, to entitle the plaintiff to recover in the present case, he must show that he performed work and labor for the defendant at his request; while in an action for damages for breach of the contract—the plaintiff's only available remedy—he would need to prove, not that he performed such services, but that he was prevented by the defendant from so doing in completion of the existing contract between them. Clearly, the causes of action are not the same, and the declaration cannot be amended to give the latter remedy: *Brodek v. Hirschfield*, 57 Vt. 12; *Estabrooks v. Fidelity Mut. Fire Ins. Co.*, 74 Vt. 202, 52 Atl. 420. And since this suit cannot be maintained on any declaration which may be filed in amendment, final judgment will be rendered here.

Judgment reversed and judgment for the defendant to recover his costs.

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*The Remedies of an Employee Wrongfully Discharged* are considered in the note to *McMullan v. Dickinson Co.*, 51 Am. St. Rep. 515. See, also, *Cox v. Bearden*, 84 Ga. 304, 20 Am. St. Rep. 359; *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 51 Am. St. Rep. 289; *Seymour v. Oelrichs*, 156 Cal. 782, 134 Am. St. Rep. 154; *Currier v. Ritter Lumber Co.*, 150 N. C. 694, 134 Am. St. Rep. 955. His remedy is not in assumpsit as for implied services, or for wages, but is for damages for breach of the contract: *Hamilton v. Love*, 152 Ind. 641, 71 Am. St. Rep. 384.

**PATTERSON & HOLDEN v. SARGENT.**

[83 Vt. 516, 77 Atl. 338.]

**STATUTE OF FRAUDS—Sale.**—To Satisfy the Statute of Frauds a purchaser of goods must accept and receive part thereof. A receipt of them without an acceptance is not sufficient. (p. 1103.)

**WORDS AND PHRASES.**—The Term "Acceptance" covers more than "receipt." (p. 1103.)

**STATUTE OF FRAUDS—Sale—Acceptance.**—The Destruction of an Article sold is an assumption of ownership, and an acceptance within the statute of frauds; and a vendee who destroys an article cannot deny that he has assumed control over it, or that he has deprived the vendor of the benefit of his lien upon it. (pp. 1103, 1104.)

**STATUTE OF FRAUDS—Sale — Acceptance — Destruction of One Article.**—If a person buys pieces of old machinery subject to his approval after inspection, but during inspection breaks and converts one of the pieces into junk, this is an acceptance of part of the property, sufficient to satisfy the statute of frauds, is a waiver of his right to examine the other pieces, and his intention to reject the other machinery, if a certain piece thereof proves unsatisfactory, can have no effect as against this waiver. (p. 1104.)

**STATUTE OF FRAUDS—Sale—Acceptance.**—Anything done by the purchaser of an article as owner is an acceptance sufficient to satisfy the statute of frauds. (p. 1104.)

**STATUTE OF FRAUDS—Sale—Acceptance of Part of Goods.** In making a sale of several pieces of old machinery, the purchaser's receipt and acceptance of one of the pieces takes the whole contract out of the statute of frauds. (p. 1104.)

General assumpsit for goods sold and delivered. There was a judgment for the plaintiffs and the defendant excepted.

March M. Wilson, for the defendant.

Darling & Wilson, for the plaintiffs.

518 **MUNSON, J.** The suit is brought to recover the price of goods sold, and the question is whether there was an acceptance sufficient to satisfy the statute of frauds. The property consisted of a gasoline engine, a water-wheel, a steel grinder, a corn-cracker, and certain shafting, pulleys, sprockets and other iron ware, all of which had been used in a grist-mill burned two years before, and most of which, exclusive of the gasoline engine, was in the basement of the mill, where it had remained undisturbed since the fire. The main value of the property was in the engine and wheel. The wheel was understood to be damaged, but the extent of the damage was not shown. The defendant relied on the statement of a third person by whom the wheel was last used. It could not be fully examined as it stood, but was to be taken by the defendant where it was.

The defendant moved all the property except the wheel to a bank on the premises about seventy-five feet distant, whence it could be conveniently loaded for carrying away. It could



not be conveniently loaded without doing this. When the corn-cracker was moved it was treated as junk and broken into pieces <sup>519</sup> with sledges. In preparing to remove the wheel defendant unnecessarily broke with sledges two or three bolts of small value, but this was apparently done in the belief that it was necessary to a removal of the wheel with reasonable convenience. When the wheel was taken from its case it was found to be damaged more than was expected, and nothing was done after this. It was not necessary to remove the machinery thus in order to examine the wheel and ascertain the condition of the buckets. The wheel could have been reached for this purpose by removing a few partially burned timbers and some rods. Defendant did all that was done toward the removal of the property with an expectation that the wheel would be found as indicated by the statement referred to, and intending to take the property if the wheel was found as expected.

Laying aside all questions regarding the effect of the preliminary moving of some of the property and the unnecessary breaking of bolts in getting at the wheel, we take up the question presented by the breaking in pieces of the corn-cracker. To satisfy the statute the purchaser must accept and receive part of the goods; and the defendant's claim is based upon the distinction between a receipt of the goods and an acceptance of them. It is well settled that the term "acceptance" covers more than "receipt," and that a receipt without an acceptance is not sufficient: Notes to 49 Am. Dec. 327; 96 Am. St. Rep. 216; *Caulkins v. Hellman*, 47 N. Y. 449, 7 Am. Rep. 461. This distinction is recognized in our own cases, although not expressed in terms: *Spencer v. Hale*, 30 Vt. 314, 73 Am. Dec. 309; *Gibbs v. Benjamin*, 45 Vt. 124. The defendant insists that although he received the property, he did not accept it; that he merely took possession of the property by way of preparing for its removal; that he had a right to inspect the property and reject it if unsatisfactory; that an intention to make an unconditional appropriation of the property is an essential element of an acceptance, and that there was no intention to accept this property unless the wheel was found to be as it was supposed to be. The defendant supports these claims by a citation from *Hunt v. Hecht*, 8 Ex. 814, to the effect that an acceptance implies some act done by the purchaser after he has exercised, or has had the means of exercising, his right of rejection. We find nothing in this argument, if treated as wholly sound and applicable, that meets the fact that the defendant <sup>520</sup> converted the corn-cracker into old iron. This certainly was a positive and unequivocal exercise of exclusive dominion over the machine. The act was in no way connected with any preparation for reaching the wheel.

It was done in advance of the removal of the wheel purely from choice. The defendant had ample opportunity to make such an examination of the wheel as was essential to an intelligent exercise of the right of rejection, and waived examination by the course taken. The intention finally to reject the property if the wheel proved unsatisfactory can have no effect as against this waiver.

The defendant contends that inasmuch as the agreed statement does not show that the corn-cracker had any value as such, it cannot be said that the plaintiff was damaged by its destruction. But the matter for consideration here is not the value of the article destroyed, but the quality of the defendant's act as affecting the ownership of all the articles. If the defendant was not to be the owner of the machine, it was not for it to pass upon its value or say what should be done with it. It is said that the plaintiffs were entitled to a vendor's lien on the property, and that the defendant's control of it could not be complete while this lien existed. Whatever the effect of a vendor's lien may be, it is certain that a vendee who destroys an article cannot deny that he has assumed entire control of it, or that he has deprived the vendor of the benefit of his lien upon it. The defendant's disposition of the corn-cracker was an assumption of ownership, and anything done by the purchaser as owner is an acceptance. The receipt and acceptance of the one article took the whole contract out of the statute: *Danforth v. Walker*, 40 Vt. 257.

Judgment affirmed.

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*The Acceptance of Goods Sufficient to Satisfy the Statute of Frauds* is discussed in the note to *Devine v. Warner*, 96 Am. St. Rep. 215. This note, at page 220, shows that the receipt and acceptance of part of the articles purchased under an entire contract of sale, or of all of any one class of them, necessarily takes the whole contract out of the statute. The same principle applies to a contract for the sale of lots. The taking of possession of one lot is equivalent to taking possession of them all: *Tillis v. Folmar*, 145 Ala. 176, 117 Am. St. Rep. 31.

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## VALIQUETTE v. CLARK BROTHERS COAL MINING COMPANY.

[83 Vt. 538, 77 Atl. 869.]

**DRAFT—Action on, by Party Beneficially Interested.**—In Vermont, contrary to the general commercial law, an action upon a promissory note or draft can be maintained in the name of the party beneficially interested, when the instrument is in terms made payable or indorsed to his agent as treasurer, cashier, or the like. (p. 1107.)

**DRAFT—Action on, by Party Beneficially Interested.**—If the whole consideration of a draft in favor of the Berwick Hotel has



moved from the plaintiff, who is the proprietor of the hotel, he can maintain an action thereon in his own name, for he is the party beneficially interested and the only one who can sue, as "Berwick Hotel" is not a legal entity, but only a name by which the plaintiff's hostelry is designated. (p. 1107.)

**APPEAL.—A Question not Raised on the Trial cannot be raised on appeal unless it is involved in the judgment.** (p. 1107.)

**APPEAL.—An Exception to a Judgment Does not Raise, for consideration in the appellate court, a question the decision of which was not necessary to the validity of the judgment and which is therefore not involved in the judgment.** (p. 1107.)

**APPEAL.—Waiver of Objections.—An Objection that the plaintiff should have declared specially is waived if not made on the trial, as it does not go to the jurisdiction, but only to a matter of pleading and procedure. Even objections to the form of action are waived if not made on the trial.** (p. 1107.)

**AGENCY—Notice of Limited Authority—Estoppel.—The principle that one who deals with an agent of limited authority must at his peril discover the limits of that authority does not apply where the principal is estopped by his acts and culpable silence to deny the authority in question.** (p. 1108.)

**AGENTS' AUTHORITY to Draw Draft Inferred from Prior Acts.—An agent is accredited by his principal as having authority to draw a draft where three like prior drafts were drawn by him without authority but were paid by the principal, as such payment might well have induced the person dealing with him to believe that authority existed, and to take the last draft on the faith of such belief.** (p. 1108.)

**AGENTS' AUTHORITY to Draw Draft Inferred from Prior Acts.—If a principal has paid three drafts drawn by his agent without authority, and does not want to be bound by a fourth, it should give notice to that effect to the person dealing with the agent; and, if he does not do so, his conduct and silence amount to an admission of authority in the agent to draw, and that is an admission of an obligation to accept.** (p. 1108.)

**AGENCY—Evidence That Third Person is Agent.—When a general authority to do an act is alleged, and the plaintiff relies on the defendant's having held out a third person as his agent, other instances of the plaintiff's having treated the person as agent for such an act are receivable to show a general holding out as agent. The principle of the rule is that the instances must be numerous enough, and occurred under conditions so similar, as to indicate a system, plan or habit of doing that particular thing under similar circumstances; and the only question in administering the rule is, whether the instances produced have any real probative value to show such system, plan or habit.** (p. 1109.)

**AGENCY—Implied Authority.—A General Authority to do an act is an implied authority derived from a course of dealing, or from a number of acts of a particular kind authorized or assented to; and such an authority enables the agent to bind his principal, without orders, in dealing with those who have no notice of the want of lawful power and who act without collusion.** (p. 1109.)

General assumpsit, based on a draft for two hundred and fifty dollars. The plea was the general issue. Plaintiff was the proprietor, and A. J. Boynton, manager, of the Berwick Hotel, in the city of Rutland, Vermont. The defendant was a foreign corporation engaged in the business of mining and

selling coal, and had employed one J. F. Scott to sell coal for it, he to have a graduated commission of so much per ton, varying with the price obtained by him for the coal. Scott put up at the Berwick Hotel, and informed Boynton that he was acting for the defendant corporation, in which he said he had an interest. Scott frequently received mail inclosed in envelopes having defendant's name printed thereon, and addressed to Scott at the Berwick Hotel. Scott became indebted to the plaintiff for board and money advanced to him, and within four weeks drew three drafts on defendant in favor of the Berwick Hotel. Two of these drafts were for seventy-five dollars each, and the other was for one hundred and fifty dollars. These drafts were paid by the defendant without any objection being made to the plaintiff. In about three weeks after the last draft was drawn, Scott drew a like draft for two hundred and fifty dollars, the one in suit, which was protested for nonpayment. In the meantime the defendant had, by letter, remonstrated with Scott for making drafts on it, but, until the last draft was protested, neither the plaintiff nor Boynton had any intimation that Scott did not have full authority to make drafts on the defendant for his board and expenses. Scott was, in fact, never so authorized, unless the acceptance of the aforesaid three drafts was in law an implied authorization. Except as above stated, he had no interest in the defendant's business, and when he made the draft in question he was indebted to the defendant. The plaintiff never caused the defendant to be notified of the representations made by Scott to the plaintiff and Boynton. There was a judgment for the plaintiff for the amount of the draft, interest and costs. The defendant excepted.

E. H. O'Brien, for the defendant.

M. C. Webber, for the plaintiff.

**542 ROWELL, C. J.** It is objected that the action cannot be maintained in the name of the plaintiff, because his name does not appear on the face of the draft in suit, which is drawn in favor of the "Berwick Hotel," of which the plaintiff was sole proprietor at the time in question; and *Bank of United States v. Lyman*, in the federal circuit court for the district of Vermont, 20 Vt. 666, Fed. Cas. No. 924, is relied upon in support of the objection; and it does support it, for it holds precisely that. But such is not the law of this state, and has not been since the case of *Arlington v. Hinds*, 1 D. Chip. 431, 12 Am. Dec. 704, decided in 1824, in which the contrary was held, and which has been followed by this court ever since. Thus, in *Rutland & Burlington R. R. Co. v. Cole*, 24 Vt. 33, the note sued upon was payable "to the order of Samuel Henshaw, Treasurer." Henshaw was the

plaintiff's treasurer, and the note was given for assessments on shares of the plaintiff's capital stock owned by the defendant, and was declared upon as payable to the plaintiff. The same objection was made there as is made here, but it was held that as the consideration moved from the plaintiff, and the note was in effect given to it, the action was maintainable in its name. There are many other cases in this state to the same effect, and among them is *United States National Bank v. Burton & Sowles*, 58 Vt. 426, 3 Atl. 756. That was assumpsit on a draft, and it was objected that the plaintiff could not maintain the action because the draft was indorsed to its cashier instead of to itself. But it was held to be the settled law of this state, contrary to the general commercial law, that an action upon a promissory note or a draft can be maintained in the name of the party beneficially interested, when the instrument is in terms made payable or indorsed to his agent as treasurer, cashier, and the like. We hold, therefore, that this action is maintainable in the name of the plaintiff, who is the party beneficially interested, and, indeed, the only party that can sue, for "Berwick Hotel" is not a legal entity, but only a name by which the plaintiff's hostelry is designated.

<sup>543</sup> It is further objected that general assumpsit will not lie, but that the plaintiff should have declared specially. This question was not raised on trial, and therefore cannot be raised here, unless it is involved in the judgment, which was rendered on agreed facts, and to the rendition of which the only exception in the case was taken. But the question is not involved in the judgment, for its decision was not necessary to the validity of the judgment, and therefore the exception to the judgment does not raise the question: *Farrant v. Bates*, 60 Vt. 37, 11 Atl. 693; *In re Hall's Estate*, 70 Vt. 458, 41 Atl. 508; *Baker v. Sherman*, 73 Vt. 26, 50 Atl. 633. The objection is one that could be waived, and was waived by not being made on trial, for it did not go to the jurisdiction, but only to a matter of pleading and procedure. Even objections to the form of action are waived if not made on trial: *Bliss v. Allard*, 49 Vt. 350. And see *Hammond v. Wilder*, 25 Vt. 342; *Chaffee v. Hooper*, 54 Vt. 513. *Bickford v. Gibbs*, 8 Cush. 154, was assumpsit against guarantors of a note who were sued as makers. It was objected above for the first time that the guaranty should have been specially declared upon. But it was held that the objection came too late, and the plaintiff had judgment.

As to the merits of the case: It is agreed that Scott had no authority to draw the draft in suit on the defendant, unless its acceptance of the three prior drafts was, in law, an implied authority, and we think it was, for it appears that those drafts were drawn without authority, and their pay-

ment was virtually holding Scott out to the plaintiff and accrediting him as having authority to draw the draft in suit. It was an approval of a series of like prior acts that well might have induced the plaintiff to believe that such authority existed, and to take the draft on the faith of it; and that he was thus induced, and did thus take the draft is not questioned in argument except as hereinafter stated.

If the defendant, after having accepted and paid the third draft, did not want to be bound by a fourth, it should have notified the plaintiff to that effect; and as it did not, it is to be taken as assenting thereto. This is the doctrine of *Keyes & Co. v. Union Pacific Tea Co.*, 81 Vt. 420, 71 Atl. 201, and it is applicable here.

But the defendant says that it was the duty of the plaintiff to ascertain the extent of Scott's authority, and not having done it, he took the draft at his peril. But that principle does not <sup>544</sup> apply here, for the defendant is estopped by its acts and culpable silence to deny the authority: *Locklin v. Davis*, 71 Vt. 321, 45 Atl. 224. There the plaintiff was taken to have intended the natural consequence of her silence, on the ground that if one by words, conduct, or culpable silence, though not intending to defraud, leads another who acts prudently, to believe that a certain state of things exists, and who acts upon that belief, he is estopped to deny the existence of that state of things if the other party would be prejudiced thereby; for such a denial would be a breach of good faith, and therefore fraudulent.

But the defendant says that in order to an estoppel it must have admitted funds in its hands, or other obligation to accept, upon which the plaintiff relied, not knowing the truth; but as there was no such admission, the plaintiff could have relied on no such, and therefore no estoppel. But the defendant's conduct and silence amounted to an admission of authority in Scott to draw, and that was an admission of an obligation to accept.

The defendant further says that an occasional recognition of paper drawn as here is not enough, and refers to *Bank of Deer Lodge v. Hope Min. Co.*, 3 Mont. 146, 35 Am. Rep. 458, as showing that one instance is not enough; and the court does so hold, but on the ground that no inference of original authority could be drawn from one ratification, because such ratification did not operate as presumptive evidence of prior authority, but only as a ratification of the unauthorized act. But the court said that if there had been repeated acts like the one in dispute, that the defendant had ratified, the plaintiff could have inferred authority to draw the bill. In support of its holding that no inference could be drawn from one instance, the court referred to *Commercial Bank v. Warren*, 15 N. Y. 577. But that case does not

hold that. There it was contended that the ratification operated merely as presumptive evidence of prior authority. But the court said that its operation was not confined to that, but worked, per se, a confirmation of the act.

In further support of its holding, the court referred to *Cook v. Baldwin*, 120 Mass. 317, 21 Am. Rep. 517, as showing that part payment of a bill of exchange is not such a recognition by the drawee as will bind him to pay the rest. And that was the holding. But the court said that such payment might have been accompanied by a positive refusal to pay more; that no indorsement <sup>545</sup> of the payment was made by the drawee, and the fact that he made the payment was simply to be taken in connection with other evidence in determining whether he recognized the bill as one accepted by him and which he was bound to pay.

*Paige v. Stone*, 10 Met. 160, 43 Am. Dec. 420, is also referred to by the defendant as showing that the recognition of two notes is not enough. There, two prior instances of recognition were relied upon. In one, only one of the defendants assented, and the court said that his assent could not bind the other without further evidence. In the other, the note was small, and was settled after suit brought, but whether the defendants had previously assented to it did not appear.

*Jackson v. National Bank*, 92 Tenn. 154, 36 Am. St. Rep. 81, 20 S. W. 802, 18 L. R. A. 663, to which reference is made, is not much in point, for the gist of the holding there is that a commercial traveler, employed to sell and take orders for goods, to collect accounts, and to receive money and checks payable to the order of his principal, is not, by implication, authorized to indorse the checks in the name of his principal.

Mr. Wigmore says that when a general authority to do an act is alleged, and the plaintiff relies on the defendant's having held out a third person as his agent, other instances of the plaintiff's having treated the person as agent for such an act have always been receivable to show a general holding out of that person as agent. The principle of the rule is, he says, that the instances must be numerous enough, and have occurred under conditions so similar as to indicate a system, plan or habit of doing that particular thing under similar circumstances; and that the only question in administering the rule is, whether the instances produced have any real probative value to show such system, plan or habit: 1 Wigmore on Evidence, sec. 377.

Now, a general authority to do an act is, as said in 1 American Leading Cases, fourth edition, 568, on the authority of Lord Ellenborough in *Whitehead v. Tuckett*, 15 East, 400, 408, an implied authority derived from a course of deal-

ing, or from a number of acts of a particular kind authorized or assented to. And such an authority, it is said, enables the agent to bind his principal, without orders, in dealing with those who have no notice of the want of lawful power in the agent, and who act without collusion. This principle is illustrated by many cases there referred to, and among them is *Munn v. Commission Co.*, 15 Johns. 44, 8 Am. Dec. 219. There an <sup>546</sup> agent of a company was authorized to make advances of money on goods consigned or deposited, but in that case he had accepted a bill for accommodation on a promise to consign rum. But it was proved that the agent had accepted a number of bills in the same manner as the one in question, which were regularly paid by the company; and the court said that though it appeared by the by-laws of the company that the agent had no authority to accept bills on an expected delivery of goods, yet it was proved that he was the general agent of the defendants, and was in the habit of accepting bills that the company afterward paid under like circumstances, and therefore it held, on the distinction between a general and a special agency, that the company was bound by the acceptance. So a general authority may be inferred from payment, with knowledge, of notes to which the payer's name was forged: *Weed v. Carpenter*, 4 Wend. 219.

In *Barber v. Gingell*, 3 Esp. 60, the defendant proved the bill to be a forgery. The plaintiff then proved that the defendant had been connected with the drawer in business, and had in fact paid several bills drawn as the one in suit was, and to which the drawer, as was supposed, had written the acceptance in the defendant's name. Lord Kenyon ruled that this was an answer to the defense of forgery; for though the defendant might not have accepted the bill, he had adopted the acceptance, and thereby bound himself to pay. In *Courteen v. Touse*, 1 Camp. 43, the proof was that one Butler signed the defendant's name to the policy, and had often done that, but the witness had not seen any general power of attorney from the defendant to Butler; nor did he know that the defendant had given Butler authority to sign this particular policy; nor was he aware of any instance in which the defendant had paid a loss on a policy so signed. Lord Ellenborough held that the proof of agency must be carried further.

In *Lytle v. Bank of Dothan*, 121 Ala. 215, 26 South. 6, the giving of other notes by the alleged agent, and the defendant's subsequent recognition of their validity, were admitted. So in *Stevenson v. Hoy*, 43 Pa. 191, it was held that a general agency to transact business for the principal was not admissible in an action against him on a guaranty, for the act of the agent in signing it was not within the scope



of his authority, but said that proof that similar guaranties had been made by the agent and ratified or previously authorized by the defendant would have been admissible. In <sup>547</sup>Bryan v. Jackson, 4 Conn. 288, a single payment without disapprobation for what a servant bought on the credit of his master was held to be equivalent to a direction to trust him in future: Story on Agency, 6th ed., sec. 56; 2 Greenleaf on Evidence, 16th ed., sec. 65.

Evidence that the defendant's son, a minor, had in three or four instances signed for his father and accepted bills for him was held sufficient prima facie evidence of authority to sign a collateral guaranty: Watkins v. Vince, 2 Stark. 368.

In Gibson v. Hunter, in the house of lords, 2 H. Black. 288, Hingston drew a bill on the plaintiffs in error in favor of a fictitious payee or order, and indorsed it in the name of the payee. The defendant in error, a bona fide holder for value, in order to show that the plaintiffs in error, at the time they accepted the bill, either knew that the name of the payee was fictitious or had given authority to draw the bill, was permitted to show below that many other bills had been drawn in the same way and accepted by the plaintiffs in error; and the defendant in error had judgment. The plaintiffs in error objected above that the evidence was not admissible to prove actual knowledge on their part; and if not admissible for that purpose, it could not be admissible to prove general authority to draw bills on them payable to fictitious persons, inasmuch as a general authority to do certain acts, when no actual authority is shown, can be inferred only by showing acquiescence of the person supposed to have given such authority in other acts of a similar nature done with his privity or consent, and that no such acquiescence on their part was shown. But it was held that the evidence was properly received, and the judgment was affirmed.

HASELTON, J., dissents on the ground that the defendant did not, by honoring Scott's three personal drafts at the times and in the circumstances shown, give him general letters of credit; nor recognize him as its agent to disburse its moneys; nor make him, nor hold him out as, its agent to make commercial paper on which it would be liable without acceptance on its part.

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*That a Bank may Sue upon a Note Payable to Its Cashier*, it appearing that the consideration proceeded from the bank, see President Com. Bank v. French, 21 Pick. 486, 32 Am. Dec. 280. See, also, note to Rose v. Laffan, 42 Am. Dec. 378; Erwin Lane etc. Co. v. Farmers' Nat. Bank, 130 Ind. 246, 30 Am. St. Rep. 246; Lookout Bank v. Aull, 93 Tenn. 645, 42 Am. St. Rep. 934.

*Persons Dealing With an Agent Having Limited Powers* must generally inquire as to the extent of his authority: *Swindell v. Latham*, 145 N. C. 144, 122 Am. St. Rep. 430; *Cornish v. Woolverton*, 32 Mont. 456, 108 Am. St. Rep. 598. But the unauthorized execution of a written instrument made by an agent may be ratified: Note to *McDowell v. Simpson*, 27 Am. Dec. 343. As to the effect of such ratification, see note to *Atlee v. Bartholomew*, 5 Am. St. Rep. 109. The authority of an agent to do a particular act in connection with a transaction may be inferred from proof that his principal authorized or ratified similar acts in connection with past transactions intrusted to him under similar circumstances: *Harrison Nat. Bank v. Austin*, 65 Neb. 632, 101 Am. St. Rep. 639.

*As to the Principal's Liability for His Agent's Unauthorized Acts*, see notes to *St. Louis etc. Ry. Co. v. Bennett*, 22 Am. St. Rep. 189; *Franklin Fire Ins. Co. v. Bradford*, 88 Am. St. Rep. 779.



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**APPEAL AND ERROR.***Appellate Practice in General.*

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the suit cannot be maintained on any declaration which may be filed in amendment, final judgment will be rendered in the appellate court. (Vt.) *Derosia v. Ferland*, 1092.

*Exceptions and Assignment of Error—Waiver.*

4. **APPEAL—Assignment of Errors.**—It is not sufficient merely to repeat an assignment of error and submit that error was committed by the trial court. Unless the error complained of is so glaring or patent that no argument is needed to demonstrate it, counsel must call the attention of the appellate court to the specific points upon which he relies to show error, otherwise such assignment will be treated as abandoned. (Fla.) *Tillman v. State*, 100.

5. **APPEAL.—An Exception is not in Proper Form** where it does not contain within itself the proposition of law to be reviewed. (S. C.) *McCallum v. Grier*, 1037.

6. **APPEAL.—Exceptions to the Refusal to Direct a Verdict** for the defendant raise the same question as to the sufficiency of the evidence to sustain a verdict for the plaintiff as would be raised by the usual motion for a new trial, except as to the amount of damages (Me.) *Ouellette v. Grand Trunk Ry. Co.*, 340.

7. **APPEAL.—An Objection to Evidence**, if it does not appear in the record, does not require consideration on appeal. (Iowa) *State v. Duff*, 269.

8. **APPEAL.—Specification of Error.**—When the Settled Statement of case in an action properly triable to a jury contains no proper specifications of errors as required by Revised Codes of 1905, section 7058, the same must be disregarded by this court, as said section expressly provides that: "If no such specification is made, the statement shall be disregarded on motion for a new trial, and on appeal." No proper specification being found in the settled statement in this case, this court is restricted to a review of such errors, if any, as appear upon the face of the judgment-roll proper. (N. D.) *State v. School District No. 50*, 787.

9. **APPEAL.—A Question not Raised on the Trial** cannot be raised on appeal unless it is involved in the judgment. (Vt.) *Valiquette v. Clark Bros. Coal Min. Co.*, 1104.

10. **APPEAL.—An Exception to a Judgment Does not Raise**, for consideration in the appellate court, a question the decision of which was not necessary to the validity of the judgment and which is therefore not involved in the judgment. (Vt.) *Valiquette v. Clark Bros. Coal Min. Co.*, 1104.

11. **APPEAL.—Waiver of Objections.**—An Objection that the plaintiff should have declared specially is waived if not made on the trial, as it does not go to the jurisdiction, but only to a matter of pleading and procedure. Even objections to the form of action are waived if not made on the trial. (Vt.) *Valiquette v. Clark Bros. Coal Min. Co.*, 1104.

12. **APPEAL.—Failure to Urge Error—Waiver.**—It is essential that all points upon which counsel rely for a reversal of a cause be made in the brief and properly made; if not so made they are waived. It is not enough to assert in general terms that a ruling of the trial court is wrong; a fair effort must be made to prove that it is wrong, or the point will not be considered as having been made. (Okl.) *Allison v. Bryan*, 988.

13. **APPEAL.—Misjoinder of Parties or Causes of Action.**—The question of misjoinder of parties, or of causes of action, or of defect of parties, must be properly taken advantage of in apt time in the trial court, or the same will be treated as waived in the supreme court. (Okl.) *Kansas City etc. Ry. Co. v. Shutt*, 870.

***Case-made—Service and Notice.***

14. **APPEAL—Parties—Service of Case-made.**—An action brought by J. against B. & R., contractors, for material furnished in the construction of buildings on lots of B., C. & M. for judgment in a certain sum, and also to enforce a mechanic's lien for that amount upon said building and lots, B. & R. having defaulted after service, and judgment being rendered against them for the amount sued for, and in favor of B., C. & M. as to the lien, on appeal to this court by J. without making B. & R. parties thereto, held, that B. & R. could not be affected or their rights prejudiced thereby, and that they were unnecessary parties. It being unnecessary to join certain parties in a proceeding in error to this court, it is not essential that the case-made be served upon them. (Okl.) Jones v. Balsley, 921.

15. **APPEAL—Statement of Case-made—Notice.**—Where it is unnecessary to join certain parties on appeal in a proceeding in error to the supreme court, it is not essential that they have notice of the time and place of the presentation of the case-made for settlement. (Okl.) Jones v. Balsley, 921.

16. **APPEAL—Manner of Service of Case-made.**—There being no mode of service of the case-made prescribed by statute, if the opposite party or his attorney of record actually receive such case-made within the given time, it is immaterial whether it be by mail, express, or otherwise, it being admitted that he actually received the same within such time. (Okl.) Jones v. Balsley, 921.

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17. **APPEAL—Finding Based on Conflicting Evidence.**—When there is a substantial conflict in the evidence upon which any finding of fact is based, such finding will not be reversed on appeal. (Idaho) Flynn Group Min. Co. v. Murphy, 201.

18. **APPEAL—Upon Writ of Error to an Order Granting New Trial,** the only questions to be considered are those involved in such order. (Fla.) Owens v. Wilson, 117.

19. **APPEAL—Request for Direct Verdict—Review.**—Where both parties, at the close of the evidence, request a peremptory instruction, and a verdict is directed in favor of plaintiff, the action of the trial court in declining to submit issues of fact to the jury presents no question for review in the appellate court. (Neb.) Henton v. Sovereign Camp of Woodmen of World, 500.

20. **APPEAL—Questions of Fact upon Conflicting Evidence** are to be decided by the jury in actions at law, and their finding will not be set aside on the ground of the want of evidence to support it unless it appears that the verdict is manifestly wrong. (Neb.) Sheridan Coal Co. v. C. W. Hull Co., 435.

21. **APPEAL—Review of Conflicting Testimony.**—An appellate court, where there is substantial testimony supporting the verdict as returned by the jury, will not disturb such finding on the ground that there may be some conflict in the testimony from which the final conclusions of the jury were reached. (Mo.) State v. Mitchell, 425.

22. **APPEAL—Review of Conflicting Evidence.**—When controverted questions of fact are submitted to a jury, and the evidence adduced is conflicting and contradictory, but there is competent evidence reasonably tending to support every material allegation necessary to uphold the verdict, and the trial court approves the verdict and renders judgment in accordance therewith, and a new trial is refused, this court will not disturb the verdict of the jury and the judgment of the court on the weight of such conflicting evidence. (Okl.) McMaster v. City National Bank, 831.



**23. APPEAL—Right Ruling on Wrong Ground.**—The appellate court will not disturb a ruling based on a wrong ground if it can be sustained on any ground. (Vt.) *Fairbanks v. Stowe*, 1074.

**24. APPEAL.—A Correct Ruling will not be Reversed on appeal,** though the reason for it is erroneous or unsound. (S. C.) *First Nat. Bank v. Badham*, 1043.

Note.

**Appeal, harmless or technical errors in criminal cases, 677–679.**

### ARBITRATION.

**1. ARBITRATION—Revocation of Submission Without Notice.**—While a submission to arbitration may be revoked by any party thereto at any time before the award is made, an express revocation of the submission is not complete until notice is given to the arbitrators. (N. C.) *Williams v. Branning Mfg. Co.*, 637.

**2. ARBITRATION—Revocation by Bringing Suit.**—If matters in dispute have been submitted to arbitration, and suit is brought for the subject matter thereof, the defendant has no legal notice of the cause of action until a complaint is filed. The mere issuance of a summons before award does not invalidate an award made before the filing of the complaint or the giving of a bill of particulars. (N. C.) *Williams v. Branning Mfg. Co.*, 637.

**3. ARBITRATION—Conclusiveness of Award.**—A valid award operates as a final and conclusive judgment, as between the parties to the submission, or within the jurisdiction of the arbitrators, respecting all matters determined and disposed of by it. (N. C.) *Williams v. Branning Mfg. Co.*, 637.

Note.

**Arbitration, agreements to arbitrate, when revocable, 640.**

agreements to arbitrate, when irrevocable, 642, 643.

agreement not to revoke, effect of, 643.

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revocation of agreement for, after award is made, 643.

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revocation of agreement for, by death or refusal of arbitrators to act, 647.

revocation of agreement for, by institution of suit, 648.

revocation of agreement for, by marriage of feme sole, 647.

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revocation of agreement for, effect of contract not to revoke, 643.

revocation of agreement for, effect of, 648.

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revocation of agreement for, when cannot be made, 642.

revocation of agreement for, when express, 646.

revocation of agreement for, when implied by operation of law, 646.

revocation of agreement for, when may be made, 640.

right to revoke agreement for, 640.

rule of court, right to revoke arbitration in case of submission by, 645.



**ARGUMENT OF COUNSEL.**

See Criminal Law, 6.

**ASSIGNMENT.**

**1. ASSIGNMENT—Suit in Name of Assignee of Chose.**—The assignee of a chose in action, under an assignment not in writing as required by Revised Laws, chapter 173, section 4, cannot, if objection is made, sue in his own name. (Mass.) *Rogers v. Abbot*, 394.

**2. ASSIGNMENT.**—The Question Whether a Claim is Covered by an assignment is a question of law for the judge, but error in submitting it to the jury is harmless if they decide rightly. (Mass.) *Rogers v. Abbot*, 394.

**3. ASSIGNMENT of Contract for Purchase of Goods to be Manufactured.**—Where a contract for the purchase of goods to be manufactured involves "personal confidence," it is not assignable by the vendor. (N. J. L.) *Schlessinger v. Forest Products Co.*, 627.

**4. ASSIGNMENT—Cause of Action for Burning Property.**—A cause of action in favor of the owner of personalty, on account of the wrongful destruction of such property by fire, against the wrongdoer, is not assignable. (Okl.) *Kansas City etc. Ry. Co. v. Shutt*, 870.

**5. ASSIGNMENT—Cause of Action for Converting Property.**—A cause of action in favor of the owner of personalty, against a party wrongfully taking and converting the same to his use, is assignable. (Okl.) *Kansas City etc. Ry. Co. v. Shutt*, 870.

See Mortgages, 2.

**ASSUMPTION OF MORTGAGE BY GRANTEE.**

See Mortgage, 3, 4.

**ATTACHMENT.***In General.*

**1. ATTACHMENT—Affidavit Stating More Than One Ground.**—An affidavit for an attachment, which states, in the language of the statute, that the debtors "have sold, assigned, transferred, secreted or otherwise disposed of, or are about to sell, assign, transfer, secrete or otherwise dispose of their property with intent to cheat or defraud their creditors" states but one ground for attachment. (N. D.) *McCarthy Bros. Co. v. McLean County Farmers' Elevator Co.*, 757.

**2. ATTACHMENT—Grounds.**—The Use of the Disjunctive Conjunction "or" in subdivision 4, section 6938, Revised Codes of 1905, is not to connect two grounds for an attachment, but said subdivision states one ground only consisting of different phases of facts or conditions, intimately related, pertaining to that one ground. (N. D.) *McCarthy Bros. Co. v. McLean County Farmers' Elevator Co.*, 757.

*Bonds and Sureties.*

**3. ATTACHMENT—Liability on Bond Given to Discharge.**—An obligor on a bond to discharge an attachment, under the provisions of section 4404, Wilson's Revised and Annotated Statutes of Oklahoma of 1903, conditioned that the defendant will perform the judgment of the court in the action in which the attachment is issued, is absolutely liable in an action against him on the bond for the amount recovered in the action in which the bond was given, without reference to the question whether the attachment was rightfully or wrongfully issued, and the defendant is precluded by such bond from controverting the grounds of the attachment. (Okl.) *Moffitt v. Garrett*, 818.

**4. ATTACHMENT.**—There is a Breach of the Bond Given to Dissolve an attachment, on the sureties failing to pay the amount of the judgment within thirty days after its date. (Mass.) *Rogers v. Abbot*, 394.

**5. ATTACHMENT.**—The Limit of the Liability of Sureties on a bond given to dissolve an attachment is the penal sum named therein and damages for the detention thereof, and this is the largest sum for which judgment can be entered and execution issued. (*Mass.*) *Rogers v. Abbot*, 394.

### ATTORNEY AND CLIENT.

#### *Authority of Attorney.*

**1. ATTORNEY**—Authority to Release or Compromise.—An attorney who is clothed with no other authority than that arising from his employment in that capacity, has no power to compromise and settle or release and discharge his client's claim. He cannot bind his client by any act which amounts to a surrender in whole or in part of any substantial right. (*Me.*) *Pomeroy v. Prescott*, 347.

**2. ATTORNEY**—Power Over Remedies and Procedure.—An attorney may do all things incidental to the prosecution of the suit in which he is employed that affect the remedy only, and not the cause of action. (*Me.*) *Pomeroy v. Prescott*, 347.

**3. ATTORNEY**—Authority to Release Part of Cause of Action.—An attorney without special authority cannot make a compromise settlement which involves a release of the cause of action, or any substantial part of his client's rights. (*Me.*) *Pomeroy v. Prescott*, 347.

**4. ATTORNEY**—Authority to Release Part of Cause.—A plaintiff's attorney exceeds his general authority when he waives and releases several items of an account sued on and constituting part of the plaintiff's single cause of action. (*Me.*) *Pomeroy v. Prescott*, 347.

#### *Fees of Attorney.*

See Executors and Administrators, 8, 9.

**5. ATTORNEY FEES.**—An Attorney Who Acts for Himself is generally not entitled to a counsel fee against his adversary. (*N. J. Eq.*) *Ordinary v. Connolly*, 577.

**6. ATTORNEY FEES**—Equitable Action.—It is Error to Tax an attorney's fee in an equitable action under section 7179, Revised Codes of 1905. (*N. D.*) *Power v. King*, 784.

#### *Disbarment.*

**7. ATTORNEYS**—Power of Court to Disbar.—It rests with the court to determine who are qualified to become its officers as attorneys and for what cause they may be removed. But this power is not arbitrary or despotic, to be exercised according to the pleasure of the court, but is judicial. (*Ill.*) *People v. Amos*, 239.

**8. ATTORNEYS.**—The Power of a Court to Disbar Attorneys should be exercised with sound and just discretion, according to the same rules of law which govern in the determination of other civil rights which are brought before the court for disposition. (*Ill.*) *People v. Amos*, 239.

**9. ATTORNEYS**—Disbarment—Evidence and Trial.—The hearing of an application for the disbarment of an attorney, being judicial, must be governed by the same rules which govern other trials of questions of fact, and the evidence on either side must be such as is legally competent to maintain the issue. He is entitled to a trial before the court upon evidence taken according to the established rules of law. (*Ill.*) *People v. Amos*, 239.

**10. ATTORNEYS**—Disbarment—Evidence.—The Record in a Private suit against an attorney, in which private interests only were represented, while it may be used in disbarment proceedings against him as a basis for entering a rule to show cause, is not admissible in evidence on the hearing. (*Ill.*) *People v. Amos*, 239.

See Affidavits, 1.

**AUTOMOBILES.**

See Negligence, 2-4.

**BAILMENTS.**

1. **BAILMENT—Negligence—Burden of Proof.**—In an action of negligence against a bailee, not a common carrier, the general burden to prove negligence rests upon the plaintiff. If he proves the bailment and a failure to return on demand, he ordinarily makes out a prima facie case, and it is then incumbent on the bailee to explain the cause of refusal, as by showing a loss by fire, theft or accident. It then devolves upon the plaintiff to show that such loss was due to the negligence of the bailee. The final burden is on the bailor to prove negligence, not on the bailee to prove due care. (Me.) *Sanford v. Kimball*, 345.

2. **BAILMENT—Hired Horse—Mysterious Injury.**—The hirer of a horse, to prima facie exonerate himself from liability for injury to the animal, need go no further than show that the cause of the injury is a mystery. He need not show how the injury was received. (Me.) *Sanford v. Kimball*, 345.

**BANKRUPTCY.**

1. **BANKRUPTCY.—The Term "Property," Used in the bankruptcy act,** is of the broadest possible signification, embracing everything that has exchangeable value, or goes to make up a man's wealth—every interest or estate which the law regards of sufficient value for judicial recognition. (S. C.) *Earle v. Maxwell*, 1012.

2. **BANKRUPTCY.—A Contingent Remainder in Land** will pass and be subject to sale by a trustee, under a bankruptcy statute providing that all property which the bankrupt could by any means have transferred passes to the assignee. (S. C.) *Earle v. Maxwell*, 1012.

3. **BANKRUPTCY—Contingent Remainder in Proceeds of Land.**—Under a bankruptcy act which provides that all "property" shall pass which the bankrupt "could by any means have transferred," a contingent remainder in land to be sold by a trustee named in a will after the death of the life tenant, the proceeds to be divided among the contingent remaindermen, is property in which the bankrupt may transfer his right before his bankruptcy, and, therefore, it passes to his trustee in bankruptcy to be sold by him. (S. C.) *Earle v. Maxwell*, 1012.

4. **BANKRUPTCY.—An Assignment by a Receiver Appointed in bankruptcy of "all bills receivable"** includes a judgment recovered by the bankrupt for the price of a machine sold by him, the judgment having been recovered before the assignment, and neither the receiver nor the assignee knowing that the claim had been reduced to judgment when the assignment was made. (Mass.) *Rogers v. Abbot*, 394.

5. **BANKRUPTCY.—An Assignment by a Receiver Appointed in bankruptcy of "all bills receivable"** includes a judgment recovered by the bankrupt for the price of a machine sold by him, and also transfers the right to sue on a bond given to dissolve an attachment in the action wherein the judgment was recovered. (Mass.) *Rogers v. Abbot*, 394.

6. **BANKRUPTCY.—A General Assignment for the Benefit of Creditors** is, under the federal bankruptcy act, an act of bankruptcy and void, and the title to the property vests in the trustee. (Mass.) *Rogers v. Abbot*, 394.

7. **BANKRUPTCY—Sale of Perishable Property.**—Where a bankruptcy court orders property in the hands of a receiver to be sold because perishable, and the sale is made on that ground, and is con-

firmed by the court on the petition of the trustee, it is not necessary to state the grounds on which the property, taken as a whole, was considered to be in the nature of perishable property. (Mass.) *Rogers v. Abbot*, 394.

8. **BANKRUPTCY—Discharge of Principal.**—The Sureties on a bond given for the release of the principal, a judgment debtor, from arrest on execution, are released by his discharge in bankruptcy. (Me.) *Almon H. Fogg Co. v. Bartlett*, 338.

9. **BANKRUPTCY.**—Until a Discharge in Bankruptcy is Granted and is pleaded as a defense, no question arises as to the debt sued on being or not being provable. (Mass.) *Rogers v. Abbot*, 394.

10. **BANKRUPTCY.**—If Defendants, Going to Trial Before Obtaining their discharge in bankruptcy, wish to plead their discharge as a bar, they should move for a continuance to see if they procure a discharge, and if they do, they should plead it. They are not entitled as of right to a stay of proceedings after they are adjudicated bankrupts. (Mass.) *Rogers v. Abbot*, 394.

### **BANKS AND BANKING.**

1. **BANKING—Acceptance of Draft.**—A Telegram by which one bank promises another to honor a certain draft amounts in law to an acceptance of the draft from which the bank cannot recede. (Iowa) *Wells v. Western Union Tel. Co.*, 317.

2. **CERTIFICATE OF DEPOSIT—Interest Agreement on Back.**—A printed statement on the back of a certificate of deposit, "This certificate will draw three per cent interest per annum if left six months; no interest if drawn before six months," is not, as a matter of law, a part of the agreement between the depositor and the bank. (Iowa) *Anderson v. First Nat. Bank of Chariton*, 288.

3. **CERTIFICATE OF DEPOSIT.**—The Presentment and Notice of Nonpayment of a certificate of deposit must be made within a reasonable time after its issue, or indorsers will be discharged. (Iowa) *Anderson v. First Nat. Bank of Chariton*, 288.

### **BASTARDS.**

1. **CUSTODY OF ILLEGITIMATE.**—The Mother of an Illegitimate child has, on a habeas corpus proceeding, the same prima facie right to its custody and control, though perhaps in a lesser degree, as in the case of legitimacy, where she has evinced a capacity and disposition properly to care for it. (N. C.) *In re Jones*, 670.

2. **CUSTODY OF ILLEGITIMATE.**—The Mother of a Nine Year Old illegitimate child has the paramount right to its custody on habeas corpus brought by her against her uncle and his wife for its custody, although it is being properly cared for and has become greatly attached to them, where it appears that she has lived with the respondents as one of their family until about five years previous, that she then married, that both she and her husband desire the custody of the child, and they are "respectable, colored people, capable of rearing and providing for the child," and that she has never abandoned the child. (N. C.) *In re Jones*, 670.

3. **ILLEGITIMATES—Mother's Right to Custody.**—At common law, so long as the mother of an illegitimate child was living, she was entitled to its custody as against all the world. (Okl.) *Allison v. Bryan*, 988.

4. **ILLEGITIMATES—Effect of Legitimation on Mother's Rights.** All rights on the part of the mother of an illegitimate child, consistent with its best interests, are not lost in the mere exercise by the father of his right of legitimation. (Okl.) *Allison v. Bryan*, 988.

5. **ILLEGITIMATES—Legitimation by Father—Visitation by Mother.**—The mother of an illegitimate, unmarried minor child which

has been legitimated by its father under the provisions of section 4931 of the Compiled Laws of Oklahoma of 1909, does not by reason of such legitimation, where same will not conflict with the best interests of the child, forfeit the right to visit the child or to have it visit her, and failure and neglect without sufficient cause on the part of the father to observe a valid order of a court enforcing such right is punishable as a contempt, and in such a case it is no defense that his wife objected or refused to consent to his obedience to the same. (Okl.) Allison v. Bryan, 988.

See Adoption, 4.

### **BENEFIT ASSOCIATIONS.**

**BENEFIT SOCIETY**—Payment to Person not Entitled.—Payment by a benefit society to a person not entitled thereto is no defense to a suit by the person who is entitled to the benefit. (Mass.) Davis v. McGraw, 398.

See Insurance, 8-10.

### **BILL OF LADING.**

See Carriers.

### **BILLS AND NOTES.**

#### *In General.*

**1. BILLS AND NOTES**—Effect of Conditional Delivery.—If the maker of a note delivers it to the payee with the agreement that it shall not take effect until the happening of a certain contingency or the performance of a certain condition, the note never becomes operative where neither the contingency has occurred nor the condition been performed, and an action thereon by the payee or his assignee with notice cannot be maintained. (Okl.) Farmers' Bank of Roff v. Nichols, 931.

**2. BILLS AND NOTES**—Collateral Agreement—Bona Fide Holder.—A negotiable promissory note was executed in payment of the premium on some life insurance policies. At the time of the delivery of the note to payee, who was agent for the insurance company, the payee executed a written agreement that if the maker of the note within a stipulated time investigated the company and found it not satisfactory or as represented, the note or the amount thereof in cash would be refunded to the maker by the payee. Held, that the contemporaneous agreement did not constitute the delivery of the note a conditional delivery or deny to the payee the right to transfer the same, and that one who purchased the note in due course of business, before maturity, for a valuable consideration, could recover in an action thereon, although at the time of the transfer he had notice of the contemporaneous agreement. (Okl.) Farmers' Bank of Roff v. Nichols, 931.

**3. BILLS AND NOTES**—Provisions Affecting Negotiability.—If a note or written instrument, otherwise negotiable, contains a provision or provisions which do not and cannot in any way have any effect on it until after it becomes non-negotiable by operation of law, to wit, after maturity, such provision or provisions do not render the instrument non-negotiable. (S. C.) First Nat. Bank v. Badham, 1043.

**4. BILLS AND NOTES**—Provisions Affecting Negotiability.—A note is not rendered non-negotiable by provisions therein for the payment of an attorney's fee, in case it becomes necessary to employ an attorney to collect the note, and for the payment of the expense of collection, as such provisions can have no active legal operation until after maturity, when the note by operation of law becomes non-negotiable. (S. C.) First Nat. Bank v. Badham, 1043.

**5. BILLS AND NOTES—Provision Destroying Negotiability.**—A provision in a note that "for value received in one machinery as per contract November 23, 1899," renders it non-negotiable. (S. C.) *First Nat. Bank v. Badham*, 1043.

*Draft—Action by Party Beneficially Interested.*

**6. DRAFT—Action, by Party Beneficially Interested.**—In Vermont, contrary to the general commercial law, an action upon a promissory note or draft can be maintained in the name of the party beneficially interested, when the instrument is in terms made payable or indorsed to his agent as treasurer, cashier, or the like. (Vt.) *Valiquette v. Clark Bros. Coal Min. Co.*, 1104.

**7. DRAFT—Action on, by Party Beneficially Interested.**—If the whole consideration of a draft in favor of the Berwick Hotel has moved from the plaintiff, who is the proprietor of the hotel, he can maintain an action thereon in his own name, for he is the party beneficially interested and the only one who can sue, as "Berwick Hotel" is not a legal entity, but only a name by which the plaintiff's hostelry is designated. (Vt.) *Valiquette v. Clark Bros. Coal Min. Co.*, 1104.

### BONDS.

See *Municipal Corporations*, 3; *Principal and Surety*; *Schools and School Districts*, 3-5.

*Note.*

**Books of Account**, admissibility as evidence. See *Evidence*.

### BRIBERY.

**BRIBERY OF JUDGE—Sufficiency of Indictment.**—No error is made to appear in overruling a motion to quash certain counts in an information, based upon section 3476 of the General Statutes of 1906, charging the defendant with the crime of bribery of a judicial officer, when such information substantially complied with the requirements of such statute. Such information is not fatally defective when it distinctly alleges that the defendant offered the bribe to the judge of a designated court for the purpose of and in order to influence him "to modify and reduce the sentence" imposed upon a certain named defendant on a prior day of the same term of court, because it does not affirmatively allege that the prosecution against such convicted defendant was still pending in such court at the time such bribe was offered. (Fla.) *Tillman v. State*, 100.

### BROKERS.

**BROKERS—Purchase by President of Brokerage Company.**—A trustee cannot buy at his own sale, nor can a broker employed to sell property buy it for himself. Hence where the authority of a brokerage company to sell land has been revoked, and the president of the company attempts to purchase the land through the company for himself, he violates the duties of his position; and where he and the company deal with the land as if no such revocation had been made, and he, through the manager of the company, obtains from the company, acting as agent for the seller, a contract for the sale of such land, the name of the purchaser never having been disclosed to the seller, the president cannot demand specific performance of his contract, which is voidable at the option of the seller. (S. C.) *McCallum v. Grier*, 1037.

### BUILDING RESTRICTIONS.

**1. BUILDING RESTRICTIONS—Rights and Obligations Imposed.** Building restrictions, imposed in deeds of several lots comprising a



tract of land, create a right in the nature of an easement in favor of, as well as impose a liability upon, the grantee of every lot, growing out of the common character of the deeds. The interest is in a contractual stipulation for the common benefit. The nature of the right and obligation created by restrictions upon the use of real estate is such as to render their breach an injury to the fee of other land included within the scheme of improvement. (Mass.) *Stewart v. Finkelstone*, 370.

**2. BUILDING RESTRICTIONS—Trivial or Technical Violations.** Whether building operations constitute in small particulars technical deviations from a strict compliance with the letter of building restrictions is of no consequence after the lapse of half a century of general concurrence in a practically uniform construction of their meaning by acts done. (Mass.) *Stewart v. Finkelstone*, 370.

**3. BUILDING RESTRICTIONS—Violation by Party Complaining.** Minor violations of building restrictions by a complainant, which are of a character wholly different from the infractions made by the defendant, are not a bar to the enforcement of his rights. (Mass.) *Stewart v. Finkelstone*, 370.

**4. BUILDING RESTRICTIONS—Mandatory Injunction to Enforce.**—A person who, with full knowledge of building restrictions, deliberately attempts to override them, and thus to deprive the district of the character given it by the restrictions, cannot object to a mandatory injunction on the ground that it will operate oppressively and impose on him a loss disproportionate to the good it can accomplish. (Mass.) *Stewart v. Finkelstone*, 370.

**5. BUILDING RESTRICTIONS.—Injunction to Enforce.**—Costs, including the expense of the surveyor's plans, are within the discretion of the court in granting a mandatory injunction for the removal of parts of a structure erected in violation of building restrictions. (Mass.) *Stewart v. Finkelstone*, 370.

See Mortgage, 8, 9.

## CANCELLATION OF INSTRUMENTS.

**1. CANCELLATION OF GUARANTY—Existence of Legal Remedy.**—An action in equity cannot be maintained to release the liability of an estate upon a contract of guaranty made by the decedent, when there exists a legal remedy at law, either affirmative or defensive, which would be adequate, certain and complete. (Idaho) *Miller v. Kettenbach*, 192.

**2. CANCELLATION OF GUARANTY—Existence of Legal Remedy.**—A court of equity will not decree the release of a guarantor upon the contract of guaranty unless special and peculiar circumstances are shown to exist which could not be shown as a defense in an action at law based upon such contract of guaranty. (Idaho) *Miller v. Kettenbach*, 192.

**3. CANCELLATION OF GUARANTY—Estate of Decedent.**—Where C. signs a joint and several contract of guaranty guaranteeing the payment of promissory notes, and afterward dies, and an administrator is appointed, and the holder of such notes files the same as claims against the estate of C., and full opportunity is given to contest such claims upon any legal or equitable ground by the administrator, heirs or creditors of said estate, such administrator, heirs or creditors of said estate cannot afterward maintain an action in equity against the holder of said notes for the purpose of releasing said estate from its liability upon said contracts of guaranty, upon the ground that a conspiracy was entered into between the holder of such notes, the administrator of said estate and the stockholders of the principal debtor, whereby property belonging to the principal debtor

was transferred to the holder of such notes at less than its actual and true value and the purchase price thereof improperly applied upon such indebtedness. (Idaho) *Miller v. Kettenbach*, 192.

See Deeds, 3; Insurance, 3, 4.

### CARRIERS.

#### *Of Freight.*

1. **CARRIER—Loss of Goods by Fire—Evidence.**—Upon the trial based upon a declaration which alleges only the common-law liability of defendant as a common carrier, by reason of the loss of plaintiff's goods by fire, and where it appeared as part of plaintiff's case that the liability was qualified by the introduction of a bill of lading, by the terms of which loss "by fire or by flood" excused the carrier from performance, held, that it was incumbent upon the plaintiff to show as a basis for recovery, not only a loss by fire, but also that the fire was attributable to some act of negligence upon defendant's part. (N. J. L.) *Johnson v. West Jersey etc. R. R. Co.*, 625.

2. **CARRIER—Custom of Delivering Without Bill of Lading.**—Custom or usage is never admissible to justify the doing of an act which is negligent per se, such as a custom of carriers to deliver goods to persons other than the consignee, or to whom the consignee has not directed or authorized the delivery. (Ala.) *Mobile etc. R. R. Co. v. Bay Shore Lumber Co.*, 84.

3. **CARRIER—Delivery to Wrong Person.**—In an Action against a carrier for conversion in delivering lumber to the wrong person, it is necessary that a plea that the plaintiffs ordered the wrongful delivery by delivering an invoice to the person who received the lumber should identify the lumber sued for. And the plea is not sustained by evidence showing that the invoice described lumber in a car actually sold to him, but did not accurately describe the lumber sued for. (Ala.) *Mobile etc. R. R. Co. v. Bay Shore Lumber Co.*, 84.

4. **CARRIER—Liability for Delivery to Wrong Person.**—A carrier who delivers a shipment of lumber to the wrong person, without the production or the assignment of the bill of lading, is liable for a conversion. (Ala.) *Mobile etc. R. R. Co. v. Bay Shore Lumber Co.*, 84.

#### *Limitation of Liability.*

5. **CARRIER—Stipulation Against Loss by Fire.**—A carrier may, by a stipulation in its bill of lading, except from its general liability loss by fire to goods while in transit. (N. J. L.) *Johnson v. West Jersey etc. R. R. Co.*, 625.

6. **CARRIERS—Limitation of Liability for Freight.**—By statute in this state a common carrier may, by special contract signed by the consignor or consignee, limit or modify its common-law liability, except that it cannot exonerate itself from liability for loss or damage resulting from the negligence, fraud or willful wrong of itself or servants. Prior to the enactment of chapter 57, page 83, Laws of 1907, it was lawful by special contract, when signed by the consignor or consignee, to exonerate such carrier from liability except for its or its servants' gross negligence, fraud or willful wrong. (N. D.) *Hanson v. Great Northern Ry. Co.*, 768.

7. **CARRIERS—Stipulation as to Value of Freight.**—Such special contract will not be enforced except when fairly entered into and when just and reasonable in the eye of the law. Stipulations fixing a mere arbitrary valuation upon goods for the sole purpose of limiting the carrier's liability in case of loss or damage are not just and reasonable in the eye of the law. (N. D.) *Hanson v. Great Northern Ry. Co.*, 768.



**8. CARRIERS—Stipulation as to Value of Freight.**—Whether the carrier may by special contract fixing the value of goods for shipment, when fairly made, limit or restrict its liability for negligence to the value thus agreed upon, is not determined. (N. D.) *Hanson v. Great Northern Ry. Co.*, 768.

**9. CARRIERS—Stipulation as to Value of Freight.**—Tested by the foregoing rules, the special contract in the case at bar, which fixes the value of the household goods at five dollars per hundred-weight, is, for reasons stated in the opinion, contrary to the public policy of this state, and hence will not be enforced here. (N. D.) *Hanson v. Great Northern Ry. Co.*, 768.

*Conflict of Laws.*

**10. CARRIERS—Conflict of Laws—Place of Contract.**—A contract entered into for carriage of freight from a point in one state to a point in another state will, in the absence of proof of a contrary intention, be governed by the law of the place where the contract was entered into. (N. D.) *Hanson v. Great Northern Ry. Co.*, 768.

**11. CARRIERS—Conflict of Laws—Contract Against Public Policy.** Where, however, such contract is against the established public policy of this state, it will not be enforced by our courts. (N. D.) *Hanson v. Great Northern Ry. Co.*, 768.

*Of Passengers.*

**12. CARRIER OF PASSENGERS—Degree of Care Exacted.**—Common carriers of passengers should be held to the strictest accountability, and be required to exercise the highest degree of care and forethought of which the human mind is capable. This rule is founded on principles of public policy and enforced by the courts for the protection of the public. (Neb.) *Quimby v. Bee Building Co.*, 477.

**13. CARRIER—Duty to Passenger Leaving Train in Darkness.**—When such a passenger is compelled, by an attack of illness, to leave the train at his first opportunity, which fact is known to the conductor and those in charge of the train, it is negligence for them to knowingly permit him to leave the way-car while it is standing on an open bridge or trestle at a time when it is so dark that he is unable to see his surroundings or ascertain the danger. (Neb.) *Otto v. Chicago etc. Ry. Co.*, 496.

**14. CARRIER—Negligence of Passenger Leaving Train in Darkness.**—The question as to whether, under such circumstances, the passenger was guilty of contributory negligence is a proper one for the determination of the jury. (Neb.) *Otto v. Chicago etc. Ry. Co.*, 496.

**15. CARRIER—Sleeping Passenger.**—It is not the Duty of a carrier to keep a passenger awake; and if his indulgence in sleep is the cause of injury sustained by his alighting from the train as it stands on a sidetrack and stepping in front of a train moving on another track, under the supposition that he has reached his station, he cannot recover. (Me.) *Ouellette v. Grand Trunk Ry. Co.*, 340.

**16. CARRIER—Stopping Train on Sidetrack—Notice to Passenger.**—Negligence on the part of a railroad company may not be inferred from the mere stopping of its train on a side or passing track without informing passengers that the stop is not at a station platform, when no station had been called or announced, and no attendant circumstances exist calculated to induce a passenger to conclude that the stop is at the usual and proper landing place. (Me.) *Ouellette v. Grand Trunk Ry. Co.*, 340.

**17. CARRIER—Passenger Alighting in Front of Passing Train.**—Where a passenger alights from a train standing on one track and

steps in front of a train passing on a parallel track, he must, in order to be entitled to a verdict against the railroad company for his injuries, prove that they were caused by the negligence of the company, and that no failure to exercise reasonable care on his part contributed to bring them about. (Me.) *Ouellette v. Grand Trunk Ry. Co.*, 340.

18. **CARRIER—Passenger Alighting in Front of Moving Train.**—If a passenger alights from a train standing on a sidetrack, and without looking, and heedless of the obvious danger, undertakes to cross another track in front of a moving train, he is not only negligent, but reckless. (Me.) *Ouellette v. Grand Trunk Ry. Co.*, 340.

19. **CARRIER—Passenger Alighting from Train in Darkness.**—It is not the act of a reasonably prudent man accustomed to railroad travel to step from a car into black darkness under a supposition that the car is then at the usual place provided for the landing of passengers. The very darkness itself should be sufficient warning that the station is not there. (Me.) *Ouellette v. Grand Trunk Ry. Co.*, 340.

*Stock Shipper on Freight Train.*

20. **CARRIER—Duty to Stock Shipper on Freight Train.**—A stock shipper, riding on a freight train for the purpose of caring for his shipment of livestock, is entitled to the highest degree of care and protection consistent with the proper and careful operation of the train and with that means or method of transportation. (Neb.) *Otto v. Chicago etc. Ry. Co.*, 496.

*Passenger Elevators.*

21. **PASSENGER ELEVATOR—Care Required in Operating.**—One who installs passenger elevators in his building for the use of his tenants and the public generally is subject to the same degree of care in transporting and protecting his passengers as is imposed upon common carriers. (Neb.) *Quimby v. Bee Building Co.*, 477.

22. **PASSENGER ELEVATOR—Duty to Warn Passengers.**—It is the duty of an elevator conductor to warn passengers, whether children or adults, to stand back from the door when the elevator is in motion, and he cannot justify his failure to do so on the ground that he is giving his attention to running the car. (Neb.) *Quimby v. Bee Building Co.*, 477.

See Railroads.

Note.

Carriers, regulation of traffic by corporation commission, 1006-1011.

**CAVEAT EMPTOR.**

See Sales, 2.

**CERTIFICATE OF DEPOSIT.**

See Banks and Banking, 2, 3.

**CHATTEL MORTGAGES.**

1. **CHATTEL MORTGAGE—In Aid of the Description in a chattel mortgage** it should be taken that the mortgagor is the owner of the property he assumes to mortgage. (Vt.) *Joslyn v. Moose River Lumber Co.*, 1067.

2. **CHATTEL MORTGAGE—Description—Location of Property.** One of the most important elements in the description of mortgaged chattels is a statement of their location. It should never be omitted. (Vt.) *Joslyn v. Moose River Lumber Co.*, 1067.

3. **CHATTEL MORTGAGE—Want of Proper Description.**—A chattel mortgage which fails to locate the property mortgaged other-

Wise than by giving the residence of the mortgagor at a place in another state where he formerly resided, suggests an erroneous location of the property, and is void, as against a subsequent mortgagee, for want of a sufficient description. (Vt.) *Joslyn v. Moose River Lumber Co.*, 1067.

**4. CHATTEL MORTGAGE—Proper County in Which to Record.**  
Under Wilson's Revised and Annotated Statutes of 1903, section 3578, providing for the filing of mortgages in the county where the property "is at such time situated," a mortgage of mules which were taken by the mortgagor by consent of the mortgagee into Indian Territory is properly recordable in the county in which the mules were at the time the mortgage was executed, and not in Indian Territory, where they were subsequently taken, and, such mortgage not being there recorded, is void as to subsequent attaching creditors of the mortgagor. (Okl.) *Hales v. Zander*, 879.

### CLASS LEGISLATION.

See Constitutional Law, 11-13.

### COMPROMISE AND SETTLEMENT.

**COMPROMISE AND SETTLEMENT.—**A Statutory Provision that "no action shall be maintained on a demand settled by a creditor, or his attorney intrusted to collect it, in full discharge thereof, by the receipt of money or other valuable consideration, however small," does not apply to a waiver or release of several items in the plaintiff's claim by his attorney, there being no valuable consideration therefor and no settlement of the demand "in full discharge thereof." (Me.) *Pomeroy v. Prescott*, 347.

See Attorney and Client, 1-4.

### CONFLICT OF LAWS.

See Carriers, 10, 11; Insurance, 2; Vendor and Vendee, 1.

### CONSPIRACY.

**1. CONSPIRACY—Whether Object must be Criminal.—**To constitute an indictable conspiracy, it is not essential that the object of the combination or the means to attain it should be criminal under the statutes. (Iowa) *State v. Hardin*, 292.

**2. CONSPIRACY—Preventing Witnesses from Attending Trial.—**An arrangement between two or more persons to take witnesses beyond the jurisdiction of the court and there maintain them until the trial terminates is an indictable conspiracy. (Iowa) *State v. Hardin*, 292.

**3. CONSPIRACY—Preventing Witnesses from Attending Trial.—**An allegation, in an indictment for spiriting witnesses beyond the jurisdiction of the court, that the "witnesses had been duly and legally subpoenaed," is by way of inducement to the substance of the charge. (Iowa) *State v. Hardin*, 292.

**4. CONSPIRACY—Preventing Witnesses from Attending Trial.—**Where two or more persons confederate to induce witnesses to go beyond the jurisdiction of the court until the trial is terminated, they transgress the law, although the service of the subpoenas may have been defective. (Iowa) *State v. Hardin*, 292.

**5. CONSPIRACY—Preventing Witnesses from Attending Trial.—**While an arrangement to induce witnesses to go beyond the jurisdiction of the court must, to constitute an indictable conspiracy, be made with a fraudulent or malicious intent, an instruction is sufficient that

it must appear that the persons in concocting the plan intended to obstruct the administration of justice, although the jury is not told that such intention must have been malicious. (Iowa) *State v. Hardin*, 292.

## CONSTITUTIONAL LAW.

### *In General.*

1-6. **CONSTITUTIONAL LAW—Departments of Government.**—The constitutional requirement that the three departments of government shall be separate and distinct refers to the government of the state and to state officers, not to the government and officers of municipal corporations. Hence the mayor of a city, though he participated as a legislator in making ordinances, is not prohibited by the constitution from acting in a judicial capacity in the trial of persons accused of violating them. (S. C.) *City of Greenville v. Pridmore*, 1058.

7. **CONSTITUTIONAL LAW—Submitting Statutes to People.**—Statutes derive their force from the legislature—the constitutional authority—even though the legislature may require a favorable vote of the people before a particular statute takes effect. When it does take effect, it is still the act of the legislature, and is subject to repeal or amendment by that body without a vote of the people. (Ill.) *Waugh v. Glos*, 259.

8. **CONSTITUTIONAL LAW.—One Legislature cannot Tie the Hands of future legislatures** so as to prevent the proper exercise of the reserved rights of the people to pass all reasonable laws which the constantly changing conditions of the state may require for the promotion of its general welfare. (Ill.) *Venner v. Chicago City Ry. Co.*, 229.

### *Questioning Validity of Statute.*

9. **CONSTITUTIONAL LAW—Questioning Constitutionality of Statute.**—An act of the legislative department of the government is clothed with the presumption that it is valid, and its constitutionality will not be considered and determined by the courts as a hypothetical question. It is only when a decision upon its validity is necessary to the determination of the cause that the same will be considered, and not then at the instance of a stranger, but only upon the complaint of a party whom the alleged invalid act affects. (Okl.) *Threadgill v. Cross*, 964.

10. **CONSTITUTIONALITY OF STATUTE—Right of Officer to Question.**—An executive officer of the government has no authority to decline the performance of a purely ministerial duty which is imposed upon him by law on the ground that the law is unconstitutional. (Okl.) *Threadgill v. Cross*, 964.

### *Class Legislation.*

11. **CONSTITUTIONAL LAW—Class Legislation.**—All laws are not required to be applicable to every case, but every law must apply uniformly to all cases in which it is applicable. A reasonable classification of cases to which a statute shall apply is permissible. (Ill.) *Waugh v. Glos*, 259.

12. **CONSTITUTIONAL LAW.—The Classification of Cities on the Basis of Population**, for the purpose of legislation regulating their internal affairs, does not violate the constitution, if population bears a reasonable relation to the subject matter of the legislation. (N. J. L.) *McCarter v. McKelvey*, 583.

13. **CONSTITUTIONAL LAW—Classification of Cities by Population.**—A statute which creates a board of fire and police commissioners, a board of finance, and a board of public works in cities having a population of not less than one hundred thousand nor more

an two hundred thousand inhabitants, is not special legislation. (N. J. L.) *McCarter v. McKelvey*, 583.

*Rules of Evidence.*

14. **CONSTITUTIONAL LAW—Rules of Evidence.**—The legislature may prescribe rules of evidence and declare that a fact shall be prima facie evidence of another fact which it has a tendency to prove. (Ill.) *Waugh v. Glos*, 259.

*Political Qualifications for Office.*

15. **CONSTITUTIONAL LAW—Political Qualifications for Office.**—A statute is not unconstitutional which provides that a certain municipal board shall be composed of four members, "not more than two of whom shall be members of the same political party." (N. J. L.) *McCarter v. McKelvey*, 583.

*Warehouse Regulations.*

16. **CONSTITUTIONAL LAW—Title of Warehouse Act.**—Chapter 13, page 167, of the Laws of 1907, which is entitled "An act requiring elevator companies transacting business in this state to return certificates of inspection and weighmaster's certificate of weight to the local buyer," and which provides for the return of such certificates by the elevator companies, etc., to their local agents, and also that the latter shall post the same in a conspicuous place in the elevators; does not contravene section 61 of the state constitution, which requires that no bill shall embrace more than one subject, which shall be expressed in its title. The subject or object of the act is to furnish information to the public of the facts which such official certificates will impart, and the provisions of section 2 (page 168), requiring local agents to post such certificates in their elevators, are germane to the provisions of section 1, and hence to the subject embraced in the title of the act. (N. D.) *State v. Minneapolis etc. Elevator Co.*, 691.

17. **CONSTITUTIONAL LAW—Warehouse Regulation—Interstate Commerce.**—Such act is not vulnerable to the objection that it contravenes the provisions of the interstate commerce clause of the federal constitution, as its operation will not directly or remotely interfere with interstate commerce; but its enactment is a legitimate exercise of the police power of the state. (N. D.) *State v. Minneapolis etc. Elevator Co.*, 691.

18. **CONSTITUTIONAL LAW—Warehouse Regulation—Foreign Corporation.**—Appellant's contention that the law is void because it attempts to make acts or omissions committed in a foreign state a crime in this state is not sustained. The conditions on which foreign corporations are permitted to do business in this state are within the legitimate power of the state to prescribe, and defendant corporation, having been authorized to transact business in this state, is amenable to its laws enacted under its police powers to the same extent as its citizens. (N. D.) *State v. Minneapolis etc. Elevator Co.*, 691.

See Corporations, 1; Records.

**CONTINGENT REMAINDERS.**

See Remainders; Wills, 9-17.

**CONTRACTS.**

*Signature Procured by Misrepresentation.*

1. **CONTRACT—Signature Procured by Misrepresentation.**—If a party is induced to sign a contract by fraud, he can, of course, avoid it for that reason. It is, however, clear that merely falsely repre-

senting to a man in possession of his faculties and able to read that a writing embodies their verbal understanding is not the fraud the law means. (Okl.) McNinch v. Northwest Thresher Co., 803.

*Certainty and Mutuality.*

2. **CONTRACT TO MANUFACTURE—Certainty and Mutuality.**—The mere fact that the amount of a product called for by a contract is uncertain or depends upon the will or efforts of the manufacturer does not render the contract void. (Ala.) McIntyre Lumber & Ex. Co. v. Jackson Lumber Co., 66.

3. **CONTRACT TO MAKE TIES—Certainty and Mutuality.**—A contract to purchase all the cross-ties of a given kind made by a manufacturer of lumber, at a given price, until the purchaser orders the manufacturer to make no more, is valid. It binds the manufacturer, probably not to make any ties, but, if he does make any, to sell them to the purchaser at the agreed price; and it binds the purchaser to take any ties already made at any time he chooses to terminate the agreement. (Ala.) McIntyre Lumber & Ex. Co. v. Jackson Lumber Co., 66.

*Legality of Contracts.*

4. **ILLEGAL CONTRACT.**—Courts will Take Notice of Their Own Motion of illegal contracts which come before them for adjudication, and will leave the parties where they have placed themselves. (Fla.) Escambia Land & Mfg. Co. v. Ferry Pass etc. Assn., 121.

5. **CONTRACT—Location of Postoffice—Public Policy.**—A contract providing for the payment for services and expenses incurred in procuring the establishment of a postoffice in a city in and upon a certain block therein, the payments thereunder to continue so long as said postoffice shall be there maintained, not to exceed ten years, is contrary to public policy and void. (Okl.) Hare v. Phaup, 852.

6. **CONTRACT FOR SERVICES—Meretricious Relation of Parties.**—An express contract for services to be rendered by a woman for a man as housekeeper and servant is valid and enforceable, although the parties entering into it live together in a state of concubinage during the time the services are being rendered, unless the contract was made in contemplation of such illicit relationship; and in a case where the claim for compensation is based on a contract and grows out of the lawful services actually rendered, and no part of the same has reference to the meretricious relationship existing between the parties, the same is enforceable. (Okl.) Emmerson v. Botkin, 953.

*Restraint of Practice of Medicine.*

7. **CONTRACTS—Restraint of Practice of Medicine.**—A contract restraining the practice of medicine and surgery in a particular locality, within a reasonable area, is valid. (Okl.) Threlkeld v. Steward, 888.

8. **CONTRACTS—Restraint of Practice of Medicine.**—The practice of medicine and surgery within the prescribed limit, contrary to the provisions of such a contract, may be restrained by injunction. (Okl.) Threlkeld v. Steward, 888.

9. **CONTRACTS—Restraint of Practice of Medicine.**—Courts will not, as a rule, inquire into the adequacy of the consideration of such contract. (Okl.) Threlkeld v. Steward, 888.

*Note.*

**Contracts, delivery, necessity and purpose of, 29.**  
delivery, sealed instruments, 29.

**Contracts, illiterate person, duty to have writing explained before signing, 813.**

**illiterate person, whether bound by writing which he signs, 813, 814.**

**negligence in signing without knowing contents, 810.**

**signing by one who cannot read and who does not know contents, 813.**

**signing induced by misrepresentation as to contents, 815-817.**

**signing in ignorance of contents, whether binds party, 810.**

**signing in reliance upon others' statements as to the contents, 815-817.**

**signing without reading by one who can read, whether binds him, 810.**

**See Sunday Contracts.**

## **CORPORATIONS.**

### ***In General.***

**1. CORPORATION—Franchise is Subject to Subsequent Statutes.** Whatever grants, stipulations or restrictions may be found in the charter of a corporation, it is within the power of subsequent legislatures to render it subject to general laws enacted under the police power of the state. (Ill.) *Venner v. Chicago City Ry. Co.*, 229.

**2. CORPORATION—Power to Trustee to Sell and Vote Stock.—**Where two groups of stockholders transfer their shares to a trust company to prevent a third group from acquiring control of the corporation, the agreement of transfer providing that the trust company shall take out a certificate to itself as trustee, vote the stock as three named shareholders or a majority of them direct, pay dividends to the owners, and sell the shares for such price and at such time as the three named stockholders or a majority of them direct, provided a sufficient number of shares are sold to constitute a majority of the stock outstanding, the agreement is valid, and creates a power of sale with an incidental provision for voting. It is something more than a mere power of attorney. It creates in effect a joint trusteeship, and is not revocable at the pleasure of one of the parties. (Me.) *Hall v. Merrill Trust Co.*, 355.

### ***Preferred Stock.***

**3. CORPORATION.—Calling Stock "Preferred Stock"** does not of itself determine the rights of the holders, for the extent of the preference is to be determined by the contract. (N. J. Eq.) *Lloyd v. Pennsylvania Elec. Vehicle Co.*, 557.

**4. CORPORATION.—Preferred Stock, in the Absence of Express stipulation or direction to the contrary, simply gives the holder a right of preference in the division of profits, and not in the distribution of capital.** (N. J. Eq.) *Lloyd v. Pennsylvania Elec. Vehicle Co.*, 557.

**5. CORPORATION—Preferred Stock.—The General Corporation Act of 1896 (Pub. Laws 1896, p. 277)** authorizes the creation of two or more kinds of stock, of such classes, with such designations, references and voting powers, or restriction or qualification thereof as shall be stated or expressed in the certificate of incorporation. A corporation organized under that act provided in its certificate for the creation of preferred stock, "the holder thereof to receive and the company to pay a fixed yearly dividend of six per cent before any dividend shall be set apart or paid on the general stock." Held, that upon the winding up of the corporation the preferred stockholders were entitled only to the preference set forth in the certificate of incorporation, and were not to be paid on account of the par value of



their shares in preference to the common stockholders. (N. J. Eq.) *Lloyd v. Pennsylvania Elec. Vehicle Co.*, 557.

*Dividends.*

**6. CORPORATION—Dividends, Whether Income or Capital—**Where a corporation, having accumulated large surplus earnings, declares an extra dividend of fifty per cent in the usual form, and gives stockholders an option to take stock in a new and independent company to an amount equal to one-half their dividends, the surplus when thus divided, is to be treated as income going to life tenants, and not as capital going to the remaindermen. (Mass.) *Gray v. Hemenway*, 377.

*Inspection of Books.*

**7. CORPORATION—Common-law Right to Inspect Books—**Under the common law the right of a stockholder to inspect the books of his corporation can be enforced only when he asks it in good faith and for reasons connected with his rights as a stockholder. (Ill.) *Venner v. Chicago City Ry. Co.*, 229.

**8. CORPORATION—Statutory Right to Inspect Books—**Where the right to inspect corporate books is conferred by statute in absolute terms upon stockholders, their purpose or motive in demanding an inspection is not material, and they cannot be required to state their reasons therefor. (Ill.) *Venner v. Chicago City Ry. Co.*, 229.

**9. CORPORATION—Statutory Right to Inspect Books—**Where the right of a stockholder to inspect the books of his corporation is given in absolute terms by statute, he need not show, in his petition for mandamus to enforce the right, the object of his inspection, and it is no defense to allege improper purposes or that he desires the information in order to injure the business of the company. (Ill.) *Venner v. Chicago City Ry. Co.*, 229.

**10. CORPORATION—Statutory Right of Inspection—**The purpose of section 13 of the Illinois incorporation act, which requires corporations to keep books of account at their principal place of business and gives stockholders the right to examine the records and books of their corporation, is to protect the public from monopolies, unlawful combinations, and unreasonable exactions from corporations, as well as to protect the interests of stockholders. (Ill.) *Venner v. Chicago City Ry. Co.*, 229.

**11. CORPORATION—Statute Giving Right to Inspect Books—**Under a statute requiring the directors "of every stock corporation" to keep books of account at its principal place of business, and giving "every stockholder in such corporation" the right to inspect the books and records of the corporation, "every stockholder" means "each and all." (Ill.) *Venner v. Chicago City Ry. Co.*, 229.

**12. CORPORATION—Statute Giving Right to Inspect Books—**The Illinois statute requiring corporations to keep books of account at their principal place of business and giving stockholders the right to inspect these books applies to corporations organized under previous special laws, and is not unconstitutional. (Ill.) *Venner v. Chicago City Ry. Co.*, 229.

**13. CORPORATION—Statute Giving Right to Inspect Books—**A statute requiring corporations to keep books of account at their principal place of business, and giving stockholders the right to inspect the books and records of their corporations, is a proper exercise of the police power. (Ill.) *Venner v. Chicago City Ry. Co.*, 229.

**14. CORPORATION—Inspection of Books—Mandamus—**The right of a stockholder to inspect the books of his corporation may be enforced by mandamus. (Ill.) *Venner v. Chicago City Ry. Co.*, 229.



*Authority of Agent.*

**15. CORPORATION—Estoppel to Deny Authority of Agent.**—In order that a corporation may be bound by the acts of one as its agent, either upon the ground of an implied authority or of estoppel, must appear that the corporation is chargeable with notice of the acts or omissions relied upon to establish such implied authority or estoppel. (N. J. L.) *Schlessinger v. Forest Products Co.*, 627.

**16. CORPORATION—Implied Authority of Agent—Notice.**—Notice to the person who is alleged to have acted as agent for a corporation is not such notice to the corporation as will suffice to bind to third persons upon the ground of implied authority to him to act as such agent or upon the ground of estoppel. (N. J. L.) *Schlessinger v. Forest Products Co.*, 627.

*Foreign Insurance Company—Jurisdiction of Courts.*

**17. FOREIGN INSURANCE COMPANY.**—A Court will not entertain jurisdiction of a suit against a foreign mutual life insurance company, brought by a member thereof for himself and in behalf of others similarly situated who may see fit to come in and share in the suit, to recover alleged balances due on account of premiums paid and misapplied; for before the balance, if any, due the plaintiff can be ascertained, there must be a complete visitation of the corporation, thorough inquiry into all its affairs, and an ascertainment not only of the condition of the account with the plaintiff, but of the accounts of all its members who have had policies, no matter how numerous they may be or through how many states they may be scattered. (Mo.) *State v. Denton*, 417.

**18. FOREIGN INSURANCE COMPANY—Jurisdiction of Court.**—The fact that the acts of a foreign insurance company complained of are fraudulent does not confer jurisdiction on a court to exercise visitatorial powers, if it otherwise lacks jurisdiction. (Mo.) *State v. Denton*, 417.

**19. FOREIGN INSURANCE COMPANY—Jurisdiction of Court.**—If a court cannot render an intelligent judgment for money which the plaintiff claims he has been unlawfully compelled to pay a foreign insurance company in excess of legitimate assessments, without entering into an elaborate accounting which the court has no jurisdiction to make, then the court has no jurisdiction to render the money judgment. (Mo.) *State v. Denton*, 417.

*Corporation Commission.*

**20. CORPORATION COMMISSION — Train Service — Interstate Commerce.**—Where a railroad company has provided adequate and reasonable facilities for the accommodation of traffic to and from a certain place, an order of the corporation commission, requiring it to stop another train engaged in interstate commerce at said point is unreasonable. (Okl.) *St. Louis etc. R. R. Co. v. Reynolds*, 1003.

**21. CORPORATION COMMISSION.**—The Term "Adequate Facilities" is not capable of exact definition, being a relative term, and calls for such facilities as may be fairly demanded, regard being had to the size of such station or place, the extent of the demand of transportation, its relative location to other places, the cost of furnishing additional accommodations asked for, and all other facts which would have a bearing upon the question of convenience and cost. (Okl.) *St. Louis etc. R. R. Co. v. Reynolds*, 1003.

*Note.*

Corporation Commission, validity of regulations affecting railroad, telegraph and telephone companies, 1006, 1007.  
review of proceedings, 1009-1011.

**COTENANCY.**

See Tenancy in Common.

**COUNTERCLAIM.**

See Setoff and Counterclaim.

**COUNTIES.**

1. **COUNTY—Annexation of Territory—Indebtedness and Taxes.**—Where a county is enlarged by annexing a portion of another county, the annexed portion is liable to pay its proportionate share of the indebtedness of the county to which it is annexed. (Idaho) *Blake v. Jacks*, 177.

2. **COUNTY—Annexation of Territory—Indebtedness and Taxes.**—Under the provisions of section 1963, Revised Codes, which pledges the faith, credit and all taxable property within the limits of the county as it was constituted at the time the indebtedness was incurred for its payment, all taxable property subsequently brought into the county is liable for its proportionate share of such indebtedness. (Idaho) *Blake v. Jacks*, 177.

3. **COUNTY—Annexation of Territory—Indebtedness and Taxes.**—Under the provisions of our statute, the indebtedness of a county becomes a burden upon all of the taxable property brought within the county after the creation of such indebtedness, as well as upon the taxable property that was within the county at the date of the creation of the indebtedness. (Idaho) *Blake v. Jacks*, 177.

**COURTS.**

1. **COURTS—Law of Case—Federal and State Courts.**—The opinion on appeal in a federal court, reversing a judgment for the plaintiff and remanding the cause, is conclusive on the trial federal court in further proceedings therein, but it will not sustain a plea of former adjudication in a subsequent action by the plaintiff in the state court after dismissing the action in the federal court without prejudice. (Iowa) *Wells v. Western Union Tel. Co.*, 317.

2. **STARE DECISIS.**—A Well-settled Rule of Practice, which has been silently acquiesced in, will not be set aside where it would probably cause great inconvenience and confusion in the practice, and where it can easily be changed by the legislature, if there is any necessity therefor. (Okla.) *Palmer v. Harris*, 822.

**CRIMINAL LAW.***Waiver of Jurisdiction.*

1. **CRIMINAL LAW—Waiver of Jurisdiction.**—Where the defendant in a prosecution for seduction appears in person and by counsel, makes no objection to the jurisdiction of the court, and announces ready for trial, this constitutes a waiver of jurisdiction over his person. (Mo.) *State v. Mitchell*, 425.

2. **JURISDICTION OF JUDGE—Waiver by Accused.**—Assuming that the defendant in a prosecution against him for crime could by appropriate action in the trial court in the way of pleas, objections or otherwise have raised the question as to the authority and jurisdiction of the judge of the criminal court of record for another county to preside over the court in the trial of such case, where such judge is acting under an order of the governor, based upon section 3871 of the General Statutes of 1906, where no objections to the authority or jurisdiction of such judge were made in the trial court and no action of any kind taken by the defendant toward raising such question, he will be deemed to have waived

by his silence any such privilege or right he may have had, and will not be permitted to raise such question for the first time in the appellate court. (Fla.) *Tillman v. State*, 100.

*Insanity as Defense.*

**3. CRIMINAL LAW—Insanity Arising During the Progress of a Difficulty** voluntarily brought on by the defendant, and as the result of a blow rightfully inflicted by his adversary, does not excuse him for his subsequent conduct in the affray. (S. C.) *State v. Coyle*, 1022.

*Cross-examination of Defendant.*

**4. CRIMINAL LAW—Cross-examination of Defendant.**—Where, on examination in chief of the defendant in seduction, reference is made to his promise to marry the prosecuting witness and his intercourse with her, he cannot, by confining his answers to a particular date, preclude the state from a full and thorough cross-examination upon these subjects. (Mo.) *State v. Mitchell*, 425.

**5. CRIMINAL LAW—Cross-examination of Defendant.**—The defendant in a criminal prosecution need not become a witness, and when he does, he enjoys an advantage over the ordinary witness in that his cross-examination must be confined to the matter with reference to which he testifies, but as to the matter to which he "refers" in his testimony in chief, he is subject to cross-examination and impeachment just as any other witness. (Mo.) *State v. Mitchell*, 425.

*Argument of Counsel.*

**6. CRIMINAL TRIAL—Argument of Counsel.**—Where the defendant in a homicide case has testified that she was sick at the time of the killing, and that a certain physician attended her, it is reversible error for the state in argument to ask, "Why didn't the judge bring Doctor Mason and show you by him that he was doctoring her?" when the physician resided in the state and was not less accessible to the prosecution than to the defense. (Ala.) *Hutcherson v. State*, 17.

*Instructions.*

**7. CRIMINAL LAW.—An Instruction is not on the Facts** where it does not assume as true any fact in issue, does not undertake to state the testimony, nor in any way convey to the jury the court's opinion of the testimony. (S. C.) *State v. Coyle*, 1022.

**8. CRIMINAL TRIAL.—An Instruction in a Seduction case** is properly refused, if it undertakes to select certain portions of the evidence, such as letters written by the defendant, and comment upon their force and effect. (Mo.) *State v. Mitchell*, 425.

*Verdict.*

**9. CRIMINAL LAW—Verdict—Intention—Certainty.**—A verdict should be regarded from the standpoint of the jury's intention, and when this can be ascertained, if consistent with legal principles, such effect should be given to the findings, as will really conform to their intention. If a verdict is not sufficiently certain to clearly show what the jury intended, it will be fatally defective. (Fla.) *Bunch v. State*, 91.

**10. CRIMINAL LAW—Verdict—"Assault With Attempt to Murder."**—The verdict of the jury was in these words: "We the jury find the defendant, Mamie Bunch, guilty of assault with attempt to murder in the second degree, so say we all." Held, that the word "attempt" carries with it the idea of intent in this verdict, and that the verdict is not fatally defective. (Fla.) *Bunch v. State*, 91.

*Sentence.*

11. **CRIMINAL LAW—Modification of Sentence.**—During the same term of court at which the sentence is imposed, before the defendant had begun serving such sentence the trial judge has the power to modify such sentence. (Fla.) *Tillman v. State*, 100.

12. **CRIMINAL LAW.—An Alternative Sentence is Erroneous** in providing that the defendant be imprisoned in the state penitentiary upon default in the payment of the fine and costs. Where the primary sentence imposed is a fine and costs of prosecution only, the court should fix a period of imprisonment in the county jail, instead of in the state penitentiary, for the nonpayment of such fine and costs. (Fla.) *Enson v. State*, 92.

13. **CRIMINAL LAW.—An Indeterminate Sentence Law is not Unconstitutional** in providing that a person convicted of crime shall be sentenced for a period not exceeding the maximum statutory penalty for the crime. (Iowa) *State v. Duff*, 269.

14. **CRIMINAL LAW.—The Constitutionality of an Indeterminate Sentence Law** is not affected by the fact that the board of parole may lessen the sentence of imprisonment by a parole. (Iowa) *State v. Duff*, 269.

15. **CRIMINAL LAW—Indeterminate Sentence.**—The Parole of Prisoners under the provisions of the indeterminate sentence law does not infringe the constitutional right of the governor to grant pardons and reprieves. (Iowa) *State v. Duff*, 269.

See Accomplices.

*Note.*

**Criminal Law, accomplices, who are.** See Accomplices.  
technical errors not ground for reversal, 677-679.

**CROPS.**

1. **CROPS—Evidence of Ownership.**—The fact that a person is the owner of a farm is no evidence that he is the owner of the crops grown thereon during the occupancy of a tenant. (Vt.) *Olin v. Martell*, 1072.

2. **CROPS.—The Lessee is the Owner of Crops**, where the lease is for a cash rental without lien reserved. (Vt.) *Olin v. Martell*, 1072.

3. **CROPS.—If a Lease is on Shares** without modifying provisions, the lessor and lessee are tenants in common of the crops. (Vt.) *Olin v. Martell*, 1072.

**CUSTOM AND USAGE.**

1. **CUSTOM—Necessity of Being General and Established.**—For a custom or usage to vary the implications of a contract, it must be established and acted upon generally and sufficiently long to raise a presumption of its knowledge, and it can never vary the expressed stipulations of a contract. (Ala.) *Mobile etc. R. R. Co. v. Bay Shore Lumber Co.*, 84.

2. **CUSTOM—Necessity of Being Fair and Just.**—It is only a reasonable custom, not opposed to law, which is admissible to aid in the interpretation of contracts. Unfair and unrighteous ones the law should not allow to exist, much less to encourage or enforce. (Ala.) *Mobile etc. R. R. Co. v. Bay Shore Lumber Co.*, 84.

**DAMAGES.**

1. **DAMAGES.—Evidence of the Pecuniary Condition of the plaintiff** is usually not admissible in cases of tort, and never so for the purpose of securing vindictive damages. (N. C.) *Robertson v. Conklin & Plymouth Lumber Co.*, 635.

**2. DAMAGES—Evidence of Extent of Personal Injuries.**—Where several nonexpert witnesses testify on one side to the effect that an injury for which damages were allowed by a jury was of a permanent nature, and the plaintiff's injured hand was exhibited to the jury in corroboration of said testimony, and several expert witnesses testify on the other side that the injury was slight, and that there was a complete recovery, it was proper to submit the evidence on both sides to the jury, and let it decide the disputed question of fact. (Okl.) *Coalgate Co. v. Bross*, 915.

**3. DAMAGES—Personal Injuries—Partial Disability.**—In an action for personal injuries that leave the plaintiff still capable of doing something for a livelihood, the burden is on him to show the difference between his earning capacity before and that since the injury. (Ala.) *Manistee Mill Co. v. Hobdy*, 73.

See *Exchange of Property*; *Insane Persons*; *Irrigation*.

## DEEDS.

### *Intoxication of Grantor.*

**1. DEEDS—Intoxication of Grantor as Invalidating Deed.**—Before a deed or other contract will be set aside on the ground of the intoxication of the grantor or maker when the same was executed, the evidence must show that the grantor was in such a degree of intoxication at the time as to render him entirely incapable of understanding the nature and effect of the transaction. (N. D.) *Power v. King*, 784.

**2. DEEDS—Intoxication of Grantor as Rendering Him Incompetent.**—Evidence considered, and held to show that plaintiff was not rendered incompetent to enter into the contract involved in this action by reason of his intoxication. (N. D.) *Power v. King*, 784.

### *Deed for Support—Remedy of Grantor.*

**3. DEED FOR SUPPORT—Remedy of Grantor by Cancellation.**—Abandonment of their contract by defendants to support the plaintiff for life as the consideration for a deed to land from plaintiff to one of defendants entitled the grantor to a cancellation of the deed in equity, on the theory that the conduct of defendants raises the presumption of a fraudulent intention at the inception of the contract, and that, too, irrespective of any question of a remedy at law. (Okl.) *Spangler v. Yarborough*, 856.

See *Building Restrictions*; *Homesteads*; *Partnership*; *Vendor and Vendee*.

## DEFINITIONS.

See *Words and Phrases*.

## DEMURRER.

See *Pleading*, 14–16.

## DEPARTMENTS OF GOVERNMENT.

See *Constitutional Law*, 6.

## DEVISES.

See *Wills*.

## DISBARMENT.

See *Attorney and Client*, 7–10.

**DISCOVERY.**

**DISCOVERY.**—The Jurisdiction of a Court of Equity cannot be sustained on the ground that the petition is in the nature of a bill for discovery, if the discovery asked is only in aid or as a part of an accounting of which the court has no jurisdiction. (Mo.) *State v. Denton*, 417.

**DISMISSAL.**

**DISMISSAL.**—*Mistake in Docketing Case.*—In the absence of a showing of prejudice, a petition filed in the office of the clerk of the district court, the object and purpose of the action being to secure the right of visitation on the part of a parent deprived of the custody of a child, will not be dismissed because entitled in, and by the clerk given, the same docket number as a former case between the same parties, which had been finally closed in that court. (Okl.) *Allison v. Bryan*, 988.

**DISTRESS.**

See Landlord and Tenant, 4, 5.

**DIVIDENDS.**

See Corporation, 6.

**DIVORCE.***Desertion.*

1. **DIVORCE**—*Desertion—Driving Spouse from Home.*—In a suit for divorce upon the ground of willful, obstinate and continued desertion for the statutory period, it is immaterial which of the married parties leave the marital home; the one who intends bringing the cohabitation to an end commits the desertion. The party who drives the other away is the deserter, and a wife may drive her husband away. (Fla.) *Hudson v. Hudson*, 141.

2. **DIVORCE**—*Desertion.*—The Meaning of the Statutory Ground for divorce, willful, obstinate and continued desertion for more than one year, considered and discussed. (Fla.) *Hudson v. Hudson*, 141.

*Property Rights and Homestead.*

3. **DIVORCE**—*Homestead not Disposed of by Decree.*—In a divorce proceeding it is competent for the court, in the decree, to set aside the homestead to either party; but where the same makes no disposition thereof, the homestead remains to the husband, as the head of the family, discharged of all homestead rights or claims of the other party. (Okl.) *Goldsborough v. Hewitt*, 795.

4. **DIVORCE**—*Enforcement of Property Rights—Multifariousness.* A bill by a wife praying a divorce, and that the defendant be required to convey to her land which stands in his name but which has been paid for with her funds, is not demurrable because multifarious. (Ala.) *Singer v. Singer*, 19.

*Note.*

**Divorce**, desertion, adultery causing separation, 158.

desertion, cessation of matrimonial intercourse, whether constitutes, 162.

desertion, confinement in insane asylum, 159.

desertion, confinement in prison, 159.

desertion, consent of parties to separation, 152.

desertion, continuity of, 148.

desertion, cruelty causing separation, 156.

desertion, definition of, 147.

**Divorce, desertion, discretion of court to grant decree, 165.**  
 desertion, domicile, separation through change of, 160.  
 desertion, intention of parties, 150.  
 desertion, involuntary separation, 159, 160.  
 desertion, facts justifying separation, 156, 157.  
 desertion, misconduct causing separation, 156–158.  
 desertion, reconciliation, duty to seek, 153.  
 desertion, reconciliation, good faith in seeking, 155.  
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 desertion, refusal to live with or near relatives, 162.  
 desertion, religious belief, adopting different, 165.  
 desertion, separation by judicial decree, 160.  
 desertion, support, neglect to, 164.  
 desertion, time of, how calculated, 148, 149.  
 desertion, time pending another suit for divorce, 149.  
 desertion, what constitutes, 147.  
 desertion, when commences, 148.  
 desertion, whether must be continuous, 148.  
 desertion, willfulness of, 151.

### DOGS.

See Animals.

### DOWER.

1. **PAROL TRUST—Dower—Evidence.**—On a petition by a second wife for dower, proof by the defendant heirs, who were the children by a former wife, that, while the legal title to certain property was in their father at the time of his death, the same had been bought, paid for, and improved from funds which constituted the separate estate of their mother; and also that the deed had been made to their father by mistake, instead of to their mother, establishes a trust in favor of defendants, superior to the claim for dower, which must be assigned, if at all, from the estate of the father. (N. C.) *Hendren v. Hendren*, 680.

2. **DOWER—Proceedings for Assignment.**—It is not the Duty of a widow to proceed for the assignment of dower. She may await the action of the heirs or personal representatives. (Ala.) *Hamby v. Hamby*, 23.

3. **DOWER.**—Creditors of the Deceased Owner of Land, entitled to the present payment of their debts, may have the land sold subject to the widow's dower right, and she may consent that her dower be sold with the residue of the land, so as to vest a complete title in the purchaser. (Ala.) *Hamby v. Hamby*, 23.

See Will, 3.

### DRAFTS.

See Banks and Banking, 1; Bills and Notes, 6, 7; Principal and Agent, 6–9.

### EJECTIONMENT.

1. **EJECTIONMENT—Possessory Rights—Sufficiency of Possession.**—The general rule in actions of ejectment that the claimant must recover upon the strength of his own title does not operate to prohibit the acquisition of possessory rights which may be enforced in actions of ejectment between parties in cases where the true owner does not intervene; but a prior possession, to be effective as against a mere squatter or intruder in actual possession, must be an actual unabandoned possession. (Fla.) *Bass v. Ramos*, 105.



2. **EJECTMENT—Title Founded on Prior Possession.**—A plaintiff may recover possession of realty by virtue of a proper prior possession, for then he recovers as much upon the strength of his own title as if he shows a good title to the premises. (Fla.) *Bass v. Ramos*, 105.

3. **EJECTMENT—Intruder—Plaintiff Without Title.**—A plaintiff in ejectment without title cannot recover as against a mere intruder without title, if such plaintiff has not himself had a prior actual possession of the land. (Fla.) *Bass v. Ramos*, 105.

4. **EJECTMENT—Right Based on Prior Possession.**—A recovery in ejectment may be had by one without title but who was in prior actual and proper possession of the land, and such prior possession need not have been for the statutory period necessary to mature into a perfect title by adverse possession. (Fla.) *Bass v. Ramos*, 105.

5. **EJECTMENT—Title or Possession Sufficient to Maintain.**—In order to recover the possession of lands by the means of an action of ejectment, the plaintiff must have either a title to the lands with a present right of continued possession, or must have had actual bona fide possession of the lands with a right to maintain a continued possession when ousted by defendant and a present right to the possession when the action was begun. (Fla.) *Bass v. Ramos*, 105.

6. **EJECTMENT—Right Founded upon Prior Possession.**—In an action of ejectment, if the character of the land is such that continued, actual possession is apparently not allowed by law, or if the prior possession was not actual or was unlawful, or was a mere pretense or was that of an intruder or trespasser, there should be a showing of title or right of possession in order to recover possession in ejectment. (Fla.) *Bass v. Ramos*, 105.

7. **EJECTMENT—Presumption as to Lawfulness of Possession.**—While ordinarily the possession of land may be presumed to be lawful, yet the character of the land, the time and manner of possession, and other apparent circumstances may rebut a presumption of lawful possession and put the party claiming such possession to the proof of the lawfulness of the asserted possession. (Fla.) *Bass v. Ramos*, 105.

8. **EJECTMENT—Land Under Navigable Waters.**—Private parties cannot by ejectment recover possession of lands under navigable waters when such parties have no legal title to or right to use the land; and even when the title is in private parties, a recovery of possession is subject to the rights of the public in the waters. (Fla.) *Bass v. Ramos*, 105.

9. **EJECTMENT—Land Under Navigable Waters.**—Where a plaintiff in ejectment shows no title, but only that he had some time previously put a one-wire fence around land in the waters of a navigable bay including the land in controversy, and employed some one to keep up the fence, the direction of a verdict for the defendant in actual possession will not be held to be error. (Fla.) *Bass v. Ramos*, 105.

#### **ELECTION OF REMEDIES.**

**ELECTION OF REMEDIES—Suit by Undisclosed Principal.**—The fact that the sendee of a forged telegram permits an undisclosed principal to sue the telegraph company in the federal courts does not constitute an election which prevents the sendee or his assignee, upon the plaintiff dismissing the case without prejudice before final judgment, from suing in a state court. (Iowa) *Wells v. Western Union Tel. Co.*, 317.



**ELECTIONS.**

*Contest—Supersedeas or Stay of Judgment.*

**1. ELECTION CONTEST—Supersedeas or Stay of Judgment.**—The trial court has jurisdiction, in the exercise of its discretion, to allow a supersedeas or stay of a judgment in an election contest, screening the contestant entitled to the office, and ousting the contestee from said office, and a writ of certiorari will not lie to review such order. (Okl.) *Palmer v. Harris*, 822.

*Choice of United States Senator.*

**2. ELECTIONS—Primaries—Choice of United States Senator.**—This is an application in the name of the state, by one Herschel Ames, as relator for an original writ to enjoin defendant, as Secretary of State, from certifying to the various county auditors the names of the two Republican candidates for the office of United States senator from this state, and to restrain him from placing upon the official ballot to be voted at such general election the names of said candidates. By such application the validity of chapter 109, page 151, Laws of 1907, known as the "Primary Election Law," is challenged in so far as it relates to the nomination and election of a candidate for the office of United States senator, which act, among other things, provides that at the primary to be held in June prior to each general election, for the nomination of state, district and county officers, the electors of each political party may designate their choice between the candidates of their party for United States senator, and that, if no candidate receives forty per cent of his party vote, the two candidates receiving the highest number of votes shall be placed on a separate ballot, under their proper party heading, to be voted on at the ensuing general election, and that the candidate receiving a majority of the votes cast shall be the nominee of his party for such office. Said act also provides that candidates for members of the legislature shall take and subscribe a certain oath, to the effect, among other things, that they are candidates for nomination to such office, and designating the political party with which they affiliate. And the act also provides that the petitions of all such candidates for members of the legislative assembly shall contain a pledge to the people that they will support and vote for that candidate of their party, for United States senator, who has received a majority of such party votes for that position at the primary election, or at the succeeding general election. Relator contends that the provision of said act requiring legislative candidates to take and subscribe the oath therein prescribed, and the pledge aforesaid, violates section 211 of our state constitution, in that it adds another oath, declaration and test, as a qualification for office. Held, that such contention is correct, but, held, further, that those provisions of the act providing a method for permitting the electors to designate their choice of a candidate for the United States Senate are not dependent for their validity upon such other provisions requiring the oath and pledge, and may be sustained regardless of the invalidity of such other provisions. (N. D.) *State v. Blaisdell*, 741.

**3. ELECTIONS—Primaries—Choice of United States Senator.**—The provisions of said act, in so far as they permit the electors to designate their choice of a candidate for the office of United States senator, are not vulnerable to attack upon any of the grounds urged by relator. The provisions of the act permitting the electors to designate their choice do not amount to an election by the people of a United States senator. Hence they do not contravene the provision of the federal constitution (section 3, article 1), providing for the election of United States senators by the state legislature; but, if they do violate such constitutional provision, relator is powerless to complain. No constitutional right of the citizen is thereby vio-

lated. It is not a judicial question; the Senate of the United States being the tribunal to determine the same. (N. D.) *State v. Blaisdell*, 741.

4. **ELECTIONS—United States Senators—Title of Statute.**—All the provisions of the act relating to the nomination and election of United States senators are germane to the subject embraced within the title of the act. (N. D.) *State v. Blaisdell*, 741.

5. **ELECTIONS—Primaries—Choice of United States Senator.**—Certain provisions found in section 13 of the act (Laws 1907, p. 157. c. 109), relating to the ballots to be used at the general election for determining the choice between the candidates for the office of United States senator construed, and held to require that the candidate of each political party shall be placed on a ballot separate and apart from the candidates of other political parties. Held, further, that the general election, in so far as it relates to the choice between the candidates for the office of United States senator, is a mere continuation of the primary election, and that the provisions of chapter 169 aforesaid, which are designed to safeguard the rights of party organization, and to prevent members of one party from participating in the nominations by another party, apply. Hence, the provisions of the law, requiring judges and inspectors, when handing a ballot to a voter, to inform him that he must vote for the candidate of the political party such ballot represents only, and the voter shall call for his party ballot only, and the provisions making it unlawful to call for or vote a ballot not representing the party or principle with which he affiliates, and permitting challenges to be interposed, and the test oath to be required as to party affiliation, also apply. (N. D.) *State v. Blaisdell*, 741.

6. **ELECTIONS—Primaries—Choice of United States Senator.**—Section 129 of the constitution of this state, guaranteeing a secret ballot, is not infringed by the act in question. (N. D.) *State v. Blaisdell*, 741.

7. **ELECTIONS—Primaries—Choice of United States Senator.**—Said act is not vulnerable to attack upon the ground that it is an unlawful delegation of power granted to the legislature by the federal constitution. (N. D.) *State v. Blaisdell*, 741.

8. **ELECTIONS—Primaries—Choice of United States Senator.**—The contention that said act unlawfully attempts to bind successive legislatures is, for reasons stated in the opinion, not tenable. (N. D.) *State v. Blaisdell*, 741.

## **ELECTRICITY.**

1. **ELECTRICITY—Rates—Reasonable Regulation.**—An Electric Company is subject to reasonable regulation and control for the public benefit. The municipality has the power to fix upon maximum rates for electricity to be consumed, which rates the company has no right to disregard, where they are reasonable in their terms and are without any discrimination as between citizens receiving the same kind and degree of service; and in the absence of more specific legislative regulation, such rates may, under some circumstances, be made the subject of judicial scrutiny and control. (N. C.) *Horner v. Oxford Water etc. Co.*, 681.

2. **ELECTRICITY—Regulation of Charges—Flat and Meter Rates.** When a town has, by an accepted ordinance, fixed maximum charges for both flat and meter rates, under which electricity is to be furnished by an electric company, and the ordinance is treated as expressing a contract between the company and consumers, such ordinance is subject to the principle of interpretation that when a promise is in the alternative, as to do a thing one way or another, the right of election is with the promisor in the absence of an express

provision to the contrary. Hence, the company has the option to furnish electricity to its consumers, at a reasonable charge, either upon the flat or meter basis. (N. C.) *Horner v. Oxford Water etc. Co.*, 681.

**3. ELECTRICITY—Ordinance Fixing Rates—Parol Evidence.**—When maximum flat and meter rates for electricity have been fixed by a town under an accepted ordinance, the plain terms of the ordinance cannot, in an action against the electric company wherein a consumer claims the right to change from a meter rate to a flat rate, be affected by parol evidence that the assignor of the franchise to the company orally agreed that he would furnish electricity according to the option of the consumer. (N. C.) *Horner v. Oxford Water etc. Co.*, 681.

**4. ELECTRICITY—Flat or Meter Rates—Change of Service.**—If a town has by ordinance fixed a maximum charge for electricity to be furnished by an electric company, either upon a flat or meter rate, and the company has the option, under the ordinance to supply electricity upon either basis, a consumer, who has contracted with the company for electricity upon a meter basis, cannot restrain the company from cutting off the current when he refuses to accept electricity at the meter rate and demands to have it furnished upon a flat-rate basis, where it appears that the company is supplying him in accordance with a reasonable and fair meter basis correctly measured, and it does not appear that other consumers upon the flat-rate system have any advantage, or are enjoying a privilege not accorded to those using meters. The action of the company does not discriminate unjustly against the plaintiff, although it has, with a desire to benefit the public, changed from a twelve hour to a twenty-four hour service, and has ceased to supply electricity upon a flat-rate basis. (N. C.) *Horner v. Oxford Water etc. Co.*, 681.

### **ELEVATORS FOR PASSENGERS.**

See Carriers, 21, 22.

### **EMPLOYER'S LIABILITY.**

See Master and Servant.

### **EQUITY.**

#### *In General.*

**1. EQUITY.**—Entrenchment Behind Considerable Expenditures of money cannot shield premeditated efforts to evade or circumvent legal obligations from the salutary remedies of equity. (Mass.) *Stewart v. Finkelstone*, 370.

**2. EQUITY.**—The Relief Granted in Equity is such as the nature of the case, the law and the facts, demand, not at the beginning, but at the time the decree is entered in the litigation. (Okl.) *Superior Oil & Gas Co. v. Mehlin*, 942.

#### *Jurisdiction of Estate of Decedent.*

**3. EQUITY—Jurisdiction of Estate of Decedent.**—If, on a bill filed for that purpose, a chancery court assumes jurisdiction of the administration of an estate of a decedent, all incidental questions may and must be there settled, and nothing can thereafter be done in the probate court. (Ala.) *Hamby v. Hamby*, 23.

#### *Pleading and Practice.*

**4. EQUITY—Multifariousness.**—Even When There is but One Defendant, a bill is multifarious which seeks relief as to two distinct

subjects having no connection with or dependence upon each other. (Ala.) *Singer v. Singer*, 19.

5. **EQUITY**.—Multifariousness is Described as the Joinder of distinct and independent matters, thereby confounding them; or the uniting, in one bill, of several matters perfectly distinct and connected against one defendant. (Ala.) *Singer v. Singer*, 19.

6. **EQUITY**.—A General Demurrer to an Entire Bill for want of equity should be overruled where the case made by the bill entitles the complainant to any substantial relief in a court of equity. (Fla.) *Lafayette Land Co. v. Caswell*, 166.

7. **EQUITY**—Striking Out Allegations of Answer.—Greater latitude is allowed in stating the issues in equity than in actions at law. Hence an exception that the court erred in refusing to strike out allegations of the answer in a suit for specific performance cannot be sustained where the appellant fails to satisfy the court that such ruling was prejudicial. (S. C.) *McCallum v. Grier*, 1037.

#### *Laches.*

8. **LACHES**—Rules as to What Constitutes.—There is no hard-and-fast rule as to what constitutes laches. If there has been unreasonable delay in asserting claims, or if, knowing his rights, a party does not seasonably avail himself of means at hand for their enforcement, but suffers his adversary to incur expense or enter into obligations or otherwise change his position, or in any way by inaction lulls suspicion of his demands to the harm of the other, or if there has been actual or passive acquiescence in the performance of the act complained of, then equity will ordinarily refuse her aid for the establishment of an admitted right, especially if an injunction is asked. (Mass.) *Stewart v. Finkelstone*, 370.

9. **LACHES**—Rules as to What Constitutes.—Diligence is an essential prerequisite to equitable relief. Quiescence will be a bar when good faith requires vigilance. But so long as there is no knowledge of the wrong committed and no refusal to embrace opportunity to ascertain facts, there can be no laches. Upon the discovery of infringement of rights, such reasonable expedition is required in their prompt assertion as is consistent with due deliberation as to the proper means of relief. On the other hand, one who openly defies known rights, in the absence of anything to mislead him or to indicate assent or abandonment of intent to oppose on the part of others, is not in a position to urge as a bar failure to take the most instant conceivable resort to the courts. (Mass.) *Stewart v. Finkelstone*, 370.

10. **LACHES**—Rules as to What Constitutes.—After a right has been invaded under circumstances which would not defeat a plaintiff in seeking relief, and no substantial harm is shown to have accrued to the wrongdoer from delay, there is not the same imminent necessity for early enforcement of demands as exists before conditions have become fixed. Mere lapse of time, although an important, is not necessarily a decisive, consideration. (Mass.) *Stewart v. Finkelstone*, 370.

11. **LACHES**—Action not Barred by Statute of Limitations.—The doctrine of laches does not apply to an action brought before it is barred by the statute of limitations. (Iowa) *Wells v. Western Union Tel. Co.*, 317.

12. **LACHES**—Delay Occasioned by Official Negligence.—Delay in the prosecution of a suit is sufficiently excused where it is occasioned solely by official negligence without the contributory negligence of the plaintiff, especially where no steps were taken by the defendant to expedite the case. (Fla.) *Robertson v. Wilson*, 128.

See Accounting.

**ESCAPE OF PRISONER.****ESCAPE OF PRISONER—Prosecution for Aiding—Evidence.—**

Where one on trial for aiding the escape of a prisoner from jail offers evidence that the prisoner said that he would have his wife bring him tools with which to cut the bars, the state may show by her that she did not deliver him any tools. (Iowa) *State v. Duff*, 269.

**ESTATES OF DECEDENTS.**

See Executors and Administrators; Wills.

*Note.*

**Estates of Decedents.** See Executors and Administrators.

**ESTOPPEL.**

**ESTOPPEL—Permitting Suit by Undisclosed Principal.—**The sendee of a forged telegram, who permits an undisclosed principal to sue the telegraph company in a federal court, and in response to the subpoena gives testimony on the trial, is not thereby estopped to sue in a state court after a dismissal of the action in the federal court before final judgment. (Iowa) *Wells v. Western Union Tel. Co.*, 317.

**EVIDENCE.**

*In General.*

**1. EVIDENCE of Prior or Subsequent Condition at Place of Accident.—**In an action for damages for an injury claimed to have been sustained because of negligence of defendant in permitting a dangerous and defective condition of a crossing switch between street-car tracks, which alleged condition should, by proper inspection, have been discovered, and, by proper diligence, have been remedied, evidence of the same condition existing within a reasonable time, both before and after the injury sued for, is admissible in corroboration of evidence that such condition existed at the time of such injury; and such evidence as to its previous existence is also available to show its persistence for such a length of time that defendant, with due diligence, should have discovered and rectified it. (N. J. L.) *Alcott v. Public Service Corp.*, 619.

**2. EVIDENCE—Secondary Evidence of Contents of Document.—**Where a proper foundation has been laid, secondary evidence may be received of the contents of a document which cannot be produced. (Neb.) *Sheridan Coal Co. v. C. W. Hull Co.*, 435.

**3. EVIDENCE—Daylight or Dark.—**A Witness may say whether, at the time of an occurrence, it was daylight or dark. (S. C.) *Lamb v. Southern Railway*, 1030.

**4. SECONDARY EVIDENCE of Alleged Lost Letter.—**An Exception that secondary evidence of the contents of an alleged lost letter, written subsequent to an alleged contract of sale, was not admissible to prove a memorandum of such contract sued upon, cannot be sustained where oral evidence as to the contents of the letter was admitted without objection; where defendant merely interposed a general objection to plaintiff's offer to introduce a copy of the letter in evidence, without specifying any grounds; where other testimony was introduced, without objection, sustaining the allegations of the complaint; and where the defendant not only failed to deny, but admitted the contract. (S. C.) *Wallace v. Dowling*, 1054.

*Declarations or Admissions of Agent.*

**5. EVIDENCE.—**An Unauthorized Declaration of an Agent, made after the transaction to which it relates is completed, is not competent evidence against the principal. (Neb.) *Sheridan Coal Co. v. C. W. Hull Co.*, 435.

**6. EVIDENCE—Admissions of Agent.**—An Agent of a Corporation having charge and control of an inferior servant of that master may properly testify to the scope of such servant's duties, and if he is permitted to deny that servant's authority to make admissions adverse to their common employer's interests, the error, if any, will be held without prejudice where it clearly appears, independently of that denial, that no such authority was vested in the servant. (Neb.) *Sheridan Coal Co. v. C. W. Hull Co.*, 435.

*Law of Other States.*

**7. EVIDENCE—Presumption as to Law of Other States.**—In the absence of proof to the contrary, the presumption prevails that the common law is in force in a foreign jurisdiction. (N. D.) *Hansen v. Great Northern Ry Co.*, 768.

*Parol Affecting Writing.*

**8. EVIDENCE—Parol Affecting Writing.**—In the absence of fraud, accident or mistake, the terms of a written contract are not permitted to be varied by parol testimony; but evidence showing the relation of the parties and their profession or business, when not in conflict with the express terms or language of the contract, is admissible. (Okl.) *Threlkeld v. Steward*, 888.

**9. EVIDENCE—Parol Affecting Writing.**—The execution of a contract in writing supersedes all the oral negotiations or stipulations concerning its terms and subject matter which preceded or accompanied the execution of the instrument, in the absence of accident, fraud, or mistake of fact; and any representation made prior to or contemporaneous with the execution of the written contract is inadmissible to contradict, change, or add to the terms plainly incorporated into and made a part of the written contract. (Okl.) *McNinch v. Northwest Thresher Co.*, 803.

**10. EVIDENCE—Parol Affecting Writing.**—Where by the terms of a written contract it is specifically stated that it is executed and delivered for and in consideration of the credit granted by one of the parties to a third person on the purchase price of certain machinery bought of said party by said third person, such provision in relation to the consideration binds the parties within the rules applicable to written contracts and can no more be altered or varied by oral evidence than any other part of the contract, in the absence of fraud, accident, or mistake. (Okl.) *McNinch v. Northwest Thresher Co.*, 803.

*Reputation—Testimony Regarding.*

**11. EVIDENCE OF REPUTATION—Who may Give Testimony.**—While a witness is not competent to testify to the reputation of another person unless he can say he believes he knows the general reputation of such person in the community, yet one who has been personally acquainted with another for a considerable length of time, and who has been in a position where he probably would have heard that other's reputation talked about were it the subject of comment, and who has never heard it questioned, may testify to the good reputation of such person. Such a witness may testify to good reputation by saying that he has never heard anything said against the person. (Fla.) *Hinson v. State*, 118.

**12. EVIDENCE OF REPUTATION—Scope of Inquiry—Cross-examination.**—The inquiry should be whether the witness knows the general reputation of the person whose character is in issue in the given community and as to the trait or quality in question. When the witness answers that question in the affirmative, the foundation for proving what that reputation is has been sufficiently laid, and the witness thus laying such foundation should be permitted to



**go on and testify as to what the reputation is, without being interrupted by a cross-examination to test the extent and sources of his information as to such character. The proper practice in testing, by cross-examination, the extent and sources of the knowledge or information of such impeaching witness is to defer it until the witness has been turned over in regular order for cross-examination in general at the close of the examination in chief. (Fla.) Hinson v. State, 118.**

***Books of Account.***

**13. EVIDENCE—Books of Account.—Where the Evidence Discloses** that a corporation extensively engaged in trade, in the regular course of its business in purchasing merchandise, causes every order to be entered in a book and numbered before it is transmitted to the person with whom the corporation is dealing, and during litigation it becomes important to prove whether an order was written and transmitted, the court in its discretion may, in connection with other evidence tending to prove that such an order was written and transmitted to the sendee and a proper foundation has been laid by verifying the book and entry therein, permit the corporation to introduce such an entry in evidence. (Neb.) *Sheridan Coal Co. v. C. W. Hull Co.*, 435.

**14. EVIDENCE—Books of Account—Enforcement of Freight Rates.** In a proceeding by a railroad company to enjoin railroad commissioners from enforcing a freight rate, the books of original entry are the best evidence of the transactions of the company, but it would be a practical denial of justice to require it to produce all the waybills, tickets, reports and other innumerable memoranda made by its multitude of employees. The entries made of the aggregations of these on the company's books of original entry kept in good faith for the purpose of showing the course of its business and its profits and losses are admissible as evidence of such transactions, but the commissioners may call for any particular document which tends to elucidate the accounts or books or bears on any of the questions at issue. (S. C.) *Seaboard Air Line Ry. v. Railroad Commissioners*, 1028.

**15. EVIDENCE.—Books of Account** kept in the regular course of business and containing the original entry of transactions, may be introduced in evidence, but the court, or referee, must decide in the first instance what are the books of original entry, what is sufficient proof of the verity of the books, and what evidence is reasonably available to the one offering the books to prove the entries made therein. These questions must be left almost entirely to the discretion of the trial court. (S. C.) *Seaboard Air Line Ry. v. Railroad Commissioners*, 1028.

See Constitutional Law, 14; Customs and Usage; Damages; Witnesses.

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**EXCHANGE OF PROPERTY.**

**1. EXCHANGE OF PROPERTY—Remedies in Case of Fraud.**—A person induced by false and fraudulent representations to purchase or exchange for property has three remedies. He may, first, upon discovery of the fraud, rescind the contract absolutely, and sue in an action at law, and recover the consideration parted with upon the fraudulent contract, and in such a case he must restore, or offer to restore, to the parties sued whatever he has received by virtue of the contract; or, second, he may bring an action in equity to rescind the contract, and in such a case it is sufficient for plaintiff to restore, or make offer in his petition to restore, everything of value which he has received under the contract; or, third, he may affirm the contract, retain that which he has received, and bring an action at law to recover the damages sustained by reason of his reliance upon the fraudulent representations. (Okla.) *Howe v. Martin*, 840.

**2. EXCHANGE OF PROPERTY—Fraud—Measure of Damages.**—A party who makes an exchange of properties is entitled to make as good a bargain as he can, provided only he deals honestly. He may place his own property at a high price and secure another's at a low one. To the benefit of his bargain he is entitled, and he should not lose this legitimate gain because the other party has been dishonest. The measure of damages, in a case of fraud and deceit on such an exchange, should be, and therefore is, the difference in value between the property conveyed to him and the value of that which would have been conveyed had such property been as represented and the actual contract honestly fulfilled. (Okla.) *Howe v. Martin*, 840.

**EXECUTIONS.***Conversion by Sheriff.*

**1. EXECUTION.**—A Sheriff is not Guilty of Conversion of Property when taken and sold under an execution, when he finds the property in the actual possession and under the control of the execution debtor, until a demand for the return of the property is made or notice given of the ownership of the property, or the sheriff has knowledge of the actual ownership of the same. (N. D.) *Mariner v. Wasser*, 714.

*Sheriff's Jury.*

**2. EXECUTIONS—Verdict of Sheriff's Jury—Replevin.**—In an action of claim and delivery brought by a third person as claimant to the property against an officer who levied upon and took into his possession personal property under an execution as the property of the defendant in the execution, it is no defense that a sheriff's jury prior to the commencement of such action found that the title to such property was in the defendant in such execution. (N. D.) *Pfeifer v. Hatton*, 698.

**3. EXECUTIONS—Sheriff's Jury.**—The Sole Function of the summary proceeding of a sheriff's jury is to justify the officer in delivering the property to the claimant in the event the jury find in his favor, unless the plaintiff in the execution furnishes indemnity to the officer against the claims of such third person. (N. D.) *Pfeifer v. Hatton*, 698.

**4. EXECUTIONS—Sheriff's Jury.**—Defendant's Answer contained a paragraph alleging the impaneling of such sheriff's jury, and the fact that the jury found against the contention of the claimant. On motion of plaintiff's attorneys such paragraph was stricken from the answer. Held, not error. (N. D.) *Pfeifer v. Hatton*, 698.

**EXECUTORS AND ADMINISTRATORS.***Recovery of Property by Heirs.*

1. **ESTATE OF DECEDENT—Right of Heirs to Recover Property.**—The next of kin of a decedent have no standing in a court of law or equity to maintain an action for the recovery of property alleged to belong to the estate of their decedent. Such actions can be brought only by the duly appointed personal representative of the deceased. (N. J. Eq.) *Buchanan v. Buchanan*, 563.

2. **ESTATE OF DECEDENT—Right of Heirs to Recover Property.**—The exception to this rule arises where the personal representative of the deceased, by reason of collusion with the defendant or otherwise, is derelict in the performance of his duty, as in the case of a delinquent trustee, the next of kin, like the cestui que trust, may maintain the action, joining the administrator as a party defendant. (N. J. Eq.) *Buchanan v. Buchanan*, 563.

*Bonds and Sureties.*

3. **ADMINISTRATOR—Administrators' Bonds are Given to Secure the creditors and next of kin of the deceased from loss through the default or fraud of the administrator, and amount to indemnity to the estate.** (N. J. Eq.) *Ordinary v. Connolly*, 577.

4. **ADMINISTRATOR—The Condition of an Administration Bond under the statutes of New Jersey is not restricted merely to the rendering of an account, but is designed to secure a faithful administration of the estate.** (N. J. Eq.) *Ordinary v. Connolly*, 577.

5. **ADMINISTRATOR—Extent of Liability on Bond.**—The ordinary is appointed by statute to make good to all persons the damages sustained by occasion of the breach of the condition of an administration bond, and he must have the whole penalty, if he should find it necessary, for that purpose. (N. J. Eq.) *Ordinary v. Connolly*, 577.

6. **ADMINISTRATOR—The Sureties of an Administrator are Required to bear any injurious consequences arising from loss to the estate, and have no right to any favor or immunity that would not be accorded to him.** (N. J. Eq.) *Ordinary v. Connolly*, 577.

7. **ADMINISTRATOR—Liability of Sureties for Attorney Fees.** The sureties on an administrator's bond are liable for counsel fees incurred in his removal and in the suit upon the bond. (N. J. Eq.) *Ordinary v. Connolly*, 577.

*Counsel Fees.*

8. **ADMINISTRATOR—Counsel Fees.**—An Administrator, Who is an Attorney, cannot recover for professional services rendered the estate, but this rule does not apply when such costs are not payable out of the trust funds, and will not diminish the estate. (N. J. Eq.) *Ordinary v. Connolly*, 577.

9. **ADMINISTRATOR—Counsel Fees.**—An Administrator, Who is an Attorney, is entitled to recover counsel fees in his suit on the bond of a former derelict administrator and his surety. (N. J. Eq.) *Ordinary v. Connolly*, 577.

*Grounds for Removal.*

10. **EXECUTOR—Grounds for Removal.**—The Encroachment by an executor and trustee upon the principal of the estate of infant legatees in advance of the period of distribution, for their maintenance and education, is not ground for his removal, in the absence of bad faith or wanton and wasteful invasion of the corpus of the estate. (N. J. Eq.) *Pfefferle v. Herr*, 518.

11. **EXECUTOR—Grounds for Removal.**—An Executor and Trustee will not be removed on the ground that when he sold real estate,

he made excessive payments to the widow on account of her dower without having it ascertained according to law, and on the ground that a suit filed by the widow, pending proceedings for the removal of the executor, has not been prosecuted with due diligence; at least until it has been definitely ascertained what is the fact in such matters. (N. J. Eq.) *Pfefferle v. Herr*, 518.

**12. EXECUTOR—Removal for Failure to Pay Taxes.**—An executor will not be removed for dereliction in not paying taxes whereby penalties and interest were incurred and some of the estate sold, if the lands have been redeemed and he has been surcharged in his account with the penalties and interest incurred. (N. J. Eq.) *Pfefferle v. Herr*, 518.

**13. EXECUTOR—Grounds for Removal.**—The Statute Providing that when property in the hands of an executor or trustee is unsecured or in danger of being wasted, he shall give bond conditioned for the faithful performance of his duty, is a declaration of legislative policy that it is not for every unwarranted act of omission or commission that an executor is to be removed, but that if he has strayed from the path of fiduciary duty, he may be compelled to secure those who might suffer by reason of his dereliction, the stigma of removal to be placed upon him only in a flagrant case. (N. J. Eq.) *Pfefferle v. Herr*, 518.

**14. EXECUTOR—Grounds for Removal.**—Where an Executor and trustee, who has made excessive payments to the widow on account of her dower, gives a bond required by court and conditioned on the faithful performance of duty, and thus secures the estate, his misconduct is not ground for removal. (N. J. Eq.) *Pfefferle v. Herr*, 518.

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### **FELLOW-SERVANT.**

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### **FOREIGN INSURANCE COMPANY.**

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### **FOREIGN LAW.**

See Evidence, 7.

### **FORGED TELEGRAM.**

See Telegraphs and Telephones, 5-10.

### **FRACTIONS OF DAY.**

See Time.

### **FRAUD.**

**FRAUD—Representation Made Without Knowledge.**—A party is guilty of fraud and deceit where, with intent to induce another to enter into a contract, he makes a positive assertion, which is material, in a manner not warranted by his information, or where he is not shown to have reasonable grounds for believing it true, where the assertion so made is not true, even though believed by the party making it. In such a case the definite assertion as a fact of that which is untrue, concerning that which the party has no knowledge, is tantamount in its effects to the assertion of something which the party knows to be untrue. (Okl.) *Howe v. Martin*, 840.

See Contracts, 1; Exchange of Property; Husband and Wife, 1-4; Marriage.

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**FRAUDS, STATUTE OF.*****Contract Concerning Land.***

**1. STATUTE OF FRAUDS—Contract Concerning Land.**—A contract by which one who had laid a cement sidewalk took in part payment the sand excavated in the course of the work is not a contract in or concerning an interest in land within subdivision 4 of section 5 of the statute of frauds. (N. J. L.) *Okin v. Selidor*, 588.

***Sale of Goods in Solido or in Futuro.***

**2. STATUTE OF FRAUDS—Sale of Goods in Solido.**—When goods contracted for exist in solido, and are capable of delivery at the time, the contract is within the statute of frauds, where the value of the goods is above that specified in the statute. (S. C.) *Wallace v. Dowling*, 1054.

**3. STATUTE OF FRAUDS—Sale of Goods in Futuro.**—When goods contracted for are to be made, or something is to be done to put them in a condition to be delivered according to the terms of the contract, such contract is not within the statute of frauds. (S. C.) *Wallace v. Dowling*, 1054.

**4. STATUTE OF FRAUDS.**—A Contract for the Sale of a Camera-graph, to be delivered in futuro, is not within the statute of frauds where there is work and labor to be performed on the machine to such an extent as to cause them to enter considerably into its cost and price. (S. C.) *Wallace v. Dowling*, 1054.

***Acceptance of Goods.***

**5. STATUTE OF FRAUDS—Sale.**—To Satisfy the Statute of Frauds a purchaser of goods must accept and receive part thereof. A receipt of them without an acceptance is not sufficient. (Vt.) *Patterson v. Sargent*, 1102.

**6. STATUTE OF FRAUDS—Sale—Acceptance.**—The Destruction of an Article sold is an assumption of ownership, and an acceptance within the statute of frauds; and a vendee who destroys an article cannot deny that he has assumed control over it, or that he has deprived the vendor of the benefit of his lien upon it. (Vt.) *Patterson v. Sargent*, 1102.

**7. STATUTE OF FRAUDS—Sale—Acceptance—Destruction of One Article.**—If a person buys pieces of old machinery subject to his approval after inspection, but during inspection breaks and converts one of the pieces into junk, this is an acceptance of part of the property, sufficient to satisfy the statute of frauds, is a waiver of his right to examine the other pieces, and his intention to reject the other machinery, if a certain piece thereof proves unsatisfactory, can have no effect as against this waiver. (Vt.) *Patterson v. Sargent*, 1102.

**8. STATUTE OF FRAUDS—Sale—Acceptance.**—Anything done by the purchaser of an article as owner is an acceptance sufficient to satisfy the statute of frauds. (Vt.) *Patterson v. Sargent*, 1102.

**9. STATUTE OF FRAUDS—Sale—Acceptance of Part of Goods.** In making a sale of several pieces of old machinery, the purchaser's receipt and acceptance of one of the pieces takes the whole contract out of the statute of frauds. (Vt.) *Patterson v. Sargent*, 1102.

***Contract not to be Performed within Year.***

**10. STATUTE OF FRAUDS—Contract not to be Performed Within Year.**—Although a contract in term covers a period of five years, yet, if under its terms performance may be required of the promisor within one year, an action is not barred by the statute of frauds if within such year the event upon which the duty of performance depended actually happened. (N. J. L.) *Okin v. Selidor*, 588.

**11. STATUTE OF FRAUDS—Contract not to be Performed Within Year.**—A contractor who agreed that a sidewalk laid by him should stay in good condition for five years is liable to an action based upon a breach of such contract occurring within one year from the date: such agreement not being one "that is not to be performed within one year from the making thereof." Subdivision 5 of section 5 of the statute of frauds. (N. J. L.) *Okin v. Selidor*, 588.

See *Timber*.

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## **GAS.**

### *Rules of Company.*

**1. GAS COMPANIES.**—A Gas Corporation may Adopt Rules and regulations for the transaction of its business, but they must be reasonable and not impose an undue burden on consumers. (Iowa) *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 299.

**2. GAS COMPANIES—Rule Requiring Payment in Advance.**—Gas companies may establish a rule exacting payment in advance in reasonable amounts, or the deposit of security. (Iowa) *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 299.

### *Rates and Regulation.*

**3. GAS—Rates—Charging for Meter.**—Where the Charter of a gas company fixes the maximum rate that can be charged at one dollar and sixty-two cents per thousand feet for lighting and one dollar and eight cents for other purposes, the company is not autho-

zed to charge consumers a minimum of one dollar per month as meter rent when they do not consume one dollar's worth of gas during the month. (Ala.) *Montgomery Light etc. Co. v. Watts*, 71.

**4. GAS RATES.—A Municipality has Power to Regulate** the rates to be charged for gas, if it does not reduce them so as to deny the company a fair return. (Iowa) *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 299.

**5. GAS RATES.—The Act of a Municipality in Fixing Gas Rates** is presumed to be reasonable, and a court can declare it otherwise only upon finding that the rate is so low that its adoption will operate as a confiscation of the company's property without due process. (Iowa) *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 299.

**6. GAS RATES—Manner of Determining Reasonableness.—To ascertain** whether gas rates fixed by a municipality will operate as a confiscation of property, it is essential to determine the fair value of the plant at the date of the enactment of the ordinance, and the amount and cost of the gas then being furnished to consumers. (Iowa) *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 299.

**7. GAS RATES—Municipal Regulation.—The Value of a Gas Plant** cannot be determined by the mere addition of the several values of its component parts, nor from the cost alone, nor from what it formerly might have been sold, nor from what it might cost to replace it; but the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity under the prescribed rates, the operating expenses, and perhaps other matters should be considered. (Iowa) *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 299.

**8. GAS RATES—Municipal Regulation—Value of Plant.—Aside** from the intangible element of goodwill, the fact that a gas plant is in successful operation constitutes an element of value. (Iowa) *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 299.

**9. GAS RATES—Municipal Regulation.—The Value of a Gas Plant** completed and earning a present income is the criterion for determining its value for the purpose of fixing rates; but in so far as influenced by income, the computation must be made on the basis of reasonable charges. (Iowa) *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 299.

**10. GAS RATES—Municipal Regulation.—The Goodwill of a gas company** which is granted a monopoly is not to be taken into account in ascertaining the value of the plant for the purpose of fixing rates. (Iowa) *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 299.

**11. GAS RATES—Municipal Regulation—Value of Property.—The** fact that a gas company is in possession of land beyond high-water mark, although it cannot acquire title thereto by the operation of the statute of limitations, should be considered in ascertaining the value of its property. (Iowa) *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 299.

**12. GAS RATES—Municipal Regulation.—The Value of Property** of a gas company which will not be used in its business for some years to come should not be considered in estimating the value of its plant for the purpose of fixing rates. (Iowa) *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 299.

**13. GAS RATES—Municipal Regulation—Value of Plant.—Dis-**carded purifiers, forming no part of a gas plant, should not be considered in estimating the value of the plant. (Iowa) *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 299.

**14. GAS RATES—Municipal Regulation.—In Estimating the Value** of the mains and pipes of a gas company, the cost of pipe, the prices



at which it ordinarily has sold, in connection with present prices, should be considered, in connection with depreciation by decay. (Iowa) Cedar Rapids Gas Light Co. v. Cedar Rapids, 299.

15. **GAS RATES—Municipal Regulation.—The Whole Cost** of a high-pressure pipe, used for the most part to carry gas to consumers beyond the city limits, should not be included in determining the value of the gas plant for the purpose of fixing rates within the city. (Iowa) Cedar Rapids Gas Light Co. v. Cedar Rapids, 299.

16. **GAS RATES—Municipal Regulation.—In Ascertaining the Value** of a gas plant, including pipes that were laid in a street which has since been paved, the worth of a new plant of equal capacity and durability, with proper discount for defects in the old and depreciation for use, should be the measure of value, rather than the cost of exact duplication. (Iowa) Cedar Rapids Gas Light Co. v. Cedar Rapids, 299.

17. **GAS RATES—Municipal Regulation.—In Estimating the Value** of a gas plant for the purpose of fixing rates, nothing can be allowed for the promotion and organization of the company. (Iowa) Cedar Rapids Gas Light Co. v. Cedar Rapids, 299.

18. **GAS RATES—Municipal Regulation.—In Estimating the Value** of a gas plant the owners should not be excluded from the advantage of prudence and foresight in its development, nor should they be relieved of the consequences of mistakes and errors of judgment. (Iowa) Cedar Rapids Gas Light Co. v. Cedar Rapids, 299.

19. **GAS RATES.—An Ordinance Fixing a Level Price** for gas is not objectionable because it eliminates a discount for prompt payment and will entail an expense for collecting gas bills. (Iowa) Cedar Rapids Gas Light Co. v. Cedar Rapids, 299.

20. **GAS COMPANIES—Reasonableness of Rates—Usual Earnings.** What gas plants usually earn, unless based on reasonable charges, cannot be accepted as a criterion for determining the reasonableness of rates. (Iowa) Cedar Rapids Gas Light Co. v. Cedar Rapids, 299.

21. **GAS RATES—Municipal Regulation—Cost of Production.—In** ascertaining the cost of manufacturing gas, that used to accomplish this should be computed at the cost only. (Iowa) Cedar Rapids Gas Light Co. v. Cedar Rapids, 299.

22. **GAS RATES—Municipal Regulation—Cost of Production.—**Taxes on property owned by a gas company which will not be used by it in its business for some years to come should be excluded in estimating the cost of producing gas. (Iowa) Cedar Rapids Gas Light Co. v. Cedar Rapids, 299.

23. **GAS RATES—Municipal Regulation—Cost of Production.—In** determining the cost of producing gas, an allowance should be made for depreciation in the value of the property of the company. (Iowa) Cedar Rapids Gas Light Co. v. Cedar Rapids, 299.

24. **GAS RATES—Municipal Regulation—Cost of Production.—A** gas company is entitled to earn enough, not only to meet the expenses of current affairs, but also to provide means for replacing parts of the plant when they can no longer be used. (Iowa) Cedar Rapids Gas Light Co. v. Cedar Rapids, 299.

25. **GAS RATES—Reasonableness—Legislative Function.—The fix-**ing of gas rates by a municipality is a purely legislative function, and the duty of a court ends when it has found that the rates are not so low as clearly to be confiscatory. (Iowa) Cedar Rapids Gas Light Co. v. Cedar Rapids, 299.

26. **GAS RATES—Reasonableness—Five Per Cent Income.—It** will not do for courts to say that the income, above all expenses, including taxes, on property devoted to the public service, must necessarily



much exceed five per cent to avoid the charge of being confiscatory. (Iowa) Cedar Rapids Gas Light Co. v. Cedar Rapids, 299.

See Oil and Gas.

### GIFT.

**GIFT.**—Where a Husband Purchases a Note and mortgage with his own money, has them assigned to himself and wife jointly, and retains possession of them and receives the interest until his death, this amounts to a gift of one-half interest therein to the wife. (Iowa) Abegg v. Hirst, 285.

### GUARANTY.

See Cancellation of Instruments, 1, 2.

### GUARDIAN AD LITEM.

See Infants, 1-4.

### GUARDIAN AND WARD.

**GUARDIAN**—Sale of Ward's Land for Maintenance.—The rule of the statute of the orphans court may order a guardian to sell so much of the ward's land as may be adequate for his maintenance and education applies to testamentary as well as statutory guardians. (N. J. Eq.) Pfefferle v. Herr, 518.

See Infants.

### HOMESTEAD.

#### *Conveyance and Estoppel.*

1. **HOMESTEAD.**—The Separate Deed of a Married Man, the head of a family, to the homestead, is void. (Okl.) Goldsborough v. Hewitt, 795.

2. **HOMESTEAD**—Deed by One Spouse to the Other.—A deed of a homestead by a householder to his or her wife or husband, not subscribed and acknowledged in accordance with the statute by the wife or husband, where possession is not abandoned or given pursuant to the conveyance, does not operate to convey the estate of homestead. (Ill.) Gillam v. Wright, 243.

3. **HOMESTEAD.**—Where a Wife Conveys to Her Husband the homestead, worth less than one thousand dollars, by a deed not subscribed and acknowledged by him in accordance with the statute, and she remains in possession until her death, the legal title descends to her heirs. (Ill.) Gillam v. Wright, 243.

4. **HOMESTEAD.**—A Deed of a Homestead by the Wife to her husband, inoperative because not subscribed and acknowledged by him as provided by statute, is not validated by her receiving a consideration therefor. (Ill.) Gillam v. Wright, 243.

5. **HOMESTEAD**—Deed by Wife, Laches in Avoiding.—Where a wife, after conveying the homestead to her husband by a deed in which he does not join as required by statute, remains in possession until her death, and her heirs do not delay asserting their rights to the property after her death, there is no laches on the part of either. (Ill.) Gillam v. Wright, 243.

6. **HOMESTEAD**—Deed by Wife, Estoppel to Avoid.—Where a wife conveys the homestead to her husband by a deed in which he does not join as required by statute, and remains in possession until her death, her heirs are not required, as a condition to avoiding the deed, to return the purchase price, which never came to them, nor are they estopped to avoid the deed if there has been no fraud, concealment or misrepresentation inducing any change of situation by anyone. (Ill.) Gillam v. Wright, 243.

*Right of Widow.*

7. **HOMESTEAD—Assignment to Widow—Determination of Value.**—In assigning a homestead to the widow of an intestate, where the estate owes no debts, the value of their homestead as owned and occupied by them at the time of the death of the husband should be adopted in fixing the extent thereof; and its enhanced value created by the industry and economy of the applicant should not be considered. (Neb.) *In re Jurgens*, 504.

8. **HOMESTEAD.**—A Widow is Entitled to Occupy the Homestead, worth less than one thousand dollars, whether she is the owner or her husband was the owner, and therefore her release to his heirs of her interest in his other land that she may occupy the homestead during her life is without consideration. (Ill.) *Gillam v. Wright*, 243.

See Divorce, 3; Public Lands; Wills, 1.

**HOMICIDE.**

1. **SELF-DEFENSE.**—To Instruct the Jury as to the Law of Self-defense is not error where the defendant's plea was simply not guilty, and where he did not make the plea of self-defense, if there was an issue in the testimony as to who made the first assault, and the court was not informed that the defendant relied solely on the defense of insanity. (S. C.) *State v. Coyle*, 1022.

2. **SELF-DEFENSE.**—In Applying the Law of Self-defense, what a man of ordinary firmness and courage would have done and should have done, under the circumstances, is a question of fact for the jury. (S. C.) *State v. Coyle*, 1022.

3, 4. **HOMICIDE—Self-defense—Evidence of Prior Beating.**—Where a woman interposes the plea of self-defense in a prosecution for killing her husband, evidence that he had on former occasions beaten her is properly excluded. (Ala.) *Hutcherson v. State*, 17.

5. **HOMICIDE—Self-defense—Duty of Wife to Retreat.**—Where a wife interposes the plea of self-defense in a prosecution for killing her husband, she is entitled to an instruction that when living with him in his house, his home is her home, and the law imposes no duty upon her to retreat to avoid a difficulty, even with him, if she is free from fault in bringing on the difficulty. (Ala.) *Hutcherson v. State*, 17.

**HUSBAND AND WIFE.**

1. **MARRIED WOMAN—Liability for Deceit.**—In an action against husband and wife for deceit in their sale of a farm, not her separate property, her liability is measured, not by the statute enlarging the powers of married women, but by the common law. (Vt.) *Rowley v. Shepardson*, 1078.

2. **MARRIED WOMAN—Liability for Deceit.**—If a man sells a farm which stands in his wife's name but is not her separate property, and the deed is executed by both, she is not liable at common law for accepting and appropriating the whole or a part of the consideration money and thereby ratifying the sale, though she does so with knowledge of misrepresentations made by him in negotiating the sale, as the tort is based upon her contract and is not a tort simpliciter. (Vt.) *Rowley v. Shepardson*, 1078.

3. **MARRIED WOMAN—Evidence of Deceit.**—In an action by the purchaser against a husband and wife for deceit in the sale of a farm, not her separate property, evidence of the husband's misrepresentations as to the number of maple trees on a designated part of the land is admissible as against him but not as against her. (Vt.) *Rowley v. Shepardson*, 1078.

**4. MARRIED WOMAN—Liability for Misrepresentations.**—In an action by the purchaser against a husband and wife for deceit in the sale of a farm, not her separate property, evidence that the wife had authorized the husband to make the sale in her behalf, and of his misrepresentations as to the number of maple trees on a designated part of the land, is not admissible against her under counts for false warranty, for at common law a married woman cannot personally, nor by her agent, make a contract which will bind her so that a judgment upon it can be rendered against her person. (Vt.) *Rowley v. Shepardson*, 1078.

See Contracts, 6; Gift; Homestead; Mechanic's Lien.

### ILLEGITIMATES.

See Bastards.

### IMMORAL CONTRACTS.

See Contracts, 6..

### INDEPENDENT CONTRACTOR.

See Master and Servant.

### INDETERMINATE SENTENCE.

See Criminal Law, 13-15.

### INDICTMENT.

**INDICTMENT—Substantial Compliance With Statutes.**—It is the declared policy of the legislature, as well as of this court, to uphold indictments and informations whenever there has been a substantial compliance therein with the statutory requirements. (Fla.) *Tillman v. State*, 100.

### INFANTS.

**1. INFANTS—Guardian Ad Litem—Service of Summons.**—When an infant defendant, in a civil action or special proceeding, has no general or testamentary guardian, a summons must be served upon such infant and a copy of the complaint also be served or filed according to law, before a guardian ad litem can be appointed. (N. C.) *Hughes v. Pritchard*, 649.

**2. INFANTS—Defective Service of Process in Partition.**—A judgment setting aside a final decree in partition, as to infant defendants under fourteen years of age who were not personally served with summons in the manner prescribed by statute, will be affirmed, though a guardian ad litem had been appointed for the infants, and had accepted service of summons. (N. C.) *Hughes v. Pritchard*, 649.

**3. INFANTS—Manner of Service of Summons—Province of Court.**—It is not the province of the court to say why the legislature has seen proper to prescribe a different manner of service of process upon infants over fourteen years of age and under fourteen—why a reading to one and a delivery of a copy to the other is required. It is enough that "Ita lex est scripta." (N. C.) *Hughes v. Pritchard*, 649.

**4. INFANTS—Vacation of Partition Judgment.**—A judgment setting aside a final decree in partition, as to infant defendants under fourteen years of age, will be affirmed upon facts showing that the summons was irregularly served upon them; that the action is between the original parties, and that no rights of third persons have intervened; that part, and probably all, of the defendants are still

minors; that they had a meritorious defense, having an equitable estate in one-third undivided interest in the land sought to be partitioned; that no real defense was made for them by the guardian ad litem; and that it would be a plain violation of right to leave the judgment standing so as to operate as an estoppel upon them. (N. C.) *Hughes v. Pritchard*, 649.

See Parent and Child.

### INITIATIVE AND REFERENDUM.

**INITIATIVE AND REFERENDUM—Mandamus to Secretary of State.**—In a mandamus proceeding to compel the Secretary of State to perform the purely ministerial duty imposed upon him by the statute and the constitution to file initiative petitions for the submission of an amendment to the constitution to a vote of the people, respondent will not be permitted, as a part of his defense, to question the validity of such proposed amendment upon the ground that it is violative of an act of Congress, the terms and conditions of which have been accepted by the state, and for that reason will be void, if adopted. (Okl.) *Threadgill v. Cross*, 964.

### INJUNCTION.

1. **INJUNCTION.**—A Mandatory Injunction is a Drastic Remedy, and ought to be applied with caution, but in cases proper for its exercise, it ought not to be withheld merely for the reason that it will cause pecuniary loss. (Mass.) *Stewart v. Finkelstone*, 370.

2. **INJUNCTION—Questions of Practice.**—Certain preliminary questions of practice, urged by defendant pertaining to relator's right to make the application, considered, and disposed of adversely to his contention. (N. D.) *State v. Blaisdell*, 741.

See Building Restrictions, 4, 5; Contracts, 8; Mortgages, 8, 9; Municipal Corporations, 9.

### INSANE PERSONS.

1. **LUNATICS—Liability for Tort—Damages.**—A lunatic is liable for his torts, the proper measure of damages being compensation for the injuries sustained. (N. C.) *Moore v. Horne*, 675.

2. **LUNATICS.**—Punitive Damages are not recoverable against a lunatic. (N. C.) *Moore v. Horne*, 675.

3. **LUNATICS—Action Against for Damages.**—Evidence by the plaintiff, in an action against a lunatic, for assaulting and injuring the plaintiff, that defendant was sane when he committed the act, is not admissible where the plaintiff claims only compensatory, not punitive damages. (N. C.) *Moore v. Horne*, 675.

4. **LUNATICS—Action Against for Damages—Evidence.**—In an action to recover damages for an assault made by a lunatic, evidence that defendant was arrested on a criminal warrant charging him with the very assault which is made the foundation of the civil action, and was drunk, disorderly, and resisted arrest, should not be admitted. It is no evidence that defendant committed the assault as alleged in the complaint, and its admission is not harmless error, because such evidence is calculated to prejudice the minds and judgment of the jurors. (N. C.) *Moore v. Horne*, 675.

See Criminal Law, 3.

### INSTRUCTIONS.

See Trial, 6-11.

**INSURANCE.*****In General.***

1. **INSURANCE—Construction in Favor of Insured.**—If a policy of insurance is susceptible of two constructions, that one is to be adopted which is more favorable to the assured. (Okl.) *Taylor v. Insurance Co. of North America*, 906.

2. **INSURANCE—Construction of Policy in Another State.**—If a policy of fire insurance has been framed under the laws of another state, and has been interpreted by the highest court of that state, such construction should be of the most persuasive influence, if not binding, with us, especially when supported by the weight of authority. (Okl.) *Taylor v. Insurance Co. of North America*, 906.

***Cancellation of Policy.***

3. **INSURANCE—Cancellation of Policy.**—The Return of the Unearned Premium is essential to a cancellation by the company, where the policy, among other things, provides, "when this policy is canceled by this company by giving notice, it shall retain only the pro rata premium." (Okl.) *Taylor v. Insurance Co. of North America*, 906.

4. **INSURANCE—Cancellation of Policy—Unearned Premium.**—When a local agent for an insurance company, under instructions thereto, gives the assured notice of the cancellation of the policy, without tendering or offering to tender the unearned premium, and neither being authorized to make such tender nor seeking a waiver thereof, or being authorized thereto, the fact that the assured does not protest against such cancellation does neither amount to a waiver of tender nor consent to such cancellation. The local agent being in possession of the policy as bailee for the assured, his marking the same "canceled" and returning same to the company, without the consent or knowledge of the assured, does neither constitute a waiver or estoppel nor a consent or acquiescence. (Okl.) *Taylor v. Insurance Co. of North America*, 906.

***Reformation of Policy.***

5. **FIRE INSURANCE—Reformation of Policy to Show Interest of Parties.**—Where the insured and the insurer agree that a policy of insurance shall be issued to protect the insured "according to their respective interests," and the policy is not so issued, it may be reformed so as to show the real interest of the parties in all the property insured, and as reformed the policy may be enforced. (Fla.) *Phenix Ins. Co. v. Hilliard*, 171.

6. **FIRE INSURANCE—Reformation of Policy to Show Intention.**—Where by inadvertence or otherwise a policy of fire insurance is issued contrary to the intention of the parties thereto, a court of equity may in a proper case reform the policy so as to make it express the real agreement and intention of the parties, and as so reformed to enforce the policy in order to do complete justice in the controversy. (Fla.) *Phenix Ins. Co. v. Hilliard*, 171.

***Employer's Indemnity.***

7. **INSURANCE—Employer's Indemnity—Contracting Disease.**—A policy insuring an employer "against loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death accidentally suffered . . . by any employee," covers the liability of the assured to a hostler whom he negligently sets at work caring for horses afflicted with glanders, and who, in doing such work, himself contracts the disease. (Mass.) *Hood v. Maryland Casualty Co.*, 379.

*Fraternal Insurance.*

8. **FRATERNAL INSURANCE—Local Camp as Agent.**—Where a local camp of a fraternal benefit society receives and collects the dues and assessments and insurance premiums from its members and transmits them to the officers of the superior or head organization, which issues the benefit certificates, and has supervision and right of expulsion of members, the local camp should be regarded and treated as the agent of the superior or head department of the society. (Idaho) *Rasicot v. Royal Neighbors of America*, 180.

9. **FRATERNAL INSURANCE—Reinstatement by Clerk of Local Camp.**—Where the by-laws of a fraternal beneficiary association authorize the clerk of a local camp to collect arrearages from members who have been suspended for nonpayment of assessments, to restore their names to the membership list, and to report reinstatements to the sovereign camp, he is the agent of the association in performing those duties. (Neb.) *Henton v. Sovereign Camp of Woodmen of World*, 500.

10. **FRATERNAL INSURANCE—Reinstatement Without Health Certificate.**—A fraternal beneficiary association may be bound by the action of a local camp clerk who collects arrearages from a member suspended for nonpayment of assessments and restores his name to the membership list without demanding or receiving a health certificate required by the by-laws, where the clerk acts with full knowledge that the member is sick at the time, and where there is no fraud on the latter's part. (Neb.) *Henton v. Sovereign Camp of Woodmen of World*, 500.

*Life Insurance.*

11. **LIFE INSURANCE—Warranties and Representations.**—Where an applicant for fraternal benefit insurance specifically warrants the literal truth of the answers given to the questions submitted, the statements made in the application are treated in law as warranties and not as mere representations. (Idaho) *Rasicot v. Royal Neighbors of America*, 180.

12. **LIFE INSURANCE—Warranties—Matters of Opinion or Judgment.**—The warranty as to the truth of an answer which by its nature expresses only the opinion or judgment of the applicant should not extend further than to insure the honesty and good faith of the party answering the question, and that it was in truth and in fact his honest opinion or judgment. (Idaho) *Rasicot v. Royal Neighbors of America*, 180.

13. **LIFE INSURANCE—Warranties as to Pregnancy.**—Where a fraternal benefit society received an application from a woman for insurance which warranted the literal truth of the answers given by her, and she represented and at the time honestly believed that she was not pregnant, when in fact and in truth she was, and the contract provided that the society would not become liable in such a case and that it would not consider such an application until at least two months after confinement, and the society collected and received dues, assessments and premiums from the insured for a period of nearly five years thereafter, during which time the applicant was in good health, the insurance society will be held to have waived the right to insist on a breach of the contract for the falsity of the answer. (Idaho) *Rasicot v. Royal Neighbors of America*, 180.

14. **LIFE INSURANCE—Sound Health—Pregnancy.**—An agreement or stipulation in a contract of insurance made with a married woman that the policy shall not go into effect unless it is delivered to her "while in sound health" is not violated by reason of the applicant being pregnant at the time of the delivery of the policy. (Idaho) *Rasicot v. Royal Neighbors of America*, 180.



**15. LIFE INSURANCE—Consulting Physician—Childbirth.**—A statement made by a married woman who applies for insurance in a fraternal benefit society that she has not consulted with a physician “in regard to a personal ailment” within the last seven years does not cover a single attendance by a physician upon the applicant some three years prior thereto when she was confined and gave birth to a child. Confinement in childbirth is not a “personal ailment” within the meaning of such a provision in the contract. (Idaho) *Basicot v. Royal Neighbors of America*, 180.

**16. LIFE INSURANCE—Avoiding Liability—Public Policy.**—It is contrary to sound public policy and detrimental to the best interests of society at large to allow a fraternal benefit society to issue to an applicant a benefit certificate, and thereafter continuously collect and receive from the applicant his dues and assessments for a number of years, and induce him to continue his payments and keep up his membership and dues, under the belief that his savings are being devoted to the purchase of protection for his family and dependent ones, and then after his death to allow the society to repudiate the contract, on the ground that the policy never went into effect because of some temporary cause of disability which existed at the time of the delivery of the policy, and of which the applicant had no knowledge and which was wholly obviated and did not in any manner contribute to the cause of death, increase the risk or lessen the life expectancy of the applicant, and which cause or condition would not have avoided the policy or been a breach of the contract had it occurred after the contract went into force and operation. (Idaho) *Basicot v. Royal Neighbors of America*, 180.

**17. LIFE INSURANCE—Action on Policy—Proofs of Death.**—In an action for recovery on a life insurance certificate, it is error for the trial court to exclude the proofs of death which have been furnished by the beneficiary, where the same are offered in evidence on the trial by the insurance society. (Idaho) *Basicot v. Royal Neighbors of America*, 180.

*Fire Insurance.*

**18. FIRE INSURANCE—Completion of Contract.**—A contract of fire insurance is complete when it appears that the terms of the contract have been settled by the concurrent assent of the parties, and nothing remains to be done but to deliver the policy. (Ala.) *Stephenson v. Allison*, 26.

**19. FIRE INSURANCE.—The Actual Delivery of a Policy of fire insurance is not essential to complete the contract; the insurer may be considered as holding it for the benefit of the assured.** (Ala.) *Stephenson v. Allison*, 26.

**20. FIRE INSURANCE—Delivery of Policy to Agent.**—The delivery of a fire insurance policy to the agent of the company is generally delivery to the insured, and is sufficient to put the insurance into effect, though the agent retains the policy in his own keeping. (Ala.) *Stephenson v. Allison*, 26.

**21. FIRE INSURANCE—When Effected—Absence of Application.** If a person of mature years and sound mind, who can read and write, accepts a policy of insurance containing stipulations material to the risk and on breach of which the policy is to be avoided, and there is nothing confusing or ambiguous in them and no representations made, calculated or intended to deceive as to their import, the policy with the stipulations becomes the contract between the parties, to be enforced, while it stands, according to its terms, and the principle should not be affected because in a given case there has been no previous application or no express representation made. (N. C.) *Lancaster v. Southern Ins. Co.*, 665.

**22. FIRE INSURANCE.—Effect will be Given to a "Rider"** attached to a policy of fire insurance on a steam cotton-gin, where the rider is inserted in and made a part of the entire policy for the purpose of adapting its provisions to this particular kind of property, especially with reference to the method and conditions of its operation; where there is nothing uncertain or restrictive in its terms, and it contains the provision, "attached to and made a part of this policy"; and where there is, at the end of the entire policy, a stipulation that it is "made and accepted under the foregoing stipulations and conditions, together with such other provisions, agreements, and conditions as may be indorsed hereto." (N. C.) *Lancaster v. Southern Ins. Co.*, 665.

*Ownership of Property.*

**23. FIRE INSURANCE—Conditional Sale—Ownership.—**A vendee in possession of a steam cotton-gin, under a binding contract of purchase, having given his notes for the purchase money, is to be considered as the "unconditional and sole owner" of the gin outfit, within the meaning of these words in a contract of insurance, though all of the purchase price has not been paid. (N. C.) *Lancaster v. Southern Ins. Co.*, 665.

**24. FIRE INSURANCE—Conditional Sale—Encumbrances.—**In the case of a purchase of personal property, such as a steam cotton-gin, where notes have been given for the purchase money, and the purchaser obtains insurance on the property before it is all paid for, a recorded vendor's lien for the amount unpaid is, in effect, an encumbrance in the nature of a chattel mortgage, and violates a stipulation in the policy against encumbrances. (N. C.) *Lancaster v. Southern Ins. Co.*, 665.

**25. FIRE INSURANCE—Sole and Unconditional Ownership.—**The interest of a purchaser of property, which he has unqualifiedly agreed to buy and which the former owner has absolutely contracted to sell to him upon definite terms, is the sole and unconditional ownership within the true meaning of the ordinary clause upon that subject in insurance policies, because the vendor may compel the vendee to pay for the property and to suffer any loss that occurs. (Fla.) *Phenix Ins. Co. v. Hilliard*, 171.

**26. FIRE INSURANCE—Sole and Unconditional Ownership.—**The just and reasonable purpose of insurance policies in requiring the insured to have the "unconditional and sole ownership" of the property insured is to give protection to only those upon whom the loss insured against would inevitably fall but for the insurance, and to avoid taking risks for those whose lack of interest or whose contingent interest in the property insured might tend to encourage carelessness or wrongdoing in the use or preservation of the property. Wager policies are not approved, and should be avoided. (Fla.) *Phenix Ins. Co. v. Hilliard*, 171.

**27. FIRE INSURANCE.—**To be "Unconditional and Sole," the Interest or "ownership" of the insured must be completely vested, not contingent or conditional, nor in common or jointly with others, but of such nature that the insured must alone sustain the entire loss if the property is destroyed; and this is so whether the title is legal or equitable. (Fla.) *Phenix Ins. Co. v. Hilliard*, 171.

**28. FIRE INSURANCE—Sole and Unconditional Ownership.—**By fair construction and intendment the "unconditional and sole ownership" of property for the purposes of insurance is in those upon whom the loss insured against would certainly fall, not as a matter of mere contract obligation, but as the result of real bona fide rights in the property insured. (Fla.) *Phenix Ins. Co. v. Hilliard*, 171.



*Loss Caused by Third Person.*

**29. INSURANCE—Subrogation—Loss Caused by Third Person.**—Where an insurance company pays to the assured a loss occasioned by the wrong of a third party, and the value of the property destroyed by the fire exceeds the amount paid by the insurance company, the assured may bring an action in his own name against the wrongdoer, and recover the full amount of the loss. (Okl.) *Kansas City etc. Ry. Co. v. Shutt*, 870.

*Statement of Loss.*

**30. FIRE INSURANCE—Statement of Loss “Forthwith,” What Constitutes.**—In determining whether an insured has rendered a statement of loss “forthwith,” the inquiry is whether in the light of conditions surrounding him at the time when he was bound to act, considered, as they then should have been, by an ordinarily prudent man, he exercised reasonable diligence in rendering the written statement to the insurer without unnecessary delay. An insured, who has suffered loss, may properly take a few days in order to acquire the knowledge necessary intelligently to prepare a statement, adequate both to give some reliable data to the insurers and to protect his own rights in the future. The time required for this purpose must vary with the character and extent of the property injured, the intimacy of the relation of the owner to it, and the circumstances peculiar or personal to himself in which at the moment he may be placed. What may be “forthwith” in any case depends upon a due regard to all these considerations. (Mass.) *Greenough v. Phoenix Ins. Co.*, 383.

**31. FIRE INSURANCE—Statement of Loss “Forthwith,” When Waived.**—There may be negotiations for a settlement of a loss of such a tenor or occurring so soon after the fire or under such surroundings as amount to a waiver, for the time being, of the right of the insurer to require a statement of the loss forthwith, and as to make it a breach of good faith for it to set up as a defense the failure immediately to furnish the statement. Facts may be found to exist equivalent to a representation by the insurer to the effect that the right to require the written statement, while not abandoned, would be treated as suspended until the termination of efforts at compromise. (Mass.) *Greenough v. Phoenix Ins. Co.*, 383.

**32. FIRE INSURANCE—Statement of Loss—Construction of Policy.**—A paragraph in the standard form of insurance requiring the insured, in case of loss, to forthwith render a statement showing the value of the property, other insurance thereon in detail, etc., does not hold an insured to anything more than good faith and reasonable investigation to ascertain the facts in rendering the statement. He is not required to be a warrantor of the truth of all recitals in it. (Mass.) *Greenough v. Phoenix Ins. Co.*, 383.

**33. FIRE INSURANCE—Statement of Loss—Construction of Policy.**—Where a standard form of insurance provides, “In case of any loss or damage under this policy, a statement in writing, signed and sworn to by the insured, shall be forthwith rendered to the company, setting forth the value of the property insured, the interest of the insured therein, all other insurance thereon, in detail, the purposes for which and the persons by whom the building insured, or containing the property insured, was used, and the time at which and the manner in which the fire originated, so far as known to the insured,” the clause “so far as known” to him, applies to all the statements the insured is required to make. (Mass.) *Greenough v. Phoenix Ins. Co.*, 383.

See Corporations, 17-19; Interpleader.

**Note.****Insurance, acceptance of policy, 63–65.**

completed contract, what constitutes, 38.

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delivery of policy, actual manual delivery not necessary, 34.

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**INTEREST.**

See Usury.

**INTERPLEADER.**

**INTERPLEADER** — When Insurer may Maintain.—Where a policy of insurance is payable to a person named and designated as the wife of the insured, and after his death two women claim to be the beneficiary so named and designated, a bill of interpleader may be maintained by the insurance company. (N. J. Eq.) *Bayerischen Nat. Verband Von Nord Amerika v. Knaus*, 573.

**Note.**

**Interstate Commerce**, regulations of corporation commission affecting, 1006.

**INTOXICATION.**

See Deeds, 1, 2.

**IRRIGATION.**

**IRRIGATION** — Breach of Contract to Furnish Water — Damages.—In an action for damages for the breach of a contract to sup-

ply water for irrigating the plaintiff's lands, where it appears that the land is unbroken and practically unproductive prairie, if the plaintiff prevails, he can only recover the difference between the rental value of said land with water according to the terms of the contract and the rental value without such water. The supposed value of what the land might have produced had the water been furnished is too remote, speculative and conjectural. (Neb.) *Wade v. Belmont Irr. etc. Co.*, 506.

### JOINT OBLIGORS.

See Release.

Note.

Joint Obligors, release of one as release of all, 834-840.

### JUDGMENT.

1. **DEFAULT JUDGMENT**—Absence of Proof of Service.—A judgment entered by default, where there is no proof of service of summons, when assailed by the defendant for this reason, should be set aside and leave given defendant to plead. (Okl.) *Shanholtzer v. Thompson*, 877.

2. **RES JUDICATA**.—A Judgment Sustaining a Demurrer for misjoinder of causes of action is not available to establish the plea of res judicata. (Okl.) *Goldsborough v. Hewitt*, 795.

3. **JUDGMENT—Res Judicata—Parties and Privies**.—The doctrine of res judicata has no application against or in favor of anyone not a party or privy. (Ill.) *People v. Amos*, 239.

4. **JUDGMENT—Estoppel**.—A Judgment for a Part of an entire demand is a bar to any other suit for another part of the same demand. (Me.) *Pomeroy v. Prescott*, 347.

### JUDICIAL SALE.

**JUDICIAL SALE—Assessment Confirmed Before Delivery of Deed**.—Where the conditions of a judicial sale provide for a sale of the property clear of encumbrance, the purchaser is not entitled to have the amount of an improvement assessment, which was confirmed after the confirmation of the sale but before delivery of the deed, paid out of the purchase money so as to get a title free of encumbrance. In such case the encumbrance arises after the completion of the sale. (N. J. Eq.) *Carpenter v. Shanley*, 576.

### JURISDICTION.

See Corporations, 17-19; Courts, 1, 2.

### JURY.

**JURORS—Examination on Voir Dire**.—In an action for personal injuries by an employee against his employer, it is improper for counsel, except for the purpose of exercising the right of peremptory challenge, to ask a juror on his voir dire if he is interested in any casualty company which insures employers against damages for injuries to employees; but if an objection to such examination is promptly sustained, and the verdict is not large considering the extent of the injuries, the error is not ground for reversal. (Ill.) *Aetitus v. Spring Valley Coal Co.*, 221.

### LACHES.

See Equity, 8-12.

**LANDLORD AND TENANT.***Estoppel to Deny Title.*

1. **LANDLORD'S TITLE—Estoppel of Tenant to Deny.**—The doctrine of estoppel cannot be invoked to prevent defendant from questioning plaintiff's title, first, because the evidence fails to show that defendant was plaintiff's tenant of the land; and, second, even if such tenancy existed, defendant would not be thus estopped in an action like this, where plaintiff claims title in fee. (N. D.) *Hebden v. Bina*, 700.

*Leases—Tide Land.*

2. **LEASE.—Two Separate Instruments Under Seal, Executed by the parties at the same time, one an indenture of lease, the other in the nature of a defeasance which defeats the force or operation of the lease, must be read and construed together as one contract.** (Fla.) *Escambia Land etc. Co. v. Ferry Pass etc. Assn.*, 121.

3. **LEASE—Shore Between High and Low Water Mark.**—A contract whereby one party leases to another the shore or space between high and low water mark, a part of the bed of a navigable stream the title to which is in the state in trust for the public, and the riparian rights which are concurrent with the rights of other inhabitants of the state and must be exercised subject to the rights of others is void, as being illegal and contrary to public policy. (Fla.) *Escambia Land etc. Co. v. Ferry Pass etc. Assn.*, 121.

*Distress.*

4. **LANDLORD AND TENANT—Distress.**—New Trials may be granted in distress proceedings. (Fla.) *Owens v. Wilson*, 117.

5. **LANDLORD AND TENANT—Distress.**—The Cessation of the Relationship of landlord and tenant does not destroy the statutory remedy by distress as to rent theretofore accrued. (Fla.) *Owens v. Wilson*, 117.

*Safe Condition of Premises.*

6. **LANDLORD—Duty to Tenants as to Safe Condition of Halls.** The owner of a lodging-house, who retains possession and control of the hallways intended to be used in common by the tenants, is under the duty to a tenant to maintain them in the same condition they were in at the time of letting him a room. (Mass.) *Faxon v. Butler*, 405.

7. **LANDLORD—Condition of Premises—Assumption of Risk.**—A tenant in a lodging-house takes the premises as she finds them, so far as the arrangement of the hallways is obvious; but she does not assume the risk of injury from having a dark hall left unlighted so as to make it dangerous because of stairs leading therefrom to the floor below, when the hall is under the control of the landlord and theretofore has been kept lighted. If the jury are satisfied that the light was extinguished before the usual time, they are warranted in finding the landlord negligent. (Mass.) *Faxon v. Butler*, 405.

8. **LANDLORD—Unlighted Hall—Negligence of Tenant.**—One who hires a room in a lodging-house and has employment in an office in apartments adjoining the lodging-house which are also owned by the landlord, and who, after completing her duties in the office for the night, starts for her room, opens the door leading into the hall, closes it after her, takes one step forward in the darkness, and falls down the stairway, cannot be said as a matter of law to act without due care, when theretofore the hall had been kept lighted and was lighted earlier in the evening when she entered the office. (Mass.) *Faxon v. Butler*, 405.

See Crops; Oil and Gas.

**LARCENY.**

1. **LARCENY—Money and Bank Bills—Description.**—By statute, bank notes and money are made the subject of larceny; and, where the required degree of certainty cannot be used in specifying the pieces or denominations of coins stolen or the number and denomination of bank bills, it will be enough to state that a better description than that given is unknown to the prosecuting solicitor or to the grand jury as the case may be. (Fla.) *Enson v. State*, 92.

2. **LARCENY—Indictment—Description of Property.**—In a prosecution for larceny, under the plea of not guilty, the allegation in the information of the prosecuting solicitor's want of knowledge of a better description of the property stolen is traversable and the subject of inquiry, and an information false in this respect will not support a conviction. (Fla.) *Enson v. State*, 92.

3. **LARCENY—Indictment—Description of Property.**—In a prosecution for larceny under the plea of not guilty, where the information alleges the prosecuting solicitor's want of knowledge of a better description of the property stolen, the defendant may not be acquitted upon proof that the solicitor could easily have known a better description of the property stolen. The fact that the solicitor could easily have ascertained a better description of the property may be evidence that he knew the same, but it is not conclusive, and cannot be made an absolute test of the sufficiency of the allegation that he did not know. (Fla.) *Enson v. State*, 92.

4. **LARCENY—Indictment—Description of Property.**—In a prosecution for larceny, where the information alleges that a more particular description of the property is unknown to the prosecuting solicitor, and there was no evidence that the solicitor knew a more particular description of the property alleged to have been stolen, the court properly refused to give an instruction predicated defendant's right to an acquittal on the fact that the solicitor could easily have known a better description of the property than that given in the information. (Fla.) *Enson v. State*, 92.

5. **LARCENY—Indictment—Bill of Particulars.**—In a prosecution for larceny of bank bills and notes and silver specie, the information alleges that a more particular description than is given of the same is to the prosecuting solicitor unknown, the accused may upon a proper showing timely made move the court to order the solicitor to give such other or more particular description, in the nature of a specification or bill of particulars of the property as may have been acquired by the solicitor after filing the information, and the trial may be suspended until this can be done. (Fla.) *Enson v. State*, 92.

6. **LARCENY.—An Information Found to be Sufficient** in its allegations of the time and place of the larceny alleged. (Fla.) *Enson v. State*, 92.

7. **LARCENY.—Evidence Found to be Sufficient to Support a verdict of guilty of grand larceny.** (Fla.) *Enson v. State*, 92.

**LEGACIES.**

See Wills.

**LICENSE TAX.**

1. **OCCUPATION TAX.—A Physician Practicing Medicine as a business is engaged in an occupation within the meaning of a statute authorizing a village "to raise revenue by levying and collecting a license tax on any occupation or business within" its limits.** (Neb.) *Village of Dodge v. Guidinger*, 494.

**2. OCCUPATION TAX—Practicing Medicine.**—Village Trustees may, for the purpose of raising revenue, lawfully enact an ordinance levying a tax upon the occupation of practicing medicine within the village limits. (Neb.) *Village of Dodge v. Guidinger*, 494.

#### **LIFE TENANTS.**

See Corporations, 6.

#### **LIMITATION OF ACTIONS.**

**LIMITATION OF ACTIONS—Amendment Changing Parties.**—Where a complaint is filed in time against the Manistee Mill Company, but it is amended by substituting as defendant Vastine J. Herlong, doing business under the name of Manistee Mill Company, the statute of limitations is no defense, if the company and the individual are the same person or entity. (Ala.) *Manistee Mill Co. v. Hobdy*, 73.

#### **LOGS AND LOGGING.**

See Timber.

#### **LUNATICS.**

See Insane Persons.

#### **MALICIOUS PROSECUTION.**

**MALICIOUS PROSECUTION.**—Evidence of the Poverty of the Plaintiff is not admissible in an action for malicious prosecution, where there is no evidence that his actual damage was increased by his poverty. (N. C.) *Robertson v. Conklin & Plymouth Lumber Co.*, 635.

#### **MANDAMUS.**

See Initiative and Referendum.

#### **MARRIAGE.**

**1. MARRIAGE—Fraud in Concealing Prior Marriage.**—Where a woman marries a man and intentionally conceals from him her prior undissolved marriage to another, this is a fraud upon him upon which he can maintain an action for deceit or a petition to annul the marriage. (Mass.) *Batty v. Greene*, 407.

**2. MARRIAGE—Fraud in Procuring—Property Rights.**—Where a woman marries a man and lives with him for years, at all times intentionally concealing her prior undissolved marriage to another, he, or his administrators after his death, may maintain an action against the administrator of her estate to recover the portion thereof which he contributed during the supposed marriage. (Mass.) *Batty v. Greene*, 407.

See Contracts, 6; Husband and Wife.

#### **MARRIED WOMEN.**

See Husband and Wife.

#### **MASTER AND SERVANT.**

##### *Wrongful Discharge of Servant.*

**1. MASTER AND SERVANT—Wrongful Discharge.**—A master has the power to dismiss his servant without cause, but he subjects himself, in so doing, to the consequences of a violation of his contract. (Vt.) *Derosia v. Ferland*, 1092.

**2. MASTER AND SERVANT—A Servant Wrongfully Discharged** has the Election of treating the contract as continuing and suing for damages for the breach by the discharge; or of treating it as, and acquiescing in its being, rescinded by the wrongful act of the master, and bringing an action on the quantum meruit for the work actually

performed; but he cannot, though waiting until the termination of the period for which he was hired, maintain *indebitatus assumpsit* for the whole wages, relying on the doctrine of constructive service. (Vt.) *Derosia v. Ferland*, 1092.

**3. MASTER AND SERVANT—Discharge—Constructive Service.** A servant discharged without cause cannot, by waiting till the end of the term for which he was employed, sue for and collect wages, as such, for the portion of the term after the dismissal. (Vt.) *Derosia v. Ferland*, 1092.

**4. MASTER AND SERVANT—Wrongful Discharge—Pleading.—**A declaration in *indebitatus assumpsit* by a servant to recover wages for the portion of the term after the time of his dismissal cannot be amended by filing a count seeking damages for breach of the contract of hiring, as the causes of action are not the same. (Vt.) *Derosia v. Ferland*, 1092.

*Employer's Liability to Employee.*

**5. EMPLOYER'S LIABILITY—Safe Place to Work.—**One of the duties which an employer assumes toward his employee is to exercise reasonable care and diligence to provide a reasonably safe place at which the employee is to work. (Me.) *Hume v. Fort Halifax Power Co.*, 332.

**6. EMPLOYER'S LIABILITY—Warning Employee of Danger.—**The law implies that the discharge of the duty of the employer to furnish a reasonably safe place for employees to work requires him to notify them of all special risks and dangers of the employment, and all dangerous conditions attendant upon the place of employment of which he has knowledge, or by the exercise of reasonable care would have knowledge, and which are unknown to the employees, and would not be known and appreciated by them in the exercise of reasonable care. (Me.) *Hume v. Fort Halifax Power Co.*, 332.

**7. EMPLOYER'S LIABILITY—Warning Employee of Danger.—**The duty of an employer to notify employees of the special risks and dangers of the employment is personal, and if he employs another to discharge the duty, the latter becomes a vice-principal, for whose acts and negligence the employer is liable. (Me.) *Hume v. Fort Halifax Power Co.*, 332.

**8. EMPLOYER'S LIABILITY—Warning Employee of Danger.—**Where a foreman, knowing of the risks and dangers of a place, sets men at work there without notifying them of the danger, and the men do not, and by the exercise of reasonable care would not, know of the danger, his negligence is that of the employer. (Me.) *Hume v. Fort Halifax Power Co.*, 332.

**9. EMPLOYER'S LIABILITY—Warning Employee of Danger.—**Where an employee is injured while working in a dangerous place when he is ignorant of the danger and is not notified thereof, it is unimportant, in determining his right to recover against the master, how or by whom the risk or danger was created. (Me.) *Hume v. Fort Halifax Power Co.*, 332.

**10. EMPLOYER'S LIABILITY—Report of Accident as Evidence.** In an action by a mining employee for injuries sustained in an accident, the report to the state mining inspector and the record of the accident, which are required by statute to be made, are admissible in evidence. If some parts thereof are objectionable, counsel should point them out to the court and ask that they be excluded from the consideration of the jury. (Ill.) *Aetitus v. Spring Valley Coal Co.*, 221.



*Marking Dangerous Places in Mines.*

11. **EMPLOYER'S LIABILITY—Duty to Mark Dangerous Places in Mine.**—The owner or operator of a mine cannot excuse himself from liability in consciously violating the statute requiring him to mark dangerous places in the mine, on the ground that his examiner and manager looked at the places and in good faith thought them not dangerous. (Ill.) *Aetitus v. Spring Valley Coal Co.*, 221.

12. **EMPLOYER'S LIABILITY—Duty to Mark Dangerous Places in Mine.**—When a mine owner or operator is advised of the conditions in the mine, he must place therein, if it is dangerous, the marks required by statute. If he fails to do so, he acts at his peril, and cannot excuse himself because he or his examiner or manager may think the mine safe. (Ill.) *Aetitus v. Spring Valley Coal Co.*, 221.

13. **EMPLOYER'S LIABILITY—Duty to Mark Dangerous Places in Mine.**—The duty imposed by the Illinois statute on the operator or owner of a mine of examining and marking dangerous places therein is mandatory. (Ill.) *Aetitus v. Spring Valley Coal Co.*, 221.

*Independent Contractor.*

14. **MASTER AND SERVANT—Acts of Independent Contractor.** If the work to be done by an independent contractor cannot be done without danger or injury to third parties, if its very nature and existence is such as to cause or produce danger or injury, the owner, master or contractor is liable as if he performs it himself. But if the work is not necessarily dangerous, and will not, if properly executed, result in danger or injury to third parties, but is rendered so only by the negligent manner in which it is performed, then the owner, master or operator is not liable, but only the independent contractor. (Ala.) *Southern Ry. Co. v. Lewis*, 77.

*Fellow-servants.*

15. **FELLOW-SERVANTS—Constitutionality of Employer's Liability Act.**—The employer's liability act of 1907 (Comp. Stats., c. 21, sec. 3), providing that every railway company operating a railway engine, car or train in the state of Nebraska shall be liable to any of its employees, who at the time of injury are engaged in construction or repair work, or in the use and operation of any engine, car or train for said company, for all damages which may result from the negligence of any of its officers, agents, or employees, is a valid law under the constitution of Nebraska, and is not repugnant to the fourteenth amendment of the federal constitution. (Neb.) *Swoboda v. Union Pacific R. R. Co.*, 483.

16. **FELLOW-SERVANTS—Employees in Railway Repair Work.** Evidence examined and set out in the opinion held sufficient to show that plaintiff at the time of his injury was engaged in construction or repair work within the meaning of such act. (Neb.) *Swoboda v. Union Pacific R. R. Co.*, 483.

17. **FELLOW-SERVANTS—Employees in Railway Repair Work.** A man employed in railway shops in placing washers under a steam hammer and removing them when flattened by a blow of the hammer, the washers being for use in the repair of the cars and engines of the railway company, is engaged in "construction or repair work," within the meaning of the statute providing that railway companies shall be liable for injuries suffered by employees through the negligence of other employees "engaged in construction or repair work." (Neb.) *Swoboda v. Union Pacific R. R. Co.*, 483.

18. **FELLOW-SERVANTS—Joint Liability With Master for Negligence.**—Under section 36, article 9, of the constitution, which provides: "The common-law doctrine of the fellow-servant, so far as it



affects the liability of the master for injuries to his servant, resulting from the acts or omission of any other servant or servants of the common master, is abrogated as to every employee of every railroad company and every street railway company or interurban railway company, and of every person, firm, or corporation engaged in mining in this state; and every such employee shall have the same right to recover for every injury suffered by him for the acts or omissions of any other employee or employees of the common master that a servant would have if such acts or omissions were those of the master himself in the performance of a nonassignable duty . . . .”—where the negligence of the fellow-servant causes the injury of a person engaged in the service of a corporation as a rope-rider in the slope of a coal mine, his act constitutes a breach of duty of the master, and at the same time a breach of duty on his own part toward his coemployee, and the person injured may maintain a joint action against the master and servant for the injury. (Okl.) *Coalgate Company v. Bross*, 915.

*Liability to Third Person for Servant's Acts.*

19. **MASTER'S LIABILITY for Servant's Malicious Act.**—A master is liable for the act of his servant, though willful and malicious, when it is done in furtherance of the master's business and within the scope of the servant's employment; but he is not liable for such act done to effect some purpose of the servant alone. (Vt.) *Ploof v. Putnam*, 1085.

20. **MASTER'S LIABILITY for Servant's Malicious Act.**—The primary test, in determining whether a master is answerable for the willful and malicious act of his servant, is, not the character of the act itself, nor whether it was done during the period of employment, but whether it was done to carry out the directions of the master, express or implied, or to effect some purpose of the servant alone. (Vt.) *Ploof v. Putnam*, 1085.

21. **MASTER'S LIABILITY for Excess or Mistaken Execution of Authority.**—To establish a right of action against the master for injuries resulting from an excess or mistaken execution of a lawful authority by his servant, it must be shown that the servant intended to do on behalf of his master something of a kind which he was in fact authorized to do; and that the act, if done in a proper manner, or under circumstances erroneously supposed by the servant to exist, would have been lawful. (Vt.) *Ploof v. Putnam*, 1085.

22. **MASTER AND SERVANT—Implied Authority of Latter.**—In determining what acts are within a servant's authority, courts are not usually confined to his express instructions. Regard should be had to the character of the work, the situation of the parties, and the surrounding circumstances. Certain implied authority goes with the relation, usually if not always; and it will be inferred that a servant has implied authority to do all those things that are necessary for the protection of the property intrusted to him, or for fulfilling the duty which he has to perform. (Vt.) *Ploof v. Putnam*, 1085.

23. **MASTER AND SERVANT—Implied Authority Against Trespassers.**—A servant who has been placed in sole charge of an island is clothed with implied authority to keep off trespassers and intruders, irrespective of written instructions by the master that he does not care to have people tie up to his wharf. Authority to use such force as may be necessary to accomplish this is implied from the character of the work. (Vt.) *Ploof v. Putnam*, 1085.

24. **MASTER AND SERVANT—Authority to Protect Property.**—A caretaker who has sole charge of an island, with instructions from his master that he does not care to have people tie up to his wharf, acts within the scope of his employment in casting off the line of

one who has moored his sloop to the master's wharf and refusing to permit him to tie thereto in a storm. (Vt.) Ploof v. Putnam, 1085.

**25. MASTER'S LIABILITY for Servant's Act in Caring for Property.**—Where a caretaker, in sole charge of an island, with instructions not to allow boats to tie up there, refuses to permit the occupants of a sloop to tie to the master's wharf in a storm, by reason whereof the sloop is wrecked and the occupants thereof injured, such act, under the peculiar circumstances, is improper and unlawful; and the master is liable if the caretaker intended to carry out instructions and perform his duty, but not if he intended only to serve some purpose of his own. (Vt.) Ploof v. Putnam, 1085.

**26. MASTER AND SERVANT—Scope of Employment.**—The questions whether a servant acts within the scope of his employment and whether he acts in behalf of the master or in his own behalf are usually for the jury; but if the facts, and the inferences to be drawn therefrom, are not in dispute, the court may dispose of these questions as matter of law. (Vt.) Ploof v. Putnam, 1085.

**27. MASTER AND SERVANT—Scope of Employment.**—Where a servant testifies that he acted according to orders, though his act was improper and unlawful, and there is nothing to show that he acted merely to serve some purpose of his own, it is proper to instruct the jury that he was acting within the scope of his employment, so that the master stands as though he were present and had himself done the act. (Vt.) Ploof v. Putnam, 1085.

#### MECHANIC'S LIEN.

**MECHANIC'S LIEN—Property of Wife—Contract by Husband.**—Where a husband, without the consent and against the protests of the wife, contracts for and purchases material to paint a dwelling-house on land owned by the wife, who, having no knowledge of where he purchased the materials, did not give notice of her objection to the improvements on the dwelling-house to the party who furnished said materials, the materialman, under the evidence in this case, acquires no lien under section 6237 of said Revised Codes of 1905 for the materials furnished. (N. D.) Christianson v. Hughes, 762.

#### METER RATES.

See Electricity.

#### MINES AND MINERALS.

**1. MINING CLAIM—Location on Land Already Located.**—A subsequent valid location of a mining claim in this state cannot be made on mineral land that is already covered by a valid location. (Idaho) Flynn Group Min. Co. v. Murphy, 201.

**2. MINING CLAIM—Excessive Location—Subsequent Location.**—Where a discovery is made on a vein of mineral-bearing rock and the notice provides that such claim extends seven hundred feet in a northwesterly direction and eight hundred feet in a southeasterly direction from such discovery, and the corner stakes on the southeasterly end are so placed as to take in more than eight hundred feet of such vein, subsequent locators may legally locate the excess of ground, as the first location is valid only to the extent of eight hundred feet southeasterly from the point of discovery on said claim. (Idaho) Flynn Group Min. Co. v. Murphy, 201.

**3. MINING CLAIM—Making Location Definite and Certain.**—The law requires the locator to make his location so definite and certain that from the location notice and stakes and monuments on the ground the limits and boundaries of the claim may be ascer-

tained, and so definite and certain as to prevent the changing or floating of such claim. (Idaho) Flynn Group Min. Co. v. Murphy, 201.

**4. MINING CLAIM—Excessive Location—Fraud.**—Where the boundaries of a claim are made excessive in size with fraudulent intent, it is void; or if so large as to preclude the presumption of innocent error, fraud will be presumed. (Idaho) Flynn Group Min. Co. v. Murphy, 201.

**5. MINING CLAIM—Location—Monument and Distances.**—Under the provisions of section 3207, Revised Codes, the locator of a mining claim is required to erect a monument at the place of discovery upon which, among other things, he must place the distance claimed along the vein each way from such monument. (Idaho) Flynn Group Min. Co. v. Murphy, 201.

**6. MINING CLAIM—Notice and Description—Subsequent Location.**—Held, that where a location notice states that the mining claim which it describes extends seven hundred feet in a north-westerly direction and eight hundred feet in a southeasterly direction along the lode, a locator may go to the point of discovery of such claim and measure the ground from the discovery point eight hundred feet in a southeasterly direction along the lode, and if there be any unlocated ground beyond that eight hundred feet, may legally locate it, regardless of the fact that the easterly end stakes had been established beyond the eight hundred feet. (Idaho) Flynn Group Min. Co. v. Murphy, 201.

**7. MINING CLAIM—Excessive Location—Fraud.**—The case of *Nicholls v. Lewis & Clark Min. Co.*, 18 Idaho, 224, 109 Pac. 846, cited and approved, and the case of *Atkins v. Hendree*, 1 Idaho, 95, cited and disapproved so far as it holds that no fraud can be perpetrated where there exists the means of ascertaining or discovering the fraud. (Idaho) Flynn Group Min. Co. v. Murphy, 201.

**8. MINING CLAIM—Notice—Description of Exterior Boundaries.** Under the provisions of section 3207, Revised Codes, of 1909, the location notice is not required to describe the exterior boundaries of the claim. (Idaho) Flynn Group Min. Co. v. Murphy, 201.

**9. MINING CLAIM—Location Notice—Sufficiency of Description.** Where it appears that a mining claim has been located in good faith, if by any reasonable construction the language used in the location notice describing the claim and referring to natural objects and permanent monuments imparts knowledge of the location of such claim to a subsequent locator, it is sufficient. (Idaho) Flynn Group Min. Co. v. Murphy, 201.

**10. MINING CLAIM—Notice of Location to Subsequent Locator.** Held, that the locator had actual notice that the ground in controversy had been located, as well as constructive notice by an examination of the recorded notice, and that no technicalities will be resorted to to sustain his relocation of the same ground. (Idaho) Flynn Group Min. Co. v. Murphy, 201.

**11. MINING CLAIM—Assessment Work and Possession.**—Held, that the finding of the court to the effect that the respondent had performed the assessment work on the Murphy Fraction for nine years and that he had worked and was in possession of said fraction for more than five years, and that during said period of time there was no adverse claim made to said premises or to any part thereof, is fully sustained by the evidence. (Idaho) Flynn Group Min. Co. v. Murphy, 201.

See Master and Servant, 11-13; Oil and Gas.

**MINORS.**

See Infants.

**MISJOINDER.**

See Pleading, 10-13.

**MORTGAGE.***In General.*

1. **MORTGAGE DURING PERIOD OF REDEMPTION—Registration—Redemption.**—The fact that a mortgage given after the act of sale occurred on a prior mortgage, and before the expiration of the period allowed for redemption, is not recorded until after the expiration of one year from the sale, but is recorded within the sixty days additional allowed where there has been a redemption, does not deprive the holder of the last mortgage given of the right to redeem on complying with the other statutory requirements. (N. D.) *North Dakota Horse and Cattle Co. v. Serumgard*, 717.

2. **MORTGAGE.**—An Assignment of a Real Estate Mortgage, which merely describes the instrument as "the mortgage executed by Matj Bina and his wife to the Bank of Minot, and recorded in Book F of Mortgages, on pages 556-558 in the office of the register of deeds of the county of Walsh," is too indefinite in description to vest in the assignee the legal title so as to authorize such assignee to foreclose by advertisement a mortgage executed by B. alone to such bank, and which was recorded in Book 15 of Mortgages. Especially is this true when the proof shows that two mortgages were executed by B. to said bank on the same day, and both were recorded in Book 15 of Mortgages, and the proof fails to show that there was no mortgage corresponding to the description contained in such assignment. (N. D.) *Hebden v. Bina*, 700.

*Assumption of Mortgage by Grantee.*

3. **MORTGAGE.**—Where a Grantee Assumes a Mortgage on the land as part of the purchase price, the mortgage is primarily a charge upon the purchase money reserved by the grantee to pay it, and the charge takes effect, as between the immediate parties to the contract, upon the land, but only upon the estate therein which the grantor purports to convey. (Mass.) *Goodenough v. Labrie*, 411.

4. **MORTGAGE**—Assumption by Grantee in Quitclaim Deed.—A grantee in a quitclaim deed who assumes a mortgage on the land as part of the purchase price may purchase and enforce a prior mortgage of which both he and his grantor were ignorant at the time of the execution of the quitclaim deed. (Mass.) *Goodenough v. Labrie*, 411.

*Record of Mortgage as Notice.*

5. **MORTGAGE**—Record of Second Mortgage as Notice.—The fact that a second mortgage, covering a few of a large number of lots, is on record, is not constructive notice of it to the holder of the first mortgage covering all the lots. (Mass.) *Clarke v. Cowan*, 388.

*Mortgagee's Right to Protect Property.*

6. **MORTGAGEE**—Right to Protect Property from Waste.—A mortgagee of real estate, though out of possession, may maintain an action in the nature of waste, or may go into equity to prevent the commission of waste. (Mass.) *Stewart v. Finkelstone*, 370.

7. **MORTGAGEE**—Remedy in Equity to Protect Security.—A mortgagee is allowed to go into equity to prevent injuries threatened

the land covered by his mortgage, because any act in its nature capable of harming the value of his security may be such an injury as to entitle him to equitable relief and protection. (Mass.) *Stewart v. Finkelstone*, 370.

**8. MORTGAGEE—Right to Enjoin Violation of Building Restrictions.**—A mortgagee of a lot may sue to enjoin a violation of building restrictions placed by the former owner on a tract of land of which the lot is a part. (Mass.) *Stewart v. Finkelstone*, 370.

**9. MORTGAGEE—Right to Enjoin Violation of Building Restrictions.**—The mortgagee of a lot and the owner of the equity of redemption may join in a suit to restrain the violation of building restrictions imposed by the former owner of a tract of land of which the lot forms a part. (Mass.) *Stewart v. Finkelstone*, 370.

*Partial Release of Mortgage.*

**10. MORTGAGE—Covenant to Give Partial Release.**—A provision in a mortgage of a large number of lots that the mortgagee will "release and quitclaim any lot upon the payment" of a specified sum with the mortgagor, not with him and his assigns, and must be regarded as a personal agreement for his benefit, and not for the benefit of anyone claiming through or under him. (Mass.) *Clarke v. Cowan*, 388.

**11. MORTGAGE—Covenant to Give Partial Release.**—A provision in a mortgage of a large number of lots that the mortgagee will "release and quitclaim any lot upon the payment" of a specified sum is a privilege to be exercised before the mortgage debt becomes due according to the terms of the mortgage. (Mass.) *Clarke v. Cowan*, 388.

**12. MORTGAGE—Partial Release—Second Mortgage.**—Where the owner of a large number of lots gives a mortgage thereon providing that the mortgagee will "release and quitclaim any lot upon the payment" of a certain sum, and afterward gives a second mortgage on six of the lots, and the first mortgagee releases a part of the lots, some before and some after notice of the second mortgage, and the assignee of the second mortgage forecloses it and purchases at the sale, he can redeem from the first mortgage only upon paying such amount as remains due thereon after such deductions as he is entitled to on account of the lots released after the first mortgagee had notice of the second mortgage. (Mass.) *Clarke v. Cowan*, 388.

**13. MORTGAGE—Partial Release—Second Mortgage.**—Where the owner of one hundred and forty lots gives a mortgage thereon providing that the mortgagee will "release and quitclaim any lot upon the payment" of a certain sum, and afterward gives a second mortgage on six of the lots, and the first mortgagee releases all but forty of the lots before having notice of the second mortgage, and twenty-eight more lots after notice, leaving twelve lots, including the six covered by the second mortgage, and the assignee of the second mortgage forecloses it and purchases at the sale, the amount he is required to pay, in redeeming from the first mortgage, is determined by deducting from the balance due on the mortgage such proportion thereof as the value of the twenty-eight lots bears to the value of the forty lots. (Mass.) *Clarke v. Cowan*, 388.

*Foreclosure.*

**14. MORTGAGE—Foreclosure.**—No Personal Notice to the Mortgagor or his grantees is required to render a foreclosure by advertisement effectual. (N. D.) *Grove v. Great Northern Loan Co.*, 707.

**15. MORTGAGE—Foreclosure.**—Mere Inadequacy of the Price at a foreclosure sale is not ground to set aside the foreclosure in the

absence of fraud, undue advantage, or prejudice. (N. D.) *Grove v. Great Northern Loan Co.*, 707.

16. **MORTGAGE—Foreclosure—Filing Certificate of Sale.**—The statutory provision that a certificate of sale shall be filed thirty days after the sale is not mandatory. (N. D.) *Grove v. Great Northern Loan Co.*, 707.

17. **MORTGAGE—Foreclosure.**—The Absence of a Date in the mortgage as recorded will not vitiate a foreclosure thereof. (N. D.) *Grove v. Great Northern Loan Co.*, 707.

18. **MORTGAGE FORECLOSURE—Proceedings Embraced by Sale.** A "foreclosure sale" under a power contained in the mortgage, which conveys the title of the mortgagor, is in a legal sense the complete foreclosure proceedings, beginning with the act of sale and terminating with the execution of the deed after the expiration of the period allowed for redemption. It includes all the proceedings for the foreclosure of the right of redemption by sale and deed. (N. D.) *North Dakota Horse & Cattle Co. v. Serumgard*, 717.

19. **MORTGAGE FORECLOSURE—Title Conveyed by Sale.**—The title conveyed by such completed foreclosure sale is all the right, title and interest in and to the mortgaged premises which the mortgagor possessed at the time the mortgage was executed or which was subsequently acquired by him. (N. D.) *North Dakota Horse & Cattle Co. v. Serumgard*, 717.

20. **MORTGAGE FORECLOSURE—Sheriff as Agent of Purchaser.** The sheriff or other person who conducts the sale on foreclosure by advertisement is the agent of the purchaser or holder of the certificate to receive redemption money, but is not such an agent as can bind his principal to accept a check, instead of money, from one qualified to redeem, or to retain the money received by such agent from one not a lawful redemptioner, if the principal makes seasonable objection to the form of payment, or refuses forthwith to recognize the party making the tender as entitled to redeem as a redemptioner, when he is not made so by statute. (N. D.) *North Dakota Horse & Cattle Co. v. Serumgard*, 717.

21. **MORTGAGE FORECLOSURE—Effect of Certificate of Sale.**—The provision of section 7464, Revised Codes of 1905, that the certificate given on the execution of a power of sale contained in a mortgage shall have the same validity and effect as the certificate of sale in like manner furnished upon the sale of real property upon execution, provided for by section 7137, Revised Codes of 1905, does not relate to the effect of the act of sale, but to the validity and effect of the certificate. (N. D.) *North Dakota Horse & Cattle Co. v. Serumgard*, 717.

22. **MORTGAGE FORECLOSURE.**—The Certificate of Sale in such case is only evidence of what transpired for the purpose of record, notice to protect purchasers against intervening claims, and to show who may become entitled to a deed, and it conveys no title. (N. D.) *North Dakota Horse & Cattle Co. v. Serumgard*, 717.

*Foreclosure by Advertisement—Power of Sale.*

23. **MORTGAGE.**—A Foreclosure by Advertisement has the same binding force as foreclosures by action in which the parties are personally served with process. (N. D.) *Grove v. Great Northern Loan Co.*, 707.

24. **MORTGAGE.**—A Foreclosure by Advertisement of a Mortgage on real property is of no validity where the person in whose name the same is foreclosed has not the legal title to the mortgage at the date of such foreclosure. (N. D.) *Hebden v. Bina*, 700.



**25. MORTGAGE FORECLOSURE—Sale Under Power, When Completed.**—The sale in the exercise of a power contained in a mortgage which conveys the title of the mortgagor is the sale as completed by the execution of a deed at the expiration of the period allowed for redemption. (N. D.) North Dakota Horse & Cattle Co. v. Serumgard, 717.

**Redemption.**

**26. MORTGAGE FORECLOSURE.—A "Redemption" from the Purchaser at a foreclosure sale by one not the mortgagor is a compulsory sale of the interest acquired by the purchaser at the foreclosure sale, and such redemption can only be enforced by one given that right by statute, and then only by pursuing the method prescribed by the statute conferring the right.** (N. D.) North Dakota Horse & Cattle Co. v. Serumgard, 717.

**27. MORTGAGE FORECLOSURE—Redemption by Superior Mortgagee.**—The holder of a mortgage superior to the one foreclosed, assuming to be a redemptioner when not made so by statute, who tenders the amount necessary to redeem, becomes by the issuance to him of a certificate of redemption and the acceptance and retention by the holder of the certificate of sale of the money tendered, as between himself and the party who parts with such certificate, a "redemptioner." (N. D.) North Dakota Horse & Cattle Co. v. Serumgard, 717.

**28. MORTGAGE FORECLOSURE—Redemption from Previous Redemptioner.**—One who is not made by statute a redemptioner, but thus acquires the rights of a redemptioner, also assumes the obligations and liabilities of a redemptioner, and it follows that he must permit the lawful redemptioner to redeem from him within the period given by statute to a subsequent lienholder by judgment or mortgage for such purpose. (N. D.) North Dakota Horse & Cattle Co. v. Serumgard, 717.

**29. MORTGAGE FORECLOSURE—Redemption—Tender of Check.** The tender, by a lawful redemptioner, of a bank check issued by a solvent and reputable bank for the sum necessary to be paid to effect a redemption, to a prior redemptioner or his agent, for the purpose of receiving redemption money, effects a redemption, unless refused because it is a check, instead of legal tender, and the subsequent lienholder given an opportunity to procure and tender the necessary currency to comply with the legal requirements of the holder of the certificate. (N. D.) North Dakota Horse & Cattle Co. v. Serumgard, 717.

**30. MORTGAGE FORECLOSURE—Redemption from Previous Redemptioner.**—Under section 7465, Revised Codes of 1905, the property sold may be redeemed within one year from the day of sale in like manner and to the same effect as provided in chapter 12 for redemption of real property sold upon execution, so far as the same may be applicable, by (1) the mortgagor or his successor in interest in the whole or any part of the property; (2) by a creditor having a lien by judgment or mortgage upon the property sold, or on some share or part thereof, subsequent to that on which the property was sold. Only those mentioned in subdivision 2 of the above section are redemptioners, and as such entitled to sixty days in which to redeem from a previous redemptioner. (N. D.) North Dakota Horse & Cattle Co. v. Serumgard, 717.

**31. MORTGAGE—Whether Land Subject to During Redemption Period.**—Real estate is subject to mortgage by the holder of the legal title between the act of sale on foreclosure under a power contained in a prior mortgage and the expiration of the period allowed by statute for redemption. (N. D.) North Dakota Horse & Cattle Co. v. Serumgard, 717.

**32. MORTGAGE FORECLOSURE—Purpose of Redemption Statute.**—The redemption statute is remedial in its nature, and is intended, not only for the benefit of creditors holding liens subsequent to a lien in process of foreclosure, but more particularly for the purpose of making the property of the debtor pay as many of his debts as it can be made to pay, and to prevent its sacrifice, and should be liberally construed. (N. D.) *North Dakota Horse & Cattle Co. v. Serumgard*, 717.

**33. MORTGAGE FORECLOSURE—Who may Redeem.**—Every Person Having an interest in property subject to a lien has a right to redeem it from the lien at any time after the claim is due, and before his right of redemption is foreclosed: Rev. Codes 1905, sec. 6141. (N. D.) *North Dakota Horse & Cattle Co. v. Serumgard*, 717.

**34. MORTGAGE FORECLOSURE—Who is a Redemptioner.**—The phrase "on the property sold," in the statutory definition of a redemptioner as being one holding "a lien by judgment or mortgage on the property sold," applies to the land or premises, as those words are commonly used. (N. D.) *North Dakota Horse & Cattle Co. v. Serumgard*, 717.

**35. MORTGAGE FORECLOSURE—Who is a Redemptioner.**—The holder of a mortgage given after the act of sale under a prior mortgage, and before the expiration of the period allowed for redemption from such sale, is a redemptioner. (N. D.) *North Dakota Horse & Cattle Co. v. Serumgard*, 717.

See Chattel Mortgages; Tenancy in Common, 4; Usury.

## MUNICIPAL CORPORATIONS.

### *Ordinances.*

**1. MUNICIPALITY.—An Ordinance Purporting to be an Amendment of a former ordinance is not void because of the alleged invalidity of the former ordinance, where such amendment is a complete law in itself, requiring no reference to any other ordinance, either for its interpretation or enforcement.** (S. C.) *City of Greenville v. Pridmore*, 1058.

**2. MUNICIPALITY—Ordinance Void in Part.**—If the law requires the sentence in a mayor's court to be in the alternative, an ordinance purporting to confer on the mayor power to impose a sentence of both fine and imprisonment is void to that extent, but this does not make void the entire ordinance if it remains complete in every respect, after striking out that provision, both as to the evil to be prevented and the penalties to be inflicted. (S. C.) *City of Greenville v. Pridmore*, 1058.

### *Bona Fide Holder of Bonds.*

**3. MUNICIPAL BONDS—Recitals—Estoppel—Bona Fide Purchasers.**—Every purchaser of municipal bonds acquires and holds them charged with full notice of the possession, or absence, of power in the first instance on the part of the public corporation to issue them; and the question of the authority of a public corporation to issue negotiable bonds cannot be concluded by mere recitals, even as against innocent purchasers thereof. (N. D.) *State v. School District No. 50*, 787.

### *Special Assessment.*

See Judicial Sales.

**4. SPECIAL ASSESSMENT—Personal Liability—Survival.**—The personal liability of a trustee for a special assessment on land to which he holds the legal title survives his death, and may be enforced against his estate in the hands of his personal representatives. (Me.) *Baagor v. Peirce*, 363.



**5. SPECIAL ASSESSMENT.—A Statute Imposing a Personal Liability** upon a land owner to make compensation for increase in the value of his property, caused by adjacent public improvements made at public expense, is constitutional. (Me.) Bangor v. Peirce, 363.

**6. SPECIAL ASSESSMENT.—The Imposition of a Personal Liability** for special assessments for public improvements is not under the power of eminent domain, but under the taxing power of the legislature. (Me.) Bangor v. Peirce, 363.

**7. SPECIAL ASSESSMENT—Personal Liability of Trustee.—A** person vested with legal title to property in trust only may be made personally liable for special assessments for public improvements, although the statute imposing the liability does not provide that he may be reimbursed from the trust estate. Such right of reimbursement exists without being expressed in the statute. (Me.) Bangor v. Peirce, 363.

*Street Improvements—Injunction.*

**8. MUNICIPALITY—Power to Change and Improve Streets.—The** trustees of an incorporated town or village organized under the laws of Oklahoma Territory as extended in force in the state after its erection are authorized and empowered to lay out, open, grade, and otherwise improve the streets, alleys, sewers, sidewalks, and crossings therein, and to keep them in repair, and to vacate the same. Such trustees are authorized in the exercise of such municipal authority to change the grade of a street. (Okl.) Edwards v. Thrash, 975.

**9. MUNICIPALITY—Injunction Against Improvements Until Damages are Paid.—The** jurisdiction of equity may not generally be invoked by an abutting lot owner to restrain a municipality from making upon a street previously dedicated to public use public improvements such as paving and the construction of sidewalks, until such abutting owner has first been compensated for any consequential damages arising solely from the change of a grade. Such abutting lot owner has an adequate remedy at law for such damages. (Okl.) Edwards v. Thrash, 975.

*Municipal Contracts—Bids and Materials.*

**10. MUNICIPAL CONTRACT—Competitive Bids.—The** true intent and purpose of that part of section 4, article 1, chapter 10, page 171, Session Laws of 1907-08, which provides that, "At the time and place specified in such notice, the mayor and council shall examine all bids received, and without unnecessary delay award the contract to the lowest and best bidder," is to secure economy and protect the public from collusive contracts or favoritism or fraud, and to promote actual, honest, effective competition. (Okl.) Reed v. Rockliff-Gibson Const. Co., 937.

**11. MUNICIPAL CONTRACT—Use of Patented Material for Pavement.—Where** the mayor and council of a city of the first class pass a resolution stating the material to be used in certain street improvements shall be "Hassam pavement," a patented material or process, and the notice to contractors published pursuant to said resolution contains a statement that the owner of all patents and process covering the laying of such Hassam pavement will furnish to any bidder to whom the contract may be awarded the right to lay said pavement and furnish to such bidder an expert to give proper advice as to the laying thereof, at a stipulated price, and a written offer by said owner to this effect is on file in the office of the city clerk during all the time said notice is being published and up to the time a contract for doing said work is let, such contract involving in its execution the use of such patented material or process is not invalid in the absence of actual fraud or deception. (Okl.) Reed v. Rockliff-Gibson Const. Co., 937.

*Suit on Contractor's Bond.*

**12. MUNICIPAL CORPORATION—Suit on Contractor's Bond.**—Where work on a sewer is to be paid for in special tax bills against the lots in the district, and the contractor fails to construct the sewer so that the city is compelled to relet the work at a higher price, the loss or burden falls upon the property owners, and the city cannot recover therefor, either as trustee for them or on its own account, upon the bond of the contractor. (Mo.) *St. Louis v. Anderson*, 414.

See Counties; Electricity; Gas.

**NAMES.**

**NAMES.**—A Person may Adopt Any Name, Style, or Signature, wholly different from his own name, by which he may transact business, execute contracts, issue negotiable paper, and sue and be sued. (Ala.) *Manistee Mill Co. v. Hobdy*, 73.

**NAVIGABLE WATERS.**

See Ejectment, 8, 9; Landlord and Tenant, 3.

**NEGLIGENCE.***In General.*

**1. NEGLIGENCE—Injury Occasioned by One of Two Causes—Evidence.**—In an action to recover damages for the death of the plaintiff's intestate, where the fact is that the injury resulting in death was occasioned by one of two causes, for one of which the defendant is responsible, and for the other not, the plaintiff must fail if his evidence does not show that the injury was produced by the former, or if it is just as probable that it was caused by one as by the other. (N. J. L.) *Chester v. Cape May Real Estate Co.*, 614.

*Operating Automobile.*

**2. NEGLIGENCE—Evidence of Speeding of Automobile.**—The fact that someone "is concerned" or frightened by the speed of the vehicle furnishes no reliable guide as to the rate of speed. (Mass.) *Beaucage v. Mercer*, 401.

**3. NEGLIGENCE—Operating Automobile—Joint Enterprise.**—Where two persons are engaged in a joint enterprise in operating an automobile, the contributory negligence of one will bar a recovery by either, if it is in a matter within the scope of the joint agreement. (Mass.) *Beaucage v. Mercer*, 401.

**4. NEGLIGENCE—Towing Automobile—Instructions.**—Where a plaintiff charges negligence in the management of a towing automobile, and also negligence in the manner of hitching the cars together, and there is evidence warranting a finding of either kind of negligence, an instruction is erroneous which authorizes the jury to find for the defendant, even if the accident was due not to the defective hitching, but solely to the manner in which the towing car was managed. (Mass.) *Beaucage v. Mercer*, 401.

See Adjoining Owners; Carriers; Evidence; Master and Servant; Railroads.

**NEGOTIABLE INSTRUMENTS.**

See Bills and Notes.

**NEW TRIAL.**

**1. NEW TRIAL—Newly Discovered Evidence.**—Held, that the court did not err in denying a new trial on the ground of newly

**Discovered evidence.** (Idaho) *Flynn Group Min. Co. v. Murphy*, 201.

**2. NEW TRIAL—Motion After Sentence Imposed.**—The right of a defendant to make a motion for a new trial within the time provided by law is not forfeited by the fact that sentence had been pronounced upon the defendant prior to the making of such motion. (Fla.) *Tillman v. State*, 100.

**3. NEW TRIAL—Newly Discovered Evidence.**—A motion for new trial on the ground of newly discovered evidence is properly overruled where the accused fails to show that the evidence was discovered since the trial and that he could not have discovered it before the trial by the exercise of due diligence. (Fla.) *Enson v. State*, 92.

### NOTARY.

See Affidavit.

### NOTICE.

**1. NOTICE OF CLAIM—Proof of Service on Agent.**—A return of service of a claim for damages, reciting that the service was made on the duly authorized agent of the defendant corporation at a named place, is not inadmissible in evidence because involving a conclusion. (Iowa) *Markley v. Western Union Tel. Co.*, 263.

**2. NOTICE OF CLAIM—Proof of Service by Direct Testimony.**—The service of a claim for damages may be proved by the direct testimony of the person who made the service. (Iowa) *Markley v. Western Union Tel. Co.*, 263.

**3. NOTICE OF CLAIM—Proof of Agency of Person Served.**—The testimony of the plaintiff that he has frequently been at the defendant telegraph corporation's office, and there seen a certain person (to whom the plaintiff's claim for damages against the company has been presented) transacting telegraph business, is admissible to prove his agency. (Iowa) *Markley v. Western Union Tel. Co.*, 263.

**4. NOTICE—Whether Service may be Made by Telegraph.**—The law requiring a written notice to be given to the opposite party or his attorney of record of the time and place of the presentation of a case-made for settlement, and a message containing a proper notice and signed by the party, or another as his attorney, seeking to have the case-made settled, sent by telegraph and properly delivered in writing, is a sufficient notice. (Okl.) *Jones v. Balsley*, 921.

### NUISANCE.

**1. NUISANCE.**—A Noise may Constitute a Nuisance which equity will restrain. (N. J. Eq.) *Reilley v. Curley*, 510.

**2. NUISANCE.**—In Determining Whether a Noise is a Nuisance the character and volume of the noise, the time and duration of its occurrence, the place where it occurs, and the surroundings thereof, are the important and determinative features. (N. J. Eq.) *Reilley v. Curley*, 510.

**3. NUISANCE.**—Where the Noise from Machinery used in depositing stone on a lot in a residential district in a city renders it impossible for people in neighboring houses to converse or use their premises for customary purposes, such operations will be enjoined. (N. J. Eq.) *Reilley v. Curley*, 510.

### OBSTRUCTING JUSTICE.

See Conspiracy, 2-5.

**OFFICERS.*****Misconduct in Office.***

1. **OFFICER—Malconduct in Selling Influence.**—One intrusted with official power, who violates his public obligation and betrays his official trust by selling his official influence or vote in a body of which he is a member, is guilty of malconduct in office. (Fla.) *Etzler v. Brown*, 113.

2. **OFFICER.—Malconduct in Office, Like Misconduct in office,** includes such acts as amount to a breach of the good faith and right action that are impliedly required of all officers. (Fla.) *Etzler v. Brown*, 113.

***Removal from Office.***

3. **OFFICER—Validity of Removal.**—Mandamus is the Proper Proceeding to test the validity of the action of a city council in expelling from office a member of the council. In such an action the court will consider the entire proceeding of the council, including the issues in effect made and the testimony taken before the council as shown by the alternative writ. If the proceedings were illegal or fatally defective, or if the testimony wholly fails to support the charges made, the court will order the officer restored. (Fla.) *Etzler v. Brown*, 113.

4. **OFFICER—Proceedings for Removal Where None are Prescribed.**—Where no particular procedure is prescribed by which a city council may exercise its power to expel an officer of the city, such proceedings should be had as will give the person charged an opportunity to be heard in defense of any charges made against him for which he may be expelled. If the charges made warrant expulsion, and there is legal evidence in support of the charges, and the person has had reasonable opportunity to defend, action taken by the requisite vote of the council in expelling a member of the council will not be disturbed by mandamus proceedings. (Fla.) *Etzler v. Brown*, 113.

5. **OFFICER—Removal—Rules of Procedure.**—In expelling a member of its body a city council does not convict of a crime, and it is not essential that the strict rules of criminal procedure be observed. Where no injury appears to have been done an expelled officer, it is not necessarily illegal for the council, while in executive session considering the action to be taken, to receive and read reports of a detective used in the case, when the action taken was publicly done and duly recorded. (Fla.) *Etzler v. Brown*, 113.

6. **OFFICER—Removal—Allegation of Charges of Malconduct.**—A charge that in effect alleges that a member of a city council agreed for a consideration to aid in securing a valuable contract with the city through a constituted board of the city and to secure an increase in the appropriation for the purposes of the contract to unduly increase the profits, sufficiently sets forth conduct amounting to "disorderly behavior and malconduct in office" for which such officer may be expelled under the statute; and where there is evidence to sustain the charge and no illegality appears in the proceedings of expulsion, the courts will not interfere by mandamus. (Fla.) *Etzler v. Brown*, 113.

See Constitutional Law, 10, 15.

**OIL AND GAS.**

1. **OIL AND GAS LEASE—Construction in Favor of Lessor.**—A different rule of construction obtains as to oil and gas leases from that applied to ordinary leases or to other mining leases; and, owing to the peculiar nature of the mineral, and the danger of loss to the owner from drainage by surrounding wells, such leases are construed most

strongly against the lessee and in favor of the lessor. (Okl.) Superior Oil & Gas Co. v. Mehlin, 942.

**2. OIL AND GAS LEASE—Specific Performance.**—Defendant, an intermarried citizen, allottee, of the Cherokee Nation, June 24, 1904, executed a contract with plaintiff in which he agreed to make an oil and gas lease on his allotment in accordance with the terms and conditions required by the Secretary of the Interior, or if they be not required, a regular oil and gas lease such as was used in the state of Kansas. Action brought for specific performance, in which the lease agreed on and sought to be enforced was shown to contain a proviso allowing plaintiff fifteen years from its execution within which to begin operations, and, for an unspecified consideration, license to extend such term indefinitely; decree by the court denied. Held, not error. (Okl.) Superior Oil & Gas Co. v. Mehlin, 942.

## PARENT AND CHILD.

### *Duty and Authority of Parent.*

**1. PARENT AND CHILD—Authority and Duties of Parent.**—At common law the principal duties of parents to their legitimate children consisted in their maintenance, their protection, and their education. While the municipal laws took care to enforce these duties, yet it was presumed that the natural love and affection implanted by Providence in the breast of every parent had done so more effectually than any law. For this reason, the parent, and especially the father, was vested with supreme control over the child, including its education. Except where modified by statute, that authority still exists. (Okl.) School Board District No. 18 v. Thompson, 861.

### *Custody of Child.*

**2. CUSTODY OF CHILD—Habeas Corpus—Welfare of Infant.**—A court, on habeas corpus, will consider and determine the rightful custody and proper placing of infant children, recognizing the welfare of the child as the cardinal influence, which should not infrequently be allowed as controlling. (N. C.) In re Jones, 670.

**3. CUSTODY OF CHILD—Right of Parents Living Together.**—On the hearing of a petition for a writ of habeas corpus for the possession of an infant, the child's parents, who are living together as lawful man and wife, have prima facie the right to its custody and control. (N. C.) In re Jones, 670.

**4. CUSTODY OF CHILD—Right of Parents Living Apart.**—Where the parents of children live apart, without being divorced, questions, on a petition for a writ of habeas, concerning the disposition of their offspring, must be decided under the provisions of the statute. (N. C.) In re Jones, 670.

**5. PARENT AND CHILD—Custody—Jurisdiction of Court.**—The district court is a court of general jurisdiction in which jurisdiction of actions both legal and equitable is vested, and in the exercise of its equity powers it has jurisdiction to entertain, hear and determine the question of the right of visitation on the part of a parent denied the custody of a child. (Okl.) Allison v. Bryan, 988.

See Adoption; Infants.

## PAROL AFFECTING WRITINGS.

See Evidence, 8-10.

## PARTIES.

**PARTIES—Amendment Changing.**—A Complaint against "Manistee Mill Company" may be amended by substituting as de-

fendant "Vastine J. Herlong, doing business under the name of Manistee Mill Company," it appearing that the individual and the company are one and the same person or entity. Whether the company is a corporation, a partnership, or a name assumed by an individual, is a matter merely of description, as to which an amendment may be made without changing the parties to the suit. (Ala.) *Manistee Mill Co. v. Hobdy*, 73.

## PARTITION.

### *In General.*

1. **PARTITION—Purpose of Compulsory Division.**—Statutes for compulsory partition among tenants in common are for the purpose of avoiding the mischief which may grow out of vicious assertions by cotenants of their right to possession of every part of the land to the embarrassment of others having the same right. (Ala.) *Hamby v. Hamby*, 23.

2. **PARTITION—Controversy as to Legal Title.**—Where the bona fide object of a suit is the partition of land between common owners thereof, some of whom are complainants and the others are defendants, and some of the parties to the suit are in possession, then all controversies as to the legal title and right of possession may and should be settled by the court, as authorized by the statute. But a suit for partition cannot be resorted to as a substitute for the action of ejectment, nor used for the sole purpose of testing a legal title or trying an issue as to it. (Fla.) *Griffith v. Griffith*, 138.

### *Personal Property.*

3. **PARTITION—Personal Property.**—A Court of Equity has Jurisdiction to decree partition of personal property where the same is held by cotenants. (Okl.) *Julian v. Yeoman*, 929.

4. **PARTITION.**—A Cotenant of Personal Property has a Right to have the same partitioned, and the exercise of this right is not subject to the control of another cotenant. (Okl.) *Julian v. Yeoman*, 929.

### *Heirs—Estate of Decedent.*

5. **PARTITION.**—Heirs cannot Maintain a bill for partition against the widow of their ancestor. (Ala.) *Hamby v. Hamby*, 23.

6. **PARTITION.**—Heirs cannot have Partition pending the paramount right of the widow to acquire dower or homestead. (Ala.) *Hamby v. Hamby*, 23.

7. **PARTITION—Administration of Estate of Deceased.**—A bill for partition among heirs does not necessarily involve the administration of the estate of the deceased owner, nor necessarily draw in the chancery court jurisdiction of such administration. (Ala.) *Hamby v. Hamby*, 23.

8. **PARTITION—Jurisdiction of Chancery and Probate Courts.**—If a bill by heirs for partition does not seek to have the estate of the deceased owner administered in the chancery court, but proceeds on the theory that no administration is necessary, a plea alleging that after the filing of the bill the probate court assumed jurisdiction, appointed an administrator, and allotted a homestead to the widow, and alleging that the remainder of the estate is subject to dower and that there are debts for the payment of which there is no personal property, will be sustained and the administration allowed to proceed in the probate court, unless the bill is amended by setting up the proceedings in the probate court, and praying a removal of the administration into the chancery court where all questions may be settled. (Ala.) *Hamby v. Hamby*, 23.

See Infants, 3, 4.

**PARTNERSHIP.**

**PARTNERSHIP.**—A Deed Made to a Firm by the Firm Name instead of the individual members of the firm is not for that reason void. It is a latent ambiguity that may be explained and supplied by parol testimony. (Fla.) *Lafayette Land Co. v. Caswell*, 166.

**PASSENGERS.**

See Carriers.

**PECUNIARY CONDITION.**

See Damages, 1; Malicious Prosecution.

**PERSONAL PROPERTY.**

**PERSONAL PROPERTY.**—Possession as Evidence of Ownership.—A person in actual possession of and having actual control over personal property is prima facie the owner thereof. (N. D.) *Mariner v. Wasser*, 714.

**PHYSICIANS.**

See Contracts, 7-9; License Taxes.

**PLEADING.**

*In General.*

1. **PLEADING.**—Failure to File Reply—Waiver.—Where a defendant voluntarily goes to trial without a reply being filed to the answer when he is not bound to do so, he is thereby held to have waived it, and is regarded as consenting to go to the proof of the answer, as if it were denied. (Okl.) *Allison v. Bryan*, 988.

2. **PLEADING.**—Essential Facts Necessary to be Shown in order to entitle a party to the relief demanded and to which he supposes himself entitled should be stated in the pleadings by allegation or averment, and not by way of recital. (Okl.) *Emmerson v. Botkin*, 953.

3. **PLEADING.**—The Statute of 4 Anne, Chapter 16, Introduced a New System of Pleading, in a great measure, and the pleader was not at liberty to combine the new and the old. He had to take or decline the benefit of the statute. If the defendant took the benefit of the statute, his plea stated that it was by leave of the court first had and obtained, according to the statute in such case made and provided. (Vt.) *Lee v. Follensby*, 1061.

4. **PLEADING.**—Under the Statute of 4 Anne, Chapter 16, There was No Implied Leave of Court to file, in connection with a plea of the general issue, and special pleas under the statute, a plea which was in one part the general issue and in another part a justification with a verification and prayer for judgment, and require the plaintiff to file a replication to that. (Vt.) *Lee v. Follensby*, 1061.

5. **PLEADING.**—Improper Plea Under the Statute of 4 Anne, Chapter 16.—If a defendant pleads the general issue to all the counts in a declaration in trespass, he cannot afterward replead it to a part of the trespasses mentioned in connection with a license justifying the other trespasses therein alleged. Such a plea must be filed as at common law, without the aid of the statute of Anne. (Vt.) *Lee v. Follensby*, 1061.

6. **PLEADING.**—A Bad Pleading is Sufficient if that which it undertakes to answer is bad. (Vt.) *Lee v. Follensby*, 1061.

7. **PLEADING.**—The Sufficiency of the Declaration as a Whole cannot be brought into question by a demurrer to a plea which under-



takes to answer only a single count in the declaration. (Vt.) *Lee v. Follensby*, 1061.

8. **PLEADING.—A Plea is not Double**, in a legal sense, though it sets up several distinct matters, where all the matter contained in it is necessary to make it a full answer to the count which it purports to answer. (Vt.) *Lee v. Follensby*, 1061.

9. **PLEADING—Motion to Strike Amended Answer.**—Where a motion to make an answer more definite and certain is sustained, and the amended answer measurably complies with the order of the court by making the answer more definite and certain in the particulars thereby required, it is error to sustain a motion to strike such amended answer from the files, although it may not state facts sufficient to constitute a defense. (Okl.) *McNinch v. Northwest Thresher Co.*, 803.

#### *Misjoinder.*

10. **PLEADING—Misjoinder.**—A Demurrer does not raise the question of misjoinder unless it goes to the whole declaration. Hence counts added to a declaration are not demurrable for misjoinder because, when filed, they become an integral part of the original declaration. (Vt.) *Lee v. Follensby*, 1061.

11. **PLEADING.—A Misjoinder of Counts may be Remedied by a trial court, before verdict, by striking out designated counts.** (Vt.) *Rowley v. Shepardson*, 1078.

12. **PLEADING—Misjoinder—Amending Verdict.**—If a general verdict is returned and a motion in arrest is filed on the ground of misjoinder of counts, and no evidence has been given on one of the inconsistent counts, or on one set of inconsistent counts, the verdict may be amended, confining it to the counts on which evidence was given, by leave of court before which the cause was tried, and the objection of misjoinder be thereby removed. (Vt.) *Rowley v. Shepardson*, 1078.

13. **PLEADING—Misjoinder—Amending Verdict.**—Where there is a misjoinder of counts in a declaration, and all but one of the inconsistent counts have been stricken out, a general verdict with entire damages cannot be amended by limiting it to a part only of the counts, for it is impossible for the court to say from the record alone, as it must, on which of the counts the damages were assessed, or whether they were apportioned upon the separate counts; and a motion in arrest should be granted unless the plaintiff is awarded and accepts a venire de novo on terms imposed. (Vt.) *Rowley v. Shepardson*, 1078.

#### *Demurrer.*

14. **PLEADING—A Demurrer, in Opening a Record, opens only that branch which it terminates.** (Vt.) *Lee v. Follensby*, 1061.

15. **DEMURRER—Acts Characterized as Fraudulent.**—A demurrer admits the facts pleaded, but not the characterization thereof as fraudulent, which is only a conclusion. (Mo.) *State v. Denton*, 417.

16. **PLEADING.—A General Demurrer to a Petition, which attempts to state several causes of action, should be overruled if any of the statements of causes of action contained in said petition are good.** (Okl.) *Emmerson v. Botkin*, 953.

17. **PLEADING—Demurrer Sustained—Failure to Amend.**—In a case where a pleading is challenged before trial by demurrer, its language, where doubtful, will be construed against the pleader upon the ground that, as he selects the language, he should make his meaning clear, and where in such a case a demurrer is sustained on account of the insufficiency of a pleading, and no application for



amendment is made, it will be presumed that the facts to justify it do not exist. (Okl.) *Emmerson v. Botkin*, 953.

**Amendments.**

18. **PLEADING.—Amendatory Counts That Differ from the Original Only** in the date on which they state an account to have fallen due, the date in each, original and amendatory, being stated under a *videlicet*, are not necessary. (Ala.) *Stephenson v. Allison*, 26.

19. **PLEADING—Discretion in Allowing Amendments.**—It is the settled rule here that our trial courts are vested with a broad discretion in the matter of allowing amendments of the pleadings in a cause, and unless there is a gross and flagrant abuse of this discretion, the appellate court will not interfere with its exercise. (Fla.) *Morgan v. Eaton*, 167.

See Actions; Equity, 4–7.

**POSSESSION.**

See Ejectment; Personal Property.

**POSTOFFICE.**

See Contracts, 5.

**POVERTY, EVIDENCE OF.**

See Malicious Prosecution.

**PREFERRED STOCK.**

See Corporations, 3–5.

**PRIMARY ELECTIONS.**

See Elections.

**PRINCIPAL AND AGENT.**

1. **AGENCY—Revocation of Agent's Authority.**—The authority of an agent may be revoked by the principal at will at any time, and with or without good reason therefor, except where the authority is coupled with an interest. (S. C.) *McCallum v. Grier*, 1037.

2. **AGENCY—Liability of Principal for Statements of Agent.**—A principal is responsible to third persons, not only for the statements and acts of his agent acting within his actual authority, but also for such acts and statements as he may do and make acting within the apparent scope of the authority conferred. (Okl.) *Howe v. Martin*, 840.

3. **AGENCY.—The Doctrine of Ratification is not Applicable** to a case where the person who makes the contract was not at the time, and did not profess or assume to be, acting on behalf of a principal. (N. J. L.) *Schlessinger v. Forest Products Co.*, 627.

4. **AGENCY.—If the Authority of an Agent of the Proprietor of a Garage** is limited to the selection of only the necessary number of men to take charge of a car sent out to tow in a disabled car, and he selects more, the surplus men cannot be regarded as the servants of the proprietor for whose negligence he will be liable; but if the agent is empowered to send as many men as he thinks necessary, and sends such men as he thinks necessary, but more than in fact are necessary, all the men so sent are the servants of the proprietor, whether or not they are in fact needed. (Mass.) *Beaucage v. Mercer*, 401.

5. **AGENCY—Evidence of Scope of Authority.**—On the issue of the scope of an agent's authority, a witness may tell what he saw the agent do, but not state the inferences he drew therefrom. (Mass.) *Beaucage v. Mercer*, 401.

6. **AGENCY—Notice of Limited Authority—Estoppel.**—The principle that one who deals with an agent of limited authority must at his peril discover the limits of that authority does not apply where the principal is estopped by his acts and culpable silence to deny the authority in question. (Vt.) *Valiquette v. Clark Bros. Coal Min. Co.*, 1104.

7. **AGENTS' AUTHORITY to Draw Draft Inferred from Prior Acts.**—An agent is accredited by his principal as having authority to draw a draft where three like prior drafts were drawn by him without authority but were paid by the principal, as such payment might well have induced the person dealing with him to believe that authority existed, and to take the last draft on the faith of such belief. (Vt.) *Valiquette v. Clark Bros. Coal Min. Co.*, 1104.

8. **AGENTS' AUTHORITY to Draw Draft Inferred from Prior Acts.**—If a principal has paid three drafts drawn by his agent without authority, and does not want to be bound by a fourth, it should give notice to that effect to the person dealing with the agent; and, if he does not do so, his conduct and silence amount to an admission of authority in the agent to draw, and that is an admission of an obligation to accept. (Vt.) *Valiquette v. Clark Bros. Coal Min. Co.*, 1104.

9. **AGENCY—Evidence That Third Person is Agent.**—When a general authority to do an act is alleged, and the plaintiff relies on the defendant's having held out a third person as his agent, other instances of the plaintiff's having treated the person as agent for such an act are receivable to show a general holding out as agent. The principle of the rule is that the instances must be numerous enough, and occurred under conditions so similar, as to indicate a system, plan or habit of doing that particular thing under similar circumstances; and the only question in administering the rule is, whether the instances produced have any real probative value to show such system, plan or habit. (Vt.) *Valiquette v. Clark Bros. Coal Min. Co.*, 1104.

10. **AGENCY—Implied Authority.**—A General Authority to do an act is an implied authority derived from a course of dealing, or from a number of acts of a particular kind authorized or assented to; and such an authority enables the agent to bind his principal, without orders, in dealing with those who have no notice of the want of lawful power and who act without collusion. (Vt.) *Valiquette v. Clark Bros. Coal Min. Co.*, 1104.

See Brokers; Corporations, 15, 16; Evidence, 5, 6; Notice, 1-3.

#### **PRINCIPAL AND SURETY.**

**SURETYSHIP—Extent of Liability on Bond.**—On failure to perform the condition of a bond, the penalty becomes an absolute debt, and at law is recoverable; but in equity relief is granted against the enforcement of the penalty on payment of a sum as damages ascertained to be an equitable equivalent of the condition not performed. (N. J. Eq.) *Ordinary v. Connolly*, 577.

See Attachment, 3-5; Bankruptcy, 8; Cancellation of Instruments, 1-3; Executors and Administrators, 3-7; Municipal Corporations, 12.

#### **PROBATE LAW.**

See Executors and Administrators; Guardian and Ward; Wills.

#### **PROCESS.**

See Infants, 1-4; Judgment, 1.

#### **PROPERTY.**

See Personal Property.

**PUBLIC LANDS.**

**1. PUBLIC LAND—Rival Homestead Claimants Before Issuance of Patent.**—In an action by one of two rival homestead claimants to a tract of public land to quiet his title and enjoin the other claimant from interfering with his possession thereof, it is proper for the state courts to decline to pass upon the question of ownership until after the government has parted with its title by duly issuing a patent therefor to one of such claimants. (Neb.) *Rupke v. Moran*, 489.

**2. PUBLIC LAND—Rival Homestead Claimants—Injunction.**—In a proper case the district court may grant a restraining order to the one who holds the receiver's final receipt for the land in question in so far as it may be necessary to protect his homestead rights. (Neb.) *Rupke v. Moran*, 489.

**QUIETING TITLE.**

**1. QUIETING TITLE—Personal Property.**—A complaint to remove a cloud on the title to personal property, such as money to be realized from the sale of land by a trustee in a will, may be maintained. (S. C.) *Earle v. Maxwell*, 1012.

**2. QUIETING TITLE—Duty of Plaintiff to Establish Title as Alleged.**—In an action to determine adverse claims to real property, it is incumbent upon plaintiff to establish his title to the property as alleged by him. This the plaintiff failed to do, and the action was therefore properly dismissed. (N. D.) *Hebden v. Bina*, 700.

**3. QUIETING TITLE—Sufficiency of Evidence to Show Possession.**—Evidence examined, and held insufficient to show possession of the real property in plaintiff prior to the commencement of the action, and hence the prima facie presumption of title resulting from possession does not apply in plaintiff's behalf. (N. D.) *Hebden v. Bina*, 700.

See Records.

**RAILROADS.***Crossing Track in Rear of Train.*

**1. RAILROADS—Crossing Track in Rear of Train.**—A declaration for negligent injuries averring that the railroad company unreasonably detained a freight train with its rear car across the principal street of a village, that the plaintiff was proceeding cautiously and prudently to pass around said car when the train without warning suddenly, swiftly and violently started backward upon her, is not ill because of failure to aver that the defendant's agents actually saw her in time to prevent the accident. (Fla.) *Johnson v. Atlantic Coast Line R. R. Co.*, 126.

**2. RAILROADS—Crossing Track in Rear of Train.**—One finding the highway blocked an unreasonable time by a train of cars is not a trespasser upon the railroad's property in passing prudently around the end of the train. (Fla.) *Johnson v. Atlantic Coast Line R. R. Co.*, 126.

*Trespasser on Bridge or Track.*

**3. RAILROADS—Trespasser Crossing Bridge.**—A person who undertakes to walk upon a long railroad bridge over a river, in spite of a conspicuous posted notice not to do so, is a trespasser, although many persons actually use the bridge to cross without objection by the railroad authorities, and one or two planks are laid on the cross-ties and used as a walkway, particularly where a safe public bridge over the river is within easy access. (S. C.) *Lamb v. Southern Railway*, 1030.

**4. RAILROADS.—The Contributory Negligence of a Trespasser or licensee in walking upon a long railroad bridge over a river will defeat a recovery for his death or injury caused by the negligence of the railroad company. (S. C.) Lamb v. Southern Railway, 1030.**

**5. RAILROADS—Trespasser—Wanton Injury.—If a trespasser is killed, while walking upon a long railroad bridge over a river, through the recklessness or wantonness of persons in charge of a railroad engine, his contributory negligence will not defeat a recovery for his death. (S. C.) Lamb v. Southern Railway, 1030.**

**6. RAILROADS—Trespasser.—An Inference of Indifference and Wanton Disregard of the safety of trespassers may be drawn from evidence that a railroad engine, without cars and without a headlight or signals, was run, between sundown and dark, at high speed across a long bridge; that the engineer saw a man on the bridge some distance ahead of him and "slowed up"; that the engineer saw the man step from the track into a platform, where there was a water barrel; that the engine was then pulled ahead; and that the engineer had said, after coming off the witness-stand, that he did knock the man off, especially where the railroad company had notice that many persons were trespassing on the bridge notwithstanding a conspicuous posted notice not to do so. (S. C.) Lamb v. Southern Railway, 1030.**

#### *Actions.*

**7. RAILROADS.—A Nonsuit is Properly Refused in an action for damages against a railroad company for killing a trespasser who was walking upon a long railroad bridge over a river, where there is sufficient evidence from which an inference of indifference and wanton disregard of his safety might be drawn. (S. C.) Lamb v. Southern Railway, 1030.**

**8. RAILROADS.—Hearsay Testimony That a Person had crossed a railroad bridge is of no consequence after the introduction of undisputed evidence that a great number of persons had crossed. (S. C.) Lamb v. Southern Railway, 1030.**

**9. RAILROADS.—Negative Evidence, if Relevant, is admissible, as that the witness had never heard of the railroad company making any objections to persons crossing its bridge. (S. C.) Lamb v. Southern Railway, 1030.**

**10. RAILROADS—Instructions—Harmless Omission.—In an action against a railroad company, an omission to give an instruction substantially included in another instruction is not material. (S. C.) Lamb v. Southern Railway, 1030.**

See Carriers.

#### *Note.*

Railroads, regulation by corporation commission, 1006–1011.

### RECEIVERS.

**FOREIGN RECEIVER.—The Recognition of a Foreign Receiver is only a matter of comity, and is not extended when the rights of a citizen would be injuriously affected. (Mo.) State v. Denton, 417.**

### RECORDS.

**1. TORRENS LAW—Abstracts as Evidence—Constitutional Law. The amendment to the Illinois Torrens law which authorizes the examiner to receive in evidence, without the sanction of an oath, abstracts of title, or certified copies thereof, made in the ordinary course of business by abstractors, is constitutional. (Ill.) Waugh v. Glos, 259.**

**2. TORRENS LAW.—The Legislature may Provide a Rule of Evidence** for proceedings under the Torrens system of registration without extending the rule to all forms of actions in which the title to real estate is involved. (Ill.) *Waugh v. Glos*, 259.

**3. TORRENS LAW—Sufficiency of Evidence.—In Applications** under the Torrens system for the initial registration of titles in fee simple, it is not sufficient for the applicant to prove only such a title as would enable him to maintain a bill to remove a cloud; he must establish a title which is good against the world. But he is not required to show the invalidity of a tax deed held by the defendant; the burden of establishing its validity rests upon the holder. (Ill.) *Waugh v. Glos*, 259.

**4. TORRENS LAW—Costs.—The Mere Fact That a Person Appears**, introducing no evidence, and insists upon the applicant establishing her title by competent evidence, furnishes no reason for charging him with any part of the cost of the proceeding. (Ill.) *Waugh v. Glos*, 259.

**5. TORRENS LAW—Burden of Proof—Costs.—Upon an application** to register title the burden of proving the validity of his title is upon the holder of a tax deed. Neither the necessity for such a proceeding nor the cost of it is affected by a tender to the holder of a tax title who introduced no evidence, and the refusal of such tender, if made, is therefore no ground for charging the costs against the holder of such title. (Ill.) *Waugh v. Glos*, 259.

See Mortgages, 5.

## REDEMPTION.

See Mortgages, 26-35.

## REFEREES.

**REFEREE—Power as a Judicial Officer.—Under our constitution** and statutes, a referee is a judicial officer appointed by the circuit court; and, being substituted in the place and stead of the official judge, such referee has, over the case referred to him, all the powers of the court in which the cause is pending. (Fla.) *Robertson v. Wilson*, 128.

## REFORMATION OF INSTRUMENT.

**REFORMATION OF INSTRUMENT.—The Right to the Reformation** of an instrument is not absolute, but depends on an equitable showing. (Fla.) *Phenix Ins. Co. v. Hilliard*, 171.

See Insurance, 5, 6.

## REGISTER OF DEEDS.

**1. REGISTER OF DEEDS—Negligence in Failing to Keep Index.** Under sections 2452, 2453, Revised Codes of 1905, it is made the duty of the register of deeds of each county to keep a numerical index in his office in which shall be noted, opposite the description of each tract, the volume and page of each mortgage or other instrument affecting the title thereto. Held, that defendant's failure for over two months after a mortgage was duly recorded to note the same in such numerical index is negligence per se, rendering him liable to one who, in reliance on such index, purchases the property and sustains damage as the necessary and proximate result of such official neglect. (N. D.) *Rising v. Dickinson*, 779.

**2. REGISTER OF DEEDS—Failure to Keep Index—Contributory Negligence.—It is essential to a recovery for such negligence** that plaintiff be free from contributory negligence, but it was not con-

tributory negligence on plaintiff's part in failing to examine the grantor and grantee index wherein such mortgage was noted. (N. D.) *Rising v. Dickinson*, 779.

**3. REGISTER OF DEEDS—Liability in Damages.**—The register of deeds is a ministerial officer, and as such is liable at common law in the absence of an express statute, to an action for damages caused by his failure or neglect to perform the duties of his office, or for their negligent or illegal performance. (N. D.) *Rising v. Dickinson*, 779.

**4. REGISTER OF DEEDS—Action Against for Negligence.**—The action was tried on the theory, and it is, in effect, conceded that it was essential to a recovery, however, that plaintiff should prove that one S., the mortgagor, and the person from whom he purchased the premises, and who gave him a warranty deed containing a covenant against encumbrances, was insolvent, and hence unable to pay the mortgage indebtedness or to respond in damages for the breach of her covenant. Evidence examined, and held insufficient, for reasons stated in the opinion, to establish such fact. (N. D.) *Rising v. Dickinson*, 779.

#### **REGISTRATION UNDER TORRENS SYSTEM.**

See Records.

#### **RELEASE.**

**JOINT OBLIGORS—Effect of Judgment Against One.**—The common-law rule governing the enforcement of joint obligations, and making a judgment against one or more joint makers of a promissory note a bar to further proceedings against the other joint makers, has been so far modified by our statute as that obligations appearing to be joint will be presumed to be joint and several until such presumption is in some manner overcome; and, unless such presumption is overcome, any one or more of the joint makers of a promissory note may be proceeded against severally without prejudice to the rights of holder against other makers. (Okl.) *McMaster v. City National Bank*, 831.

See Attorney and Client, 1-4; Mortgages, 10-13.

Note.

**Release, joint obligors, consent of all to release**, 836.

joint obligors, essential elements of release, 835.

joint obligors, intention of parties as governing release, 837.

joint obligors, operation of receipt as release, 836.

joint obligors, release of one as release of all, 834.

joint obligors, release of one, when not release of all, 837-840.

joint obligors, release of one reserving right to pursue others, 839.

joint obligors, statutory modification of rule of release, 840.

joint obligors, subject matter of instrument of release, 836.

seals and their operation upon, 839.

#### **REMAINDERS.**

**1. REMAINDER—Action to Protect Contingent Interest.**—Under the provisions of section 4538 of the Revised Codes, an action may be maintained by a remainderman for the protection of a contingent remainder as against one who claims an estate or interest in the property adverse to such remainderman. (Idaho) *Wilson v. Linder*, 213.

**2. A CONTINGENT REMAINDER in the Proceeds of Land is personalty.** (S. C.) *Earle v. Maxwell*, 1012.

**3. CONTINGENT REMAINDER.**—An Assignment or Mortgage of a contingent remainder in land is good, at least in equity. (S. C.) Earle v. Maxwell, 1012.

**4. CONTINGENT REMAINDER**—Assignment or Mortgage.—While a paper in the form of a mortgage of a possible future interest in personal property, such as money to be realized from the sale of land by a trustee in a will, cannot operate as a mortgage, it is good in equity as an assignment. (S. C.) Earle v. Maxwell, 1012.

**5. REMAINDER**—Rule in Shelley's Case.—Under the provisions of section 3076 of the Revised Codes, the common-law rule, generally known as the "Rule in Shelley's Case," has been abrogated, and the term "heirs" has been changed from a word of limitation to one of purchase. (Idaho) Wilson v. Linder, 213.

See Bankruptcy, 2-4; Corporations, 6; Wills, 9-17.

### REMOVAL OF CAUSES.

**REMOVAL OF CAUSE**—Colorable Assignment of Claim.—Where there is nothing but the barest inference that a cause of action was assigned to prevent a removal to the federal courts, the maintenance of the action in the state court is not thereby defeated. (Iowa) Wells v. Western Union Tel. Co., 317.

### REPUTATION.

See Evidence, 11, 12.

### RES JUDICATA.

See Judgments, 2-4.

### RESTRAINT OF PRACTICE OF MEDICINE.

See Contracts, 7-9.

### RIPARIAN RIGHTS.

See Waters and Watercourses, 1-4.

### SALES.

#### *In General.*

**1. SALE**—Acceptance.—An Affirmative Answer to a Proposition to purchase coal, followed by a delivery of a major part of the fuel referred to, may be taken as satisfactory evidence of an acceptance of the proposition, although the answer indicates there may be a brief delay in the first delivery of the coal. (Neb.) Sheridan Coal Co. v. C. W. Hull Co., 435.

**2. SALES**—Caveat Emptor—Cattle Infected With Fever Ticks.—A vendor, who sells cattle at a sound price, knowing that they have Texas fever ticks on them, or any other infection affecting their value for the purpose for which they are bought, the infection not being easily detected by those having had no experience with it, and who does not disclose such knowledge to the vendee, is guilty of the fraudulent concealment of a latent defect, for which he must answer, and the rule of caveat emptor does not apply. But the vendor is not answerable unless he has knowledge, prior to the time the sale is consummated, that the cattle had such ticks on them. (Okl.) Puls v. Hornbeck, 883.

**3. SALES.**—There can be No Rescission of an Executed Sale for breach of warranty, except: 1. Where this right is given in the contract of purchase; 2. Where the seller is guilty of fraud; 3. Where



there has been an entire failure of consideration. (S. C.) *First Nat. Bank v. Badham*, 1043.

*Conditional Sales.*

**4. CONDITIONAL SALE—Rights and Liabilities of Parties.—**A conditional sale of personal property by which the vendee takes possession of the property with an unconditional promise to pay for it, but the vendor retains the title till payment in full of the purchase price is made, confers upon the vendor the absolute right of the purchase price, and imposes upon the vendee the unconditional obligation to pay the purchase price, and also casts upon the vendee all the risks of loss incident to the full and complete ownership of the property, unless otherwise specially provided by contract. (Fla.) *Phoenix Ins. Co. v. Hilliard*, 171.

**5. CONDITIONAL SALE—Property Retains Its Character as Personalty.—**If a vendor sells personal property, such as a steam cotton-gin, takes notes for the purchase money, delivers possession, retains title as security, and has the contract properly registered according to the statute, the property retains its character as personalty both as between the parties and others claiming adversely to the lien. (N. C.) *Lancaster v. Southern Ins. Co.*, 665.

**6. CONDITIONAL SALE—Loss of Property by Fire.—**If a vendor sells a steam cotton-gin, takes notes for the purchase price, retains title as security for the purchase money, and delivers possession, the obligation to pay the notes is absolute, and, if the gin outfit is destroyed by fire, the loss must fall on the vendee. (N. C.) *Lancaster v. Southern Ins. Co.*, 665.

**7. CONDITIONAL SALE—Destruction of Property.—**Where personal property is sold and delivered to the vendee under an agreement that title is to remain in the vendor until payment, the loss or destruction of the property while in the possession of the vendee before payment, without his fault, does not relieve him from the obligation to pay the price. (Okl.) *Harley & Willis v. Stanley*, 900.

See Contracts, 2, 3; Frauds, Statute of.

*Note.*

Sale, conditional, whether loss falls on vendee if goods are destroyed, 903-905.

destruction of property before price is paid, 903-905.

**SCHOOLS AND SCHOOL DISTRICTS.**

**1. SCHOOLS—Courses of Study—Rights of Parent.—**The school authorities of this state have the power to classify and grade the scholars in their respective districts, and cause them to be taught in such departments as they may deem expedient. They may also prescribe the courses of study and text-books for the use of the schools, and such reasonable rules and regulations as they may think needful. They may also require prompt attendance, respectful deportment, and diligence in study. The parent, however, has a right to make a reasonable selection from the prescribed course of study for his child to pursue, and this selection must be respected by the school authorities, as the right of the parent in that regard is superior to that of the school officers and the teachers. (Okl.) *School Board District No. 18 v. Thompson*, 861.

**2. SCHOOL BOARD—Contract by Individual Members With Teacher.—**The power to make or alter contracts for a school district is vested in a board of directors, and in order to bind the district and to make or alter a valid contract in respect to the hiring of teachers, it is necessary that the members of the board act as a board in its capacity as such. In such a case the acts and declara-



tions of individual members of the board, independent and apart, will not create contract enforceable against the district. (Okl.) School District No. 39 v. Shelton, 962.

**3. SCHOOL BONDS—When Void.**—The Municipal Bonds of defendant school district which are sued upon in this case were issued without first submitting to the electors of the school district the question of their issuance, and, furthermore, the school district had no power to issue the same by the express provisions of the act under which it is claimed they were issued as there were not twenty-five legal votes cast in such district at the preceding annual school election therein. Chapter 11, page 39, Laws of 1887, under which plaintiff contends such bonds were issued, is printed upon the back of the bonds, and section 9 thereof expressly provides that the question of refunding prior indebtedness shall be first submitted to a vote of the qualified electors of the district after giving certain notice therein prescribed of an election for such purpose, and that the proposition to issue such bonds must receive the affirmative votes of at least two-thirds of all the votes cast; also, that no school district in which less than twenty-five legal votes were cast at the annual school election next preceding the issuance of such bonds shall avail itself of the provisions of this act. Held, for these reasons, that such bonds are void. (N. D.) State v. School District No. 50, 787.

**4. SCHOOL BONDS—Recitals—Estoppel—Innocent Purchaser.**—The bonds in suit contain a recital to the effect that they are issued for the purpose of refunding present indebtedness "as authorized by act of the legislative assembly approved March 11, 1887" (Laws 1887, p. 39, c. 11), entitled "An act to provide for refunding the outstanding indebtedness which existed prior to July 30, 1886, of any incorporated board of education or school district in the territory of Dakota." Held, that such recital does not estop the school district from urging the defense, even as against an innocent purchaser, that such bonds were illegally issued. (N. D.) State v. School District No. 50, 787.

**5. SCHOOL BONDS—Authority to Issue—Submission to Voters.** The school district possessed no implied authority to issue such bonds on account of the fact that they were refunding bonds and issued in lieu of presumably valid obligations of the district, because by the express provisions of section 9 aforesaid, their issuance was prohibited because of the fact that less than twenty-five legal votes were cast at the preceding annual school election. (N. D.) State v. School District No. 50, 787.

Note.

Seals, effect upon instruments of release, 839.

## SEDUCTION.

**1. SEDUCTION.—A Promise to Marry in the Future** when the promisor has finished a course of study at school, followed by intercourse consented to on the faith thereof, will sustain a criminal prosecution for seduction, whether or not the time for consummating the marriage has expired. (Mo.) State v. Mitchell, 425.

**2. SEDUCTION—Promise to Marry in Future.**—An instruction in a seduction case that if the defendant had intercourse with the prosecuting witness because he promised to marry her after he got through school and because of her love for him, and he in good faith made the promise and intends to carry it out, the jury must acquit, is not the law. The offense does not depend upon the expiration of the time when the marriage was to be consummated. (Mo.) State v. Mitchell, 425.

3. **SEDUCTION—Confining Offense to Particular Date.**—The jury should not be instructed in a seduction case that to authorize a conviction the intercourse must have been on a specified date. If the defendant, under and by a promise to marry, at any time within three years before the filing of the information, debauched the prosecuting witness, he may be convicted. (Mo.) *State v. Mitchell*, 425.

4. **SEDUCTION—What Constitutes.**—Illicit Intercourse permitted by a woman as a mere barter and trade for a promise of marriage is not seduction; there must be the exercise of certain influences upon her affections by reason of the promise, and to some extent the bringing into play of certain arts and blandishments, reasonably sufficient, aided by the promise to marry, to have her yield to the desires of the defendant. (Mo.) *State v. Mitchell*, 425.

#### **SELF-DEFENSE.**

See Homicide.

#### **SENATORS.**

See Elections, 2-8.

#### **SENTENCE.**

See Criminal Law, 11-15.

#### **SETOFF AND COUNTERCLAIM.**

**COUNTERCLAIM—Pleading.**—Where the sufficiency of an Answer to support a counterclaim is not questioned until after judgment, all reasonable intendments should be indulged in support of the pleading. (Neb.) *Sheridan Coal Co. v. C. W. Hull Co.*, 435.

Note.

Signature to Contract given in ignorance of contents, 810-817.

#### **SHELLEY'S CASE.**

See Remainders, 5.

#### **SHERIFF'S DUTY.**

See Executions, 2-4.

#### **SIGNATURE.**

See Contracts, 1.

#### **SPECIFIC PERFORMANCE.**

1. **SPECIFIC PERFORMANCE—Land in Another County—Venue.** A suit to enforce specific performance of an agreement to convey land need not be brought in the county where the land lies. (Fla.) *Morgan v. Eaton*, 167.

2. **SPECIFIC PERFORMANCE—Suit by Vendor of Land.**—It is the settled rule that the remedy by specific performance is mutual as between vendor and vendee, and where the remedy is sought by the vendor, it makes no difference that the relief he seeks thereby is only to enforce the payment of a specific sum of money. And a suit by a vendor for specific performance of a contract for the sale of land cannot be defeated on the ground that there is a remedy at law. (Fla.) *Morgan v. Eaton*, 167.

3. **SPECIFIC PERFORMANCE—Unfair or Unjust Contract.**—Specific performance will not lie, unless the agreement is certain, fair and just in all its parts; and in such an action any element showing

that the contract is unfair, unjust and against good conscience will justify the court in refusing such decree, although the contract, had it been executed, might offer no sufficient ground for cancellation. (Okl.) Superior Oil & Gas Co. v. Mehlin, 942.

**4. SPECIFIC PERFORMANCE—Executory Optional Contract.**—An executory contract, which under its terms leaves it optional with one party whether or not he will proceed with the contemplated enterprise, makes the same likewise optional with the other, and specific performance will not be decreed. (Okl.) Superior Oil & Gas Co. v. Mehlin, 942.

**5. SPECIFIC PERFORMANCE—Sale by Broker After Authority Revoked.**—Where a broker makes a sale of land after his authority has been revoked, the purchaser, though not then aware of the revocation, cannot enforce specific performance against the principal. (S. C.) McCallum v. Grier, 1037.

**6. SPECIFIC PERFORMANCE—Compensation—Lien for Reimbursement.**—When specific performance cannot be decreed, compensation will be allowed to the extent of the purchase money actually paid upon the alleged contract, and, if the facts show that the plaintiff is entitled to have a lien declared upon the premises for reimbursement, the court may retain the case for the purpose of affording such relief, and compensation may be awarded for improvements made in good faith. (Okl.) Superior Oil & Gas Co. v. Mehlin, 942.

**7. SPECIFIC PERFORMANCE—Compensation on Denial of Equitable Relief.**—In a case where specific performance requiring execution of a contract is not decreed by reason of a want of equity growing out of the peculiar character of the contract involved, it is the duty of the court to retain jurisdiction of the action, and to decree compensation to the plaintiff to the extent of the money by him paid, and interest thereon, and also for all beneficial and lasting improvements which in carrying out the terms of the alleged contract he may have in good faith made upon the premises. (Okl.) Superior Oil & Gas Co. v. Mehlin, 942.

**8. SPECIFIC PERFORMANCE—Compensation on Denial of Equitable Relief.**—Where, in an action for specific performance of a lease, the same is found to be of a class which will not support a decree, but there is no fraud, and plaintiff has paid a money consideration thereon, and has in good faith entered under the same and made valuable and lasting improvements, a court in denying specific performance will grant plaintiff an opportunity to establish his right to compensation from defendant, and decree the same a lien upon the premises involved. (Okl.) Superior Oil & Gas Co. v. Mehlin, 942.

See Oil and Gas.

### STARE DECISIS.

See Courts, 2.

### STATUTE OF FRAUDS.

See Frauds, Statute of.

Note.

Statute of Frauds. See Frauds, Statute of.

### STATUTE OF LIMITATIONS.

See Limitation of Actions.

### STATUTES.

**1. STATUTES.**—Punctuation of Statutes, although often disregarded, may be resorted to when it tends to throw light upon the

meaning of the language. (Mass.) *Greenough v. Phoenix Ins. Co.*, 383.

2. **STATUTES.—The General Rule That a Modifying Clause is** ordinarily to be confined to the last antecedent does not apply where a consideration of the subject matter requires a different construction. (Mass.) *Greenough v. Phoenix Ins. Co.*, 383.

3. **STATUTES—Repugnant Provisions in Compilation.—**The commissioners who compiled the General Statutes under the act of 1903 were authorized "to revise, simplify, arrange and consolidate all the public statutes of the state of Florida, which are general and permanent in their nature, and which shall be in force in this state at the time such commissioners shall make their final report." Under this authority if repugnant provisions of prior statutes are compiled and adopted in the General Statutes, it must be presumed that the repugnancy was overlooked, and that it was the intention of the compilers and of the legislature to bring forward the latest expression of the legislative will. (Fla.) *County Commrs. of Hillsborough v. Jackson*, 110.

4. **STATUTES—Conflicting Provisions in Compilation.—**Where there are two conflicting sections of a general compilation or code of statute laws, that section should prevail which is derived from a source that can be considered as the last expression of the law-making power in enacting separate statutes upon the same subject (Fla.) *County Commrs. of Hillsborough v. Jackson*, 110.

5. **STATUTES—Conflicting Provisions in Compilation.—**Sections 976 and 4108 of the General Statutes of the state of Florida are conflicting, and as section 976 was the latest expression of the legislature in enacting separate laws upon the same subject, such section 976 must prevail even though section 4108 appears in the General Statutes subsequent in place and numerical order. (Fla.) *County Commrs. of Hillsborough v. Jackson*, 110.

See Constitutional Law.

#### **STAY OF JUDGMENT.**

See Appeal and Error, 1; Elections, 1.

#### **STOCK AND STOCKHOLDERS.**

See Corporations.

#### **SUBROGATION.**

See Insurance, 29.

#### **SUMMONS.**

See Infants, 1-4; Judgment, 1.

#### **SUNDAY CONTRACTS.**

1. **SUNDAY CONTRACT—Ratification.—**A Contract Illegal because made on Sunday cannot be validated by subsequent ratification. (N. J. Eq.) *Burr v. Nivison*, 554.

2. **SUNDAY CONTRACT—Consummation of Conveyance on Secular Day.—**Negotiations for the sale and conveyance of land in New Jersey were had in Connecticut, on Sunday, between the vendor and the agent of the vendee; the written memorandum required by the statute of frauds was signed by the vendor and delivered to the agent, who in return delivered the vendee's check, made and dated on Saturday, for the first payment; the memorandum embodied terms to which the agent was not authorized to agree, and it was not

delivered to the vendee nor assented to by him until Monday. Held, that the contract was made on Monday, and not invalid as a Sunday contract. (N. J. Eq.) *Burr v. Nivison*, 554.

#### **SUPERSEDEAS.**

See Appeal and Error, 1; Elections, 1.

#### **SURETYSHIP.**

See Principal and Surety.

#### **SURFACE WATERS.**

See Waters and Watercourses, 8-19.

#### **TAXATION.**

**A TAX SALE is Void as Against Public Policy**, where the tax collector struck off the property to the plaintiff on the strength of the latter's promise, made prior to the sale, and received as a bid, that he would pay the taxes and costs for the land, especially where the plaintiff was not present at the sale, and there was no other bidder. Under these circumstances, the collector was acting for the plaintiff, which relation was inconsistent with his official duty and forbidden by the law. (Vt.) *Hubbard v. Taylor*, 1071.

See Counties; License Taxes; Municipal Corporations, 4-7.

#### **TELEGRAPHS AND TELEPHONES.**

##### *In General.*

**1. TELEGRAMS—Notice of Contents—Negligent Transmission.** In order to charge a telegraph company with liability for damages growing out of its neglect to correctly transmit a dispatch ordering the purchase or sale of a certain commodity, it is not necessary that the message should, on its face, disclose the nature of the business, so that the operator may understand its meaning as to the article, quantity, quality and price. If enough appears in the message to show that it relates to a commercial business transaction between the correspondents, it will be sufficient to charge the company with damages resulting from its negligent transmission. (Okl.) *Western Union Tel. Co. v. Blackwell etc. Co.*, 893.

**2. TELEGRAMS—Mistake in Transmission—Damages for Loss of Sale.**—A postal card containing the following offer was received by plaintiff: "Gainesville, Tex., June 29, 1903. We bid you track A. T. & S. F. Ry., Blackwell, acceptance to reach us here by 9:30 a. m. next business day, shipment within 20 days, 2 Red Wheat, 63¾. Wire acceptance to Gainesville. State price when telegraphing acceptance. We reserve the right to reject amounts in excess of 10,000 bushels. Richardson & Co." Plaintiff, in ample time for delivery in due course within its terms, answered by cipher message, which, translated, read as follows: "We accept your bid 63¾ cents, 20,000 bushels wheat, shipment within 20 days. Give shipping instructions." The address of the sendee of the message was plainly written; but the same was by the telegraph company negligently missent, and by reason thereof arrived too late. On this account no sale was made, and plaintiff sustained loss. There was testimony establishing that, if the message had been delivered, the amount of wheat offered would have been purchased. Held, the telegraph company was liable for the loss sustained. (Okl.) *Western Union Tel. Co. v. Blackwell etc. Co.*, 893.

**3. TELEGRAM.**—The Addressee of a Telegram, although having no direct contract relations with the company, may recover damages

sustained by him through the erroneous transmission or negligent delay of the message. (Iowa) *Wells v. Western Union Tel. Co.*, 317.

4. **TELEGRAMS—Action in Tort by Sendee.**—The sendee of a telegram may bring his action in tort for a negligent delay in delivering the message. (Iowa) *Markley v. Western Union Tel. Co.*, 263.

*Forged Message.*

5. **TELEGRAM—Forged Message—Notice of Claim.**—A statute requiring a claim against a telegraph company for an erroneous transmission or an unreasonable delay of a message to be presented within a certain time does not apply to a claim for sending a fictitious or forged message. (Iowa) *Wells v. Western Union Tel. Co.*, 317.

6. **TELEGRAM—Forged Message.**—No Presumption of Negligence arises against a telegraph company in sending a forged message. (Iowa) *Wells v. Western Union Tel. Co.*, 317.

7. **TELEGRAM.**—Where a Forged Telegram Containing a Promise to Honor a certain check is sent to a bank, and the bank, relying thereon, pays the check to an insolvent, the bank may maintain an action against the telegraph company, if it was negligent in sending the message for the resulting loss. (Iowa) *Wells v. Western Union Tel. Co.*, 317.

8. **TELEGRAM—Liability for Sending Forged Message.**—A telegraph company cannot be a party to an actionable fraud in sending a forged telegram, without submitting itself to liability for the injury. (Iowa) *Wells v. Western Union Tel. Co.*, 317.

9. **TELEGRAM—Liability for Sending Forged Message.**—To render a telegraph company liable for sending a forged message, it is not necessary that the exact damages should have been foreseen. (Iowa) *Wells v. Western Union Tel. Co.*, 317.

10. **TELEGRAM—Liability for Sending Forged Message.**—To render a telegraph company liable to a person injured through its sending a forged telegram, it is not necessary that the message should have been addressed to him directly, if he is one of the persons interested in its correct transmission and delivery. The company may be liable to an undisclosed principal of the sendee who parts with value on the faith of the telegram. (Iowa) *Wells v. Western Union Tel. Co.*, 317.

11. **TELEGRAM—Liability for Sending Forged Message.**—To render a telegraph company liable for sending a forged message, it is not necessary that it should have knowledge of all the details of the business to which the message relates; it is enough if the results likely to follow may be gathered in a general way from the sending of the telegram. And it is not essential that the parties must have contemplated the amount of the actual damages which ought to be allowed. (Iowa) *Wells v. Western Union Tel. Co.*, 317.

*Notice of Claim.*

11a. **TELEGRAMS—Notice of Claim—Time for Presenting.**—Where a telegram, sent on December 28th, is not delivered to the addressee until December 31st, but if it had been delivered on the 29th or 30th he would have sustained no injury, his presentation of a claim for damages on February 28th is a compliance with the statute that such claims must be presented within sixty days from the time the cause of action accrues. (Iowa) *Markley v. Western Union Tel. Co.*, 263.

12. **TELEGRAMS—Notice of Claim—Time for Presenting.**—A provision indorsed on the back of a telegram that a claim for negligent delay must be presented within sixty days after the message is filed for transmission is not controlling if the written contract is not produced in evidence. (Iowa) *Markley v. Western Union Tel. Co.*, 263.

**13. TELEGRAMS—Notice of Claim—Time for Presenting.**—Where the sendee of a telegram sues in tort for its negligent delivery, a provision on the back of the telegram, that a claim for negligence must be presented within sixty days after the message is filed for transmission, is not controlling. (Iowa) *Markley v. Western Union Tel. Co.*, 263.

**14. TELEGRAMS—Notice of Claim—Time for Presenting.**—A statutory provision that a claim for damages against a telegraph company must be presented within sixty days from the time the cause of action accrues, and that the cause may be continued in force by presenting a claim within sixty days as therein provided, cannot be qualified by an indorsement on the message that claims for damages must be presented within sixty days after the message is filed for transmission. (Iowa) *Markley v. Western Union Tel. Co.*, 263.

See Notice, 4.

Note.

**Telegraphs and Telephones, regulation by corporation commission,** 1008, 1009.

### TENANCY IN COMMON.

**1. COTENANCY.**—A Widow is not a Cotenant With the Heirs of her husband. (Ala.) *Hamby v. Hamby*, 23.

**2. COTENANCY—Sale of Personalty by One Tenant.**—As a general rule, one tenant in common of personal property is not liable in trover at the suit of his cotenant for selling the common property. (Vt.) *Olin v. Martell*, 1072.

**3. COTENANCY—Effect of Deed by One Tenant.**—A deed, by a tenant in common, to all the timber on a described portion of the common property, with a right of way to and from the timber and a right to enter to cut and remove it, is inoperative as to his cotenants. (Vt.) *Lee v. Follensby*, 1061.

**4. COTENANCY—Foreclosure of Mortgage on Undivided Interest.**—In a case where a mortgagee forecloses a chattel mortgage given on an undivided interest in certain personal property, the interest of a cotenant as such only will not give him a standing to attack the validity of the sale of the property mortgaged on foreclosure of the said chattel mortgage, where such sale is acquiesced in by the mortgagor. (Okl.) *Julian v. Yeoman*, 929.

See Partition.

### TENDER.

**TENDER.**—Ordinarily, in Case of Tender, Judgment will be rendered only for the amount, if any, which the plaintiff recovers over and above the amount tendered. (Mass.) *Clarke v. Cowan*, 388.

### TIMBER.

**1. TIMBER.**—A Sale and Conveyance of Standing Trees, to be removed within a specified time, works a severance thereof from the freehold, converts them into personal property, and vests the title thereto in the grantees, as such property. (Vt.) *Fairbanks v. Stowe*, 1074.

**2. TIMBER—Oral Sale.**—The Grantees of Growing Trees may sell and convey them orally or otherwise, the same as they can any other personal property, and the buyer will acquire title thereto, authorizing him to go upon the land and cut and remove them within the time limited. (Vt.) *Fairbanks v. Stowe*, 1074.

**3. TIMBER—Oral Sale.**—If Standing Trees are Conveyed by an instrument in writing, called a "contract" or "lease," duly witnessed,



acknowledged and recorded, with a time specified therein in which to remove them, and the grantees make a parol sale of the trees, they cannot afterward defeat the purchaser's title by assigning the "contract" or "lease" to a third person to whom the land has been conveyed. (Vt.) *Fairbanks v. Stowe*, 1074.

### **TIME.**

1. **TIME—Fractions of Day.**—The Law will Take Account of the fraction of a day when justice so requires. (N. J. Eq.) *Gallagher v. True American Pub. Co.*, 514.

2. **TIME—Fractions of Day—Adjudications on Same Day.**—If on a day when this court adjudicates that a corporation is insolvent and appoints a receiver thereof in whom title to the company's real and personal property thereupon vests, a judgment is recovered and entered against the corporation at an earlier hour, the judgment is to be paid out of the proceeds of the sale of the company's land as a preferred claim, because the judgment was a lien upon the land at the time of the appointment of the receiver. *Doane v. Millville Mutual Ins. Co.*, 43 N. J. Eq. 522, 11 Atl. 739, distinguished. (N. J. Eq.) *Gallagher v. True American Pub. Co.*, 514.

### **TORRENS LAW.**

See Records.

### **TRESPASS.**

**TRESPASS—Evidence Under the General Issue.**—In trespass *quare clausum* for cutting trees, when the act complained of is *prima facie* a trespass, and the allegations of fact in the declaration cannot be denied, evidence that the defendant had acquired title to the trees by a parol purchase is inadmissible under the general issue. As a general rule, any matter of justification or excuse, in such a case, must be specially pleaded. (Vt.) *Fairbanks v. Stowe*, 1074.

### **TRESPASSER.**

See Railroads, 3-6.

### **TRIAL.**

#### *In General.*

1. **TRIAL—Conflicting Evidence—Question for Jury.**—Where there is a reasonable conflict in the evidence, the issue must be submitted to the jury for determination. (Okl.) *Taylor v. Insurance Co. of North America*, 906.

2. **TRIAL—Sufficiency of Evidence.**—Evidence Examined and set out in the opinion held sufficient to sustain the verdict of the jury (Neb.) *Quimby v. Bee Building Co.*, 477.

3. **TRIAL—Admission of Counsel—Direction of Verdict.**—Where the court overrules the motion of the defendant for a directed verdict, and the defendant in open court concurs in the view of the court that there are no disputed facts, the court is justified in determining both the facts and the law of the case. (Iowa) *Wells v. Western Union Tel. Co.*, 317.

#### *Argument or Misconduct of Counsel.*

See Criminal Law, 6.

4. **TRIAL—Necessity of Objection to Misconduct of Counsel.**—To present the question of misconduct of counsel in making improper statements to the jury in his argument for appellate review, there



must be an objection seasonably made, and an exception properly taken if it is overruled. (Okl.) *Coalgate Company v. Bross*, 915.

5. **TRIAL—Argument of Counsel as to Abandoned Defenses.**—Where an amended answer has been filed in a case which omits and abandons certain affirmative defenses pleaded in the original answer, the trial court should not permit the counsel for the plaintiff in his opening statement to read and comment upon the defenses contained in the original answer, and which have been omitted and abandoned in the answer on which the case is to be tried. (Idaho) *Rasicot v. Royal Neighbors of America*, 180.

*Instructions.*

See Criminal Law, 7, 8.

6. **TRIAL—Instructions.**—The Use of the Word "Even" in an instruction that "even should you find for the plaintiff, he can recover in this action only his actual damages," carries an intimation of the court's opinion and is an invasion of the province of the jury. (Ala.) *Manistee Mill Co. v. Hobdy*, 73.

7. **TRIAL—Instructions Given by the Trial Court** and set out in the opinion sustained. (Neb.) *Quimby v. Bee Building Co.*, 477.

8. **TRIAL—Instructions Requested by the Defendant** and refused by the court and set out in the opinion held properly refused. (Neb.) *Quimby v. Bee Building Co.*, 477.

9. **INSTRUCTIONS.**—Upon Appeal, the District Court's Instructions will be considered together, and the losing party will not be heard to complain that an instruction is not precisely and clearly stated if he did not request a proper instruction upon the subject. (Neb.) *Sheridan Coal Co. v. C. W. Hull Co.*, 435.

10. **INSTRUCTIONS—Refusal of Additional Instructions.**—Where the trial court has, on his own motion, fully and fairly instructed the jury upon all of the issues and the law of the case, it is not error to refuse to give additional instructions requested by the parties. (Neb.) *Otto v. Chicago etc. Ry. Co.*, 496.

11. **INSTRUCTIONS—Sufficiency.**—Where the Instructions given by the court fairly and reasonably present for the consideration of the jury the issues joined by the pleadings and presented by the evidence, they are sufficient. (Okl.) *McMaster v. City National Bank*, 831.

*Directing Verdict.*

12. **TRIAL—A Charge Directing a Verdict** for the defendant should never be given unless it is clear that there is no evidence whatever adduced that could in law support a verdict for the plaintiff. If the evidence is conflicting, or will admit of different reasonable inferences, or if there is evidence tending to prove the issue presented by the plaintiff, it should be submitted to the jury as a question of fact, and not taken from them and passed upon by the judge as a question of law. (Fla.) *Bass v. Ramos*, 105.

13. **TRIAL—Directing Verdict for Defendant.**—Where it is apparent that no evidence has been submitted upon which the jury could lawfully find for the plaintiff, the judge may direct a verdict for the defendant. (Fla.) *Bass v. Ramos*, 105.

14. **TRIAL—Directing Verdict for Defendant.**—If upon the evidence adduced a verdict for the plaintiff could lawfully have been rendered, a charge of the court to find for the defendant is error that necessarily injures the plaintiff. (Fla.) *Bass v. Ramos*, 105.

See Conspiracy, 2-5.

**TROVER.**

**TROVER—Conversion of Hay by Tenant.**—If a farm is leased with a requirement that the lessee shall leave as much hay on the premises at the end of the term as he found there when he took possession, and a settlement is had at the end of the term, but the landlord finds, on taking possession, that several tons of hay which had been left in one of the barns are gone, and that straw had been substituted in the place thereof, an action of trover for the conversion of the hay cannot be maintained, in the absence of anything to show that the tenant had not left as much hay on the premises as was on them when he went there. (Vt.) *Olin v. Martell*, 1072.

See Executions, 1.

**TRUSTS.**

1. **TRUSTEE—Right to Reimbursement in Trust Estate.**—Whenever any law, statutory or other, imposes a personal duty upon a guardian, executor or trustee to pay money of his own for the benefit of the estate in his care, it follows under the general principles of jurisprudence, without special statutory provision, that the money so paid will be chargeable to the estate, and that in equity, at least, reimbursement will be enforced. (Me.) *Bangor v. Peirce*, 363.

2. **TRUSTEE—Encroachment on Corpus of Estate.**—In a proper case a testamentary trustee may obtain the protection of an order of court to make an encroachment in behalf of his ward on the corpus of the estate, and what may be done in advance may be ratified afterward. (N. J. Eq.) *Pfefferle v. Herr*, 518.

3. **PAROL TRUST.**—Evidence to Establish a parol trust must be clear, strong, and convincing, but if the testimony is sufficient to carry the case to the jury, it is for them, under proper instructions, to determine whether the evidence is of such a character. (N. C.) *Hendren v. Hendren*, 680.

See Corporations, 2; Dower; Wills, 2.

**USURY.**

1. **USURY—Effect on Validity of Mortgage.**—A mortgage given for interest partly in excess of twelve per cent per annum is not void in this state. (N. D.) *Grove v. Great Northern Loan Co.*, 707.

2. **USURY.—A Purchaser of Real Estate Subject to a Mortgage** thereon for interest partly in excess of twelve per cent per annum is entitled to defend against the foreclosure of such mortgage so far as the entire interest is concerned, unless the amount of the usurious mortgage was deducted from the purchase price. (N. D.) *Grove v. Great Northern Loan Co.*, 707.

3. **USURY—Purchase Subject to Usurious Mortgage.**—The purchaser in such cases is permitted to defend as against usury, on the ground that he stands in privity of contract and estate with the mortgagor. (N. D.) *Grove v. Great Northern Loan Co.*, 707.

4. **USURY—Foreclosure of Usurious Mortgage.**—The mere fact that the purchaser of real estate did not have actual notice of a mortgage on the land does not entitle him to set aside the sheriff's deed under a foreclosure regular in all respects where the mortgage was duly recorded, and the only ground on which relief is asked is that the mortgage was usurious. (N. D.) *Grove v. Great Northern Loan Co.*, 707.

5. **USURY—Setting Aside Foreclosure of Mortgage.**—A purchaser of real estate on which there is a mortgage given for interest, partly usurious, is not entitled to have a sheriff's deed given on the foreclosure of the mortgage, regular in all particulars, set aside on

**account** of such usury and on the ground that he had no actual notice of the mortgage or of the foreclosure, when the mortgage was duly recorded and the notice of foreclosure duly published, where the application is not made until about three months after the redemption period has expired. (N. D.) *Grove v. Great Northern Loan Co.*, 707.

## **VENDOR AND VENDEE.**

**1. VENDOR AND VENDEE—Conflict of Laws.**—Where a person residing in one place makes a proposal to purchase property by letter to a person residing in another place, and such proposal is there accepted, the place of acceptance, and not the place of the proposal, is the place of the contract. (Fla.) *Morgan v. Eaton*, 167.

**2. VENDOR AND VENDEE—Effect of Offer to Return Deed.**—An offer to return a deed received does not divest grantee, or reinvest the grantor with title, nor is it a rescission of the contract by the grantee, nor sufficient to constitute an offer to rescind. (Okl.) *Howe v. Martin*, 840.

**3. VENDOR AND VENDEE—Defective Title of Vendor.**—The rule is that where it appears from the contract, or the circumstances accompanying it, that the parties had in view merely such a conveyance as will pass all the title which the vendor had, whether defective or not, that is all the vendee can insist upon. (Fla.) *Morgan v. Eaton*, 167.

**4. VENDOR AND VENDEE—Purchaser Without Notice.**—If a person who has been in the apparent adverse possession of land for twenty years conveys, without general warranty, a right of way to a railway company which has no actual notice that he is holding under an unrecorded deed conveying only a life estate, the company is a purchaser for value without notice of such deed. (S. C.) *Southern Railway v. Carroll*, 1017.

**5. PURCHASER WITHOUT NOTICE.**—The Holder of a Quitclaim Deed is entitled to the protection of the plea of purchaser for value without notice. (S. C.) *Southern Railway v. Carroll*, 1017.

**6. A PURCHASER WITH NOTICE from a Prior Purchaser for Value Without Notice** is entitled to the same protection as his grantor. (S. C.) *Southern Railway v. Carroll*, 1017.

**7. PURCHASER WITHOUT NOTICE—Notice to Agent.**—A railway company which buys a right of way is deprived of the claim that it is a purchaser for value without notice of a prior unrecorded deed to its grantor, if its agent was informed by the grantor that he had only a life estate in the land. (S. C.) *Southern Railway v. Carroll*, 1017. See Building Restrictions; Deeds; Frauds, Statute of; Mortgages, 3, 4; Specific Performance.

## **VERDICT.**

See Criminal Law, 9, 10; Trial.

## **WAREHOUSEMEN.**

**WAREHOUSEMAN—Loss of Goods by Fire Before Storage.** Where a warehouseman takes goods to store and keeps them on a wagon in his stable for two days and nights until they are destroyed by fire, it is a question of fact whether he has used the care required by law. (N. J. L.) *Levine v. D. Wolff & Co.*, 617.

See Constitutional Law, 16-18.

**WATERS AND WATERCOURSES.***Riparian Rights.*

1. **WATERS—Material Diminution.**—Riparian Proprietors, in the absence of specific limitation upon their rights, are entitled to have the stream which washes their lands flow as it is wont by nature, without material diminution. (N. C.) *Harris v. Norfolk & Western Ry. Co.*, 686.

2. **WATERS—Property in Flowing Water.**—Riparian Proprietors have no property in the flowing water, which is indivisible and not the subject of riparian ownership. They may use the water for any purpose to which it can be beneficially applied, but in doing so they have no right to inflict material or substantial injury upon those below them. (N. C.) *Harris v. Norfolk & Western Ry. Co.*, 686.

3. **WATERS—Withdrawal of, from Stream—Riparian Rights.**—The size and character of the stream have much to do with the quantity of water which may be withdrawn from it, and where there has been no appreciable, perceptible diminution of the volume of the stream, by the upper proprietor, the lower one has no cause of action. (N. C.) *Harris v. Norfolk & Western Ry. Co.*, 686.

4. **WATERS—Diminution by Use—Conflicting Evidence.**—The question as to whether the water in a stream has been materially lowered by withdrawing water therefrom is properly submitted to the jury where the evidence is conflicting. (N. C.) *Harris v. Norfolk & Western Ry. Co.*, 686.

5. **WATERS—Riparian Rights.—One Who Owns a Water-mill** cannot recover damages of a railroad company for withdrawing water from the stream, above the mill, for use in its locomotives, where the jury finds that the flow of water has not been materially or substantially diminished. (N. C.) *Harris v. Norfolk & Western Ry. Co.*, 686.

6. **WATERS.—A Railroad Company, Being a Riparian Proprietor,** may take a reasonable amount of water from a stream for the purpose of supplying its locomotives, but it cannot do so in such way as to interfere with other rights on the stream. (N. C.) *Harris v. Norfolk & Western Ry. Co.*, 686.

7. **WATERS—Right of Railroad to Use from Stream.**—A railroad company crossing a stream may take water for its locomotives, provided the quantity taken does not materially, appreciably, perceptibly, or sensibly reduce the volume of water flowing down the stream. If it materially lowers the stream, it is liable to a lower proprietor who suffers a substantial injury thereby. (N. C.) *Harris v. Norfolk & Western Ry. Co.*, 686.

*Surface Waters.*

8. **SURFACE WATERS—Flooding Land.**—Where an Excavation made by a railroad company of itself causes surface waters to flood the land of the lower proprietor, the company is not relieved of liability because the work was done by its contractor and without negligence. (Ala.) *Southern Ry. Co. v. Lewis*, 77.

9. **SURFACE WATERS—Flooding Land—Act of God.**—Where the making of an excavation by a railroad company is in itself unlawful, and its very nature is to turn surface waters upon a lower proprietor, the company cannot escape liability for flooding his land by setting up unprecedented rains as the cause thereof. (Ala.) *Southern Ry. Co. v. Lewis*, 77.

10. **SURFACE WATERS.**—Although the Rights and Duties of adjoining owners as to surface water and its drainage differ from the rights and duties as to streams flowing through their lands, some of the maxims apply to both cases, such as "so use your own prop-

erty as not thereby to injure that of another," and "water flows, and as it flows, so it ought to flow." (Ala.) Southern Ry. Co. v. Lewis, 77.

11. **SURFACE WATERS.—Owners of Land Do not have Property Rights** in surface waters thereon by virtue of their ownership of the land. (Ala.) Southern Ry. Co. v. Lewis, 77.

12. **SURFACE WATERS.—Natural Drains for Surface Waters** must be kept open by the owner, and the lower estate is subject to the servitude of receiving the water through its accustomed and natural channels. (Ala.) Southern Ry. Co. v. Lewis, 77.

13. **SURFACE WATERS—Casting upon Neighbor's Land.—**The owner of land on which surface waters come by nature cannot collect it in artificial drains and ditches and thereby cast it upon his neighbor's land or so near the line that it will thereby naturally flow on his premises. (Ala.) Southern Ry. Co. v. Lewis, 77.

14. **SURFACE WATERS—Flooding Foundry and Coal Yard.—**When a railroad company, in making an excavation, casts surface waters upon premises occupied by a foundry and coal and coke yard, where there is no artificial drainage provided by law, nor any necessity therefor, and the excavation is not occasioned by the building of the city or the improvement of a city lot, the company cannot invoke the doctrine that a land owner has a right to discharge surface waters on city lots for which artificial drainage is or must be provided. (Ala.) Southern Ry. Co. v. Lewis, 77.

15. **SURFACE WATERS—Flooding Land—Pleading.—**In an action for damages for the flooding of land caused by an excavation made by the defendant, the complaint need not allege that the work of excavation is negligently done; it is sufficient to show that it was wrongfully done and that the plaintiff was damaged in consequence thereof. (Ala.) Southern Ry. Co. v. Lewis, 77.

16. **SURFACE WATERS—Flooding Land—Evidence.—**In an action for damages for the flooding of land caused by an excavation made by the defendant, it is competent for the plaintiff to show that he told the defendant the excavation was too near a ditch, and that by reason of the excavation the banks of the ditch were so weakened that they broke and allowed the water to flow on the plaintiff's premises. (Ala.) Southern Ry. Co. v. Lewis, 77.

17. **SURFACE WATERS—Flooding Land—Opinion of Witness.—**On the issue whether an excavation was made so near a ditch as to cause the walls thereof to break and the water to flow upon neighboring land, a question to a witness, "Did you leave enough bank to hold the water in the ditch?" is objectionable because calling for an opinion or conclusion. (Ala.) Southern Ry. Co. v. Lewis, 77.

18. **SURFACE WATERS—Flooding Lands—Evidence.—**Where a railroad company makes an excavation close to the banks of a ditch, so that they break and permit the water to flow upon neighboring land, it is competent for the land owner to show, in his action for damages, what work the company did on the banks and ditch, after the third overflow, and that thereafter no further flooding occurred. (Ala.) Southern Ry. Co. v. Lewis, 77.

19. **SURFACE WATERS—Flooding Lands—Evidence.—**In an action for the flooding of lands through making an excavation so near the banks of a ditch that they broke and permitted the overflow complained of, conversations between the plaintiff's agent and the person doing the excavating for the defendant corporation relative to the cutting down of the banks and made during the progress of the work are admissible as part of the res gestae and to show that the defendant knew or should have known of the injury that would result. (Ala.) Southern Ry. Co. v. Lewis, 77.

See Irrigation.

**WEALTH, EVIDENCE OF.**

See Damages, 1; Malicious Prosecution.

**WILLS.***In General.*

1. **WILL—Homestead not Subject to Testamentary Disposition.**—Where a person entitled to a homestead dies leaving children, the homestead is not subject to testamentary disposition. (Fla.) Griffith v. Griffith, 138.

2. **WILL—Words of Confidence not Creating a Trust.**—A testatrix devised and bequeathed all her estate of every kind to her grandson B, to have and to hold to him and to his heirs and assigns to his and their own proper use, benefit and behoof forever, and stated therein that it was her intention to make no provision for her daughter C, or her granddaughter D, as in her judgment they will be more amply provided for by her grandson B than they could be by her in her will. Held, that no trust in favor of C was created by the will which a court of equity could enforce. (Fla.) Floyd v. Smith, 133.

3. **WILL—Encumbrance on Land—Dower.**—The Direction in a will for the payment of all encumbrances on the testator's real estate out of his personal property is the expression of an intention to pass the real estate to the devisees unencumbered and to endow the widow in the same value therein as that value is in the hands of the devisees. (N. J. Eq.) Pfefferle v. Herr, 518.

*Construction.*

4. **WILL—Construction.**—The Cardinal Rule to be Applied in the construction of a will is to gather the intent of the testator from the language he has employed in the will, and this intent is to be ascertained from a full view of everything within the "four corners of the instrument." This rule must be understood and applied in connection with that other rule to the effect that a clearly expressed intention in one portion of the will is not to yield to a doubtful construction in another portion of the instrument. (Idaho) Wilson v. Linder, 213.

5. **WILLS—Construction—Consideration of Entire Instrument.**—When a will is presented for construction, the entire instrument must be considered and the intention of the testator ascertained from the language used by him. (N. C.) Herring v. Williams, 659.

6. **WILLS—Construction—Matters for Consideration.**—In construing a will it is competent to consider the condition of the testator's family, how he was circumstanced, and his relationship to the objects of his testamentary disposition, so as to get, as nearly as possible, his viewpoint at the time the will was executed. (N. C.) Herring v. Williams, 659.

7. **WILL—Construction—State of Law at Time of Execution.**—In determining the intention of a testator in the use of language capable of more than one construction, his circumstances and environment at the time of the execution of the will, including the state of the law at that time, may be considered. (Ill.) Wallace v. Noland, 247.

*Estate Created.*

8. **WILL—Estate Created—Cutting Down Fee.**—When property is given in clear language sufficient to convey an absolute fee, the interest so given will not be taken away, cut down, or diminished by any subsequent, vague and general expressions. (Idaho) Wilson v. Linder, 213.



9. **WILL—Estate Created—Contingent Remainder.**—Where a testator provided by a will as follows: "My son Jesse shall have the home place. [Here follows a description of the property.] . . . But should my son Jesse die without any wife or children, the property herein conveyed to him shall be equally divided between my other four children, or their heirs, share and share alike"—held, that the devisee, Jesse Wilson, took a limited estate only, subject to the vesting of an absolute and fee simple title on his leaving surviving him at time of his death a wife or child, and that the remaindermen had only an expectancy which might be vested in them as an absolute estate upon the contingency of Jesse Wilson dying without either wife or child. (Idaho) *Wilson v. Linder*, 213.

10. **WILL—Estate Created.**—Where a Contingency Named in a will upon which an absolute estate may vest in one devisee as against another is unlimited as to time and is such a contingency as may never occur either prior or subsequent to the death of the testator, and may also occur at any time, the contingency should not be limited by construction to the period prior to the death of the testator so as to exclude therefrom the possibility of that contingency happening during the period subsequent to the death of the testator and prior to the death of the devisee. (Idaho) *Wilson v. Linder*, 213.

11. **WILL—Fee Limited by Subsequent Provision.**—A devise of an estate in fee simple may be limited by a subsequent valid provision that the estate shall go over to others upon the happening of a certain contingency. The estate, when so limited, is still a fee, for the reason that it will last forever if the contingency does not happen, but so long as it is possible that the contingency may happen, it is a base or determinable fee. (Ill.) *Williams v. Elliott*, 254.

12. **WILL—Fee Limited by Subsequent Provision.**—One of the conditions upon which a limitation of a prior devise in fee may lawfully rest is the death of the first devisee without issue, and so far as an executory devise depends on such death it is valid. (Ill.) *Williams v. Elliott*, 254.

13. **WILLS—Power of Disposition of Life Tenant.**—If a testator, having no children of his own, devises all of his property to his wife, to have and to hold during the term of her natural life, and at her death the property, or as much thereof as may then be in her possession, to go to his adopted daughter, her heirs and assigns forever, the wife takes a life estate with power to dispose of any part or all of the property during her life, and the adopted daughter, as the devisee of the remainder in fee, is entitled only to such of the real estate as has not been disposed of by the wife. (N. C.) *Herring v. Williams*, 659.

#### *Executory Devise—Remainders.*

14. **WILL.**—An Executory Devise cannot be Created if the estate given to the first devisee is such that he can, by virtue of his ownership, alienate the estate in fee. An executory devise is indestructible by any act of the owner of the preceding estate. (Ill.) *Williams v. Elliott*, 254.

15. **WILL—Executory Devise.**—If There is an Absolute Power of disposition in the first devisee, a limitation over is void as an executory devise. (Ill.) *Williams v. Elliott*, 254.

16. **WILL—Executory Devise.**—Where a Testator Makes a Devise to his niece in fee simple, subject to a life estate in his wife, a subsequent provision that in case the niece "shall not dispose of the said estate devised to her, by will or otherwise, before her death, and should die without issue, seized of said estate, then said estate"

shall go to his daughters, is void as an attempted executory devise. (Ill.) *Williams v. Elliott*, 254.

17. **WILL—Remainder.**—If There is an Absolute Power of Disposition in the first devisee, a limitation over is void as a remainder. (Ill.) *Williams v. Elliott*, 254.

*Children and Heirs—Adopted Children.*

18. **WILL—Meaning of "Children" and "Heirs"—Res Judicata.**—A decision by the supreme court that the word "heirs" means "children" is res judicata on that question on a subsequent appeal, but leaves open for determination the question whether the word "children" includes adopted children. (Ill.) *Wallace v. Noland*, 247.

19. **WILL—Adopted Child.**—The Word "Heirs" will Include All who stand in a relation to the ancestor that will entitle them to inherit upon his death, and this includes an adopted child where the statute puts him on an equality with children by birth for the purpose of inheriting from the adopting parents. (Ill.) *Wallace v. Noland*, 247.

20. **WILL—Heirs—Adopted Children.**—Where a Man Devises land to his son B, "but should the said B die leaving no heirs, then the said devised property to descend" to designated persons, the word "heirs" means "children," but does not include adopted children, there having been no statute at the time of the execution of the will or the death of the testator authorizing the adoption of a child and giving it the right to inherit from the adopting parents. (Ill.) *Wallace v. Noland*, 247.

**WITNESSES.**

1. **EVIDENCE—Competency of Parties as Heirs.**—Where the heirs of a wife bring suit against the heirs of her husband to set aside her deed to him of the homestead, and where the parties are therefore suing and defending as heirs, they are not competent to testify, nor are their husbands or wives in their behalf. (Ill.) *Gillam v. Wright*, 243.

2. **WITNESS—Privilege.**—It is No Part of the Duty of Counsel on the other side to advise witnesses as to their privilege in the matter of incriminating testimony, and it is not error for the court to suppress his effort in that direction. (Iowa) *State v. Hardin*, 292.

3. **WITNESSES—Leading Questions.**—Where a Witness is Called to Contradict the testimony of a former witness who has stated that certain things were said, it is within the discretion of the trial court to permit counsel to ask leading questions. (Neb.) *Sheridan Coal Co. v. C. W. Hull Co.*, 435.

See Conspiracy, 2-5; Criminal Law, 4, 5.

Note.

Witness, refreshing memory from books of account, 475.

**WORDS AND PHRASES.**

1. **WORDS AND PHRASES.**—The Term "Acceptance" covers more than "receipt." (Vt.) *Patterson v. Sargent*, 1102.

2. **WORDS AND PHRASES.**—The Word "Defeasance" is "fetched from the French word 'defaire,' i. e., to defeat or undo, 'infectum reddere quod factum.' . . . . The true meaning of this language is to make void the principal deed. (Fla.) *Escambia Land & Mfg. Co. v. Ferry Pass I. & S. Assn.*, 121.

3. **WORDS AND PHRASES—Judicial Dictum.**—If an expression of opinion by the supreme court upon a point argued by counsel and deliberately passed upon by the court is a dictum, it is a judicial dictum as distinguished from a mere obiter dictum—that is, an ex-



pression of the judge who writes the opinion, made as an argument or illustration. (Vt.) *Derosia v. Ferland*, 1092.

4. **WORDS AND PHRASES.**—The Word "Every" means "each and all." (Ill.) *Venner v. Chicago City Ry. Co.*, 229.

5. **WORDS AND PHRASES.**—The Word "Occupation" is a generic term. An occupation is "that to which one's time and attention are habitually devoted; habitual or stated employment; vocation; calling; trade; business." (Neb.) *Village of Dodge v. Guidinger*, 494.

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